COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia Teachers' Federation v. British Columbia,* 2015 BCCA 184

Date: 20150430
Docket: CA41560

Between:

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

Respondent
(Plaintiff)

And

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

Appellant
(Defendant)

And

The Coalition of British Columbia Businesses

Intervenor

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald
The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated January 27, 2014 (*British Columbia Teachers' Federation v. British Columbia*, 2014 BCSC 121, Vancouver Docket No. S124584)

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Place and Date of Hearing:	Vancouver, British Columbia October 14, 15, 16, 2014
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Written Reasons by:
The Honourable Chief Justice Bauman and The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders

Dissenting Reasons by:
The Honourable Mr. Justice Donald (page 81, para. 275)

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DISSENTING REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE DONALD:

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Summary:

The trial judge held that certain sections of the Education Improvement Act, S.B.C. 2012, c. 3, unjustifiably infringed teachers' freedom of association under s. 2(d) of the Charter. This holding was based on two main conclusions: the Province's consultations with the BCTF before the legislation was enacted were irrelevant to its constitutionality, and the Province had in any event failed to consult in good faith. The Province appeals. Held: Appeal allowed (Donald J.A. dissenting).

Majority (per Bauman C.J.B.C., Newbury, Saunders and Harris JJ.A.): The Province's consultations are relevant to the constitutionality of the legislation. The trial judge's finding that the Province had failed to consult in good faith was based on errors of law and palpable and overriding errors of fact. Between the consultations and the collective bargaining leading up to the legislation, teachers were afforded a meaningful process in which to advance their collective aspirations. The legislation did not infringe s. 2(d) of the Charter.

Dissent (per Donald J.A.): The majority's conclusion that the consultations are relevant is agreed with. However, the trial judge did not err in law or fact in finding that the Province had failed to consult in good faith. The legislation infringed s. 2(d) and is not demonstrably justified under s. 1 of the Charter.

Reasons for Judgment of the Honourable Chief Justice Bauman and Mr. Justice Harris:

Introduction

[1] This appeal addresses the constitutionality of legislation that affects the workload and working conditions of teachers in the public school system in this province. Enacted in 2012, the legislation nullified terms that were part of the teachers' collective agreement before 2002 and provided that similar terms could not be renegotiated or included in their collective agreement until July 2013. The legislation also provided for the appointment of a mediator whose primary goal was to help the teachers' union (the BCTF) and school boards negotiate toward a short-term collective agreement that would expire at the end of June 2013.

[2] Earlier legislation nullifying terms of the teachers' collective agreement had been declared unconstitutional for infringing teachers' freedom of association under s. 2(d) of the *Charter*. The judge suspended the effect of her decision for 12 months to allow the parties time to address its implications. During that period, teachers were consulted by the Province, and teachers and school boards engaged in

collective bargaining through their certified bargaining agents. The parties did not reach agreement and teachers engaged in lawful job action. On the expiry of the 12-month suspension, the legislation at issue in this appeal was enacted.

[3] The Province recognizes that the legislation affects teachers' working conditions and covers subjects on which teachers hold strong professional views. However, it contends that the legislation goes beyond the subject matter of typical collective agreements (such as job security and seniority rights) by addressing issues for which the Province is politically accountable. These issues include education policy under the *School Act*, resource allocation within the education portfolio—between potentially competing priorities such as class size and composition, salaries, technology in the classroom, new school building and seismic upgrading, among many other matters—as well as resource allocation across competing government portfolios—for example, between investments in hospitals and the operating budgets of schools. The Province says that during the 12-month suspension it consulted with teachers in good faith, in a manner that respected their freedom of association.

[4] The BCTF brought another constitutional challenge. The judge declared that this legislation was also unconstitutional for infringing teachers' freedom of association. The Province appeals.

[5] The judge's decision was based on two main conclusions. She held that the Province's consultations with the BCTF were irrelevant to the constitutionality of the legislation. She also considered that the Province had failed to consult in good faith.

[6] We would allow the appeal. In our opinion, the legislation was constitutional. Between the consultations and the collective bargaining leading up to the legislation, teachers were afforded a meaningful process in which to advance their collective aspirations. Their freedom of association was respected.

[7] Moreover, the judge's finding that the Province did not consult in good faith was based on legal error and must be set aside. In our opinion, the judge should not

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have assessed the substantive merit or objective reasonableness of the parties' negotiating positions. Courts are poorly equipped to make such assessments. What matters in this case is the quality of the consultation process itself and whether it gave teachers a meaningful opportunity to make collective representations (through the BCTF) about their shared workplace goals. We find that it did.

[8] We turn now to a more detailed overview and summary.

Overview and summary

[9] In January 2002, the *Education Services Collective Agreement Act*, S.B.C. 2002, c. 1 ("*ESCAA*") and the *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3 ("*PEFCA*") (collectively, "Bill 28") were enacted. Bill 28 declared void certain terms of the expired collective agreement continuing in force between the British Columbia Teachers' Federation (the "BCTF") and the British Columbia Public School Employers' Association (the "BCPSEA") (the agreement had expired in June 2001). Bill 28 also prohibited the inclusion of similar terms in all future collective agreements between the BCTF and the BCPSEA. The BCTF was not consulted before Bill 28 was enacted.

[10] In May 2002, the BCTF commenced a constitutional challenge. It submitted that Bill 28 unjustifiably infringed teachers' freedom of association as 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.

[11] By consent, the action was held in abeyance for several years as a similar constitutional challenge wound its way up to the Supreme Court of Canada (*Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27). In June 2006, the BCTF and the BCPSEA agreed to a new five-year collective agreement.

[12] On 13 April 2011, in reasons for judgment indexed as 2011 BCSC 469 (the "Bill 28 Decision"), Madam Justice Griffin held that Bill 28 infringed teachers' freedom of association in two ways: first, by declaring void certain terms of the

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collective agreement then in force; and second, by effectively prohibiting collective bargaining on the subject matter of those terms in the future. She found that this infringement was not demonstrably justified under s. 1 of the *Charter*. She declared certain sections of Bill 28 to be unconstitutional and invalid, although she suspended her declaration of invalidity for one year to allow the Province of British Columbia ("the Province") time to address the repercussions of the decision and consider remedial legislation. The Province chose not to appeal.

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[13] In the year that followed, the Province and the BCTF discussed the implications of the Bill 28 Decision, and the BCPSEA and the BCTF engaged in collective bargaining. Their collective agreement, made in 2006, expired on 30 June 2011 (though it provided that its terms would remain in effect until a new agreement was reached). The discussions and collective bargaining did not lead to a new agreement, nor did they resolve the issues arising from the Bill 28 Decision, within the one-year suspension of the declaration of invalidity. On 14 April 2012, new legislation came into force, the *Education Improvement Act*, S.B.C. 2012, c. 3 ("Bill 22").

[14] This appeal addresses the constitutionality of Bill 22.

[15] Like Bill 28, Bill 22 declared void every term of the expired collective agreement between the BCPSEA and the BCTF which had the effect of:

- restricting or regulating a school board's power to establish class size and class composition;
- establishing or imposing class size limits, requirements respecting average class sizes, or methods for determining class size limits or average class sizes;
- restricting or regulating a school board's power to assign a student to a class, course or program;
- restricting or regulating a school board's power to determine staffing levels or ratios or the number of teachers or other staff;
- establishing minimum numbers of teachers or other staff;

- restricting or regulating a school board's power to determine the number of students assigned to a teacher; or,
- establishing maximum or minimum case loads, staffing loads or teaching loads.

[16] We will refer to the collective agreement terms declared void by Bill 22 as the "Deleted Terms".

[17] The trial judge referred to the subject matter of the Deleted Terms (*i.e.*, the subjects listed just above) as "Working Conditions". We accept that these subjects affect teachers' working conditions, but they engage more than just working conditions; they directly engage education policy. We consider this to be a centrally important fact. Accordingly, we adopt the neutral term "Affected Topics".

[18] Bill 22 also provided that no term concerning the Affected Topics could be included in a collective agreement until 30 June 2013. In a sense, this effectively prohibited the parties from collective bargaining about the Affected Topics for approximately 14 months. 30 June 2013 corresponded with the end of the collective agreement expected to be mediated under Bill 22, the anticipated beginning of the next round of collective bargaining and, of course, the end of the school year.

[19] The BCTF challenged the constitutionality of Bill 22 in two proceedings. First, it applied in the Bill 28 action for damages and orders striking down certain provisions of Bill 22. (The BCTF also applied for additional remedies in respect of Bill 28.) Second, in response to the Province's position that Bill 22 could not be challenged in the Bill 28 action, the BCTF started a new action challenging the constitutionality of Bill 22. The two proceedings were heard together by Griffin J., giving rise to the combined decision under appeal, indexed as 2014 BCSC 121.

[20] In the application for additional remedies in respect of Bill 28, the judge found that Bill 22 (which repealed Bill 28) had been enacted one day too late to prevent the declaration of invalidity in the Bill 28 Decision from taking effect. She held that the suspension of that declaration of invalidity expired at midnight on 12 April 2012. In her view, this meant that as of 13 April 2012, Bill 28 had been invalid from the date

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on which it purported to come into force, namely 1 July 2002. Bill 22 did not come into force (and repeal Bill 28) until 14 April 2012. As a result of this one-day delay, the Deleted Terms were retroactively restored to the collective agreement from 1 July 2002 until 14 April 2012, the date on which provisions of Bill 22 came into force again declaring the Deleted Terms to be void.

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[21] Turning to Bill 22 itself, the judge held that it also infringed teachers' freedom of association and was not demonstrably justified under s. 1 of the *Charter.* She concluded that Bill 22 was invalid from the date on which it purported to come into force. Combining her findings about Bill 28 and Bill 22, the judge declared that the Deleted Terms were retroactively restored from 1 July 2002 to present. She also awarded $2 million to the BCTF as s. 24(1) *Charter* damages.

[22] At the core of the judge's decision concerning Bill 22 was the question of whether the Province, in consulting with the BCTF before Bill 22 was enacted, had discharged its constitutional obligations so that the legislative interference with the collective agreement and future collective bargaining did not infringe teachers' freedom of association.

[23] The trial judge framed the issue as whether, given that Bill 28 infringed s. 2(d), the Province's consultations with the BCTF could "save" the subsequent "duplicative" legislation (Bill 22). She concluded that the Province's consultations were irrelevant to the infringement analysis and held that Bill 22 also infringed s. 2(d). In her view, this infringement was not demonstrably justified under s. 1.

[24] These conclusions were sufficient to establish that Bill 22 was unconstitutional. However, in case she was wrong in her analysis, the judge also considered alternative arguments about the constitutionality of Bill 22.

[25] In the first alternative, she found that only consultations akin to employer-employee bargaining could possibly be relevant to whether Bill 22 infringed teachers' freedom of association. The Province would have to show it had acted as employer in consulting the BCTF. However, the judge found the Province had not consulted as

employer. Thus, in the first alternative, its consultations with the BCTF were irrelevant to whether teachers' constitutional rights under s. 2(d) of the *Charter* were infringed.

[26] In the second alternative, the trial judge assumed that consultations by the Province with the BCTF could be relevant to whether Bill 22 infringed teachers' freedom of association. However, she concluded the Province had not consulted in good faith.

[27] The trial judge also rejected the argument that Bill 22 was materially different from Bill 28 because the effective prohibition on collective bargaining about the Affected Topics in Bill 22 applied only until June 2013, whereas the effective prohibition in Bill 28 had been indefinite.

[28] On appeal, the Province submits that the trial judge misinterpreted the jurisprudence of the Supreme Court of Canada on freedom of association in the labour relations context. It contends (A.F. Opening Statement):

> In a workplace context, s. 2(d) protects the right of employees to a meaningful process to associate to make collective representations on employment matters and to have those representations considered in good faith. Section 2(d) protects a process of association, not its outcome; s. 2(d) does not mandate a particular model of association; s. 2(d) does not give constitutional protection to concluded collective agreement terms. …
>
> In contrast, the judgment under appeal entitles members of the BCTF to the substantive outcome sought in bargaining; it constitutionally mandates a *Wagner Act* model of collective bargaining; and it accords constitutional status to contractual terms in an expired collective agreement. The analysis cannot be reconciled with controlling authority from the Supreme Court of Canada.

[29] The BCTF, of course, resists these conclusions and defends the trial judge's analysis and result.

[30] We would allow the appeal.

[31] The central question is whether Bill 22 substantially interfered with teachers' s. 2(d) right to a meaningful process by which they could make collective

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representations about workplace goals and have those representations considered in good faith. To answer this question, this Court must adopt a broad, contextual approach, having regard both to the content of Bill 22 and the context in which it was enacted. In our opinion, when analyzed in its full context, Bill 22 did not substantially interfere with the s. 2(d) rights of teachers. As a result, it is not necessary to consider s. 1 of the *Charter.*

[32] It is useful to remember what this appeal does and does not involve. The issue here is whether legislation which interfered with terms of a collective agreement and temporarily prohibited collective bargaining on certain topics substantially interfered with workers' freedom of association. Similar issues were addressed by the Supreme Court of Canada in *Health Services* and *Meredith v. Canada (Attorney General)*, 2015 SCC 2.

[33] There is no allegation in this appeal that the statutory regime for collective bargaining between the BCTF and the BCPSEA is itself constitutionally deficient. Issues of that kind were at stake in *Ontario (Attorney General) v. Fraser,* 2011 SCC 20 (for agricultural workers), and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*MPAO*") (for RCMP employees). *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 ("*SFL*"), dealt with a somewhat different type of structural issue.

[34] *Fraser*, *MPAO* and *SFL* offer limited assistance in answering the question before us. As we see the matter, the resolution of this appeal turns principally on the correct interpretation of *Health Services* and *Meredith*, the two decisions directly engaging legislative interference with collective agreements.

[35] We acknowledge that the task facing the trial judge was a difficult one, since it required her to apply the very general principles articulated in *Health Services* to a different factual context. *Fraser* was also before her, but she did not have the benefit of *Meredith* (nor *MPAO* and *SFL*). As will become clear, our interpretation of *Health Services*, influenced by our reading of *Meredith,* differs from the trial judge's in ways that compel a different result.

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[36] In our view, the trial judge fell into error in her conclusion that the Province's consultations were irrelevant to whether Bill 22 substantially interfered with teachers' freedom of association. The trial judge did not give effect to statements by the Supreme Court of Canada which emphasize the importance to the infringement analysis of the process by which changes were made to the collective agreement. As the Court stated in *Health Services* (at para. 129):

> Even where a matter is of central importance to the associational right, 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.

[37] As a general matter, a legislature does not have a duty to consult over the content of legislation. However, if government does choose to consult before enacting legislation, those consultations are an important part of the context in which the constitutionality of the legislation must be assessed. Consultation assumes particular contextual significance in s. 2(d) cases because the protected right is one to a *process* of "associational collective activity in furtherance of workplace goals" (*Fraser* at para. 38). The point is this. It is improper to frame the issue as whether legislation that would otherwise infringe s. 2(d) is "saved" by prior consultations in a manner analogous to the way in which legislation may be justified under s. 1. If prior consultations provided workers with a meaningful opportunity to act collectively and attempt to influence their working conditions, the legislation may not infringe the associational right. There may be nothing that needs "saving".

[38] The trial judge also erred in her alternative conclusion that the pre-legislative consultations could be relevant to the infringement analysis only if the Province was acting as employer while consulting. In our opinion, this conclusion rests on an overly narrow approach to the constitutional right. Freedom of association protects collective activity taken in furtherance of workplace goals. Such activity may occur in the context of traditional collective bargaining with an employer, but it is not limited to traditional collective bargaining. The judge erred in failing to realize that there are other ways in which workers can act collectively to further their workplace goals.

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[39] Just as government may interfere with associational activity even when it is not the employer, government may *promote* associational activity even when it is not the employer. For example, government might provide a forum outside traditional collective bargaining in which workers can make collective representations about workplace goals and have those representations considered in good faith. In our view, the consultations leading up to Bill 22 were such a forum.

[40] The trial judge fell into error by understanding s. 2(d) to require employer-employee negotiations and asking whether the Province, when consulting, acted as the (direct or indirect) employer of teachers. This was the wrong question. The correct question was whether the Province provided the BCTF with a meaningful process to make collective representations and attempt to advance its members' workplace goals. We agree that the Province is not the employer of teachers and was not acting as if it were when consulting with the BCTF. The Province was acting in its capacity as the maker of education policy and custodian of public finance. (Importantly, the Affected Topics encompass not just teachers' working conditions, but also matters of education policy and public finance.) Due to Bill 28, there was little the BCTF could achieve by discussing the Affected Topics with the BCPSEA at the collective bargaining table – but the BCTF could usefully discuss the Affected Topics with the Province at the consultation table. Thus, even though the Province is not the employer of teachers, the consultations expanded and enriched the process through which teachers could make collective representations about their working conditions (assuming the Province was prepared to consult in good faith).

[41] Finally, the trial judge erred in her analysis of the principles that determine whether a party is consulting in good faith for the purposes of s. 2(d). Her conclusion that the Province was not consulting in good faith followed largely from her scrutiny of the factual basis, internal logic and overall substantive reasonableness of the Province's position. This was an error of principle. Although standards of good faith articulated by specialized labour relations tribunals do not define the constitutional standard, it is instructive that those tribunals consider it inappropriate to scrutinize the substantive reasonableness of parties' bargaining positions. In effect, the trial

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judge imposed a more onerous standard of good faith for s. 2(d) negotiations than labour relations tribunals impose for traditional collective bargaining. If the trial judge's conclusion were correct, it would call into question the constitutionality of statutory labour regimes and the specialized jurisprudence on the requirements of good faith bargaining throughout the country. In our view, this is inconsistent with the reasoning of the Supreme Court of Canada and a misapplication of the legal standard of good faith in this context.

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[42] In summary, we consider the trial judge did not properly weigh the full contextual and practical realities of the relationship between the Province, the BCPSEA and the BCTF, as required by *Health Services* and *Meredith*. There are five primary contextual factors bearing on the s. 2(d) infringement analysis. First, Bill 22 was enacted after consultations between the Province and the BCTF that gave the BCTF a meaningful opportunity to make representations about how the Province could achieve its education policy objectives, including its objectives about the Affected Topics, without resorting to legislation like Bill 28. The Province was prepared to consider such representations and adjust its proposals in light of them. Second, the Affected Topics cover not only working conditions but matters of education policy. This is directly relevant to the infringement analysis and is not simply a matter for s. 1. Third, Bill 22 was enacted after the traditional collective bargaining between the BCTF and the BCPSEA had failed to produce a new collective agreement (to replace the one that had expired in June 2011), and in the face of the April 2012 deadline to address the Bill 28 Decision. It is significant that Bill 22 anticipated mediation in an effort to reach a new collective agreement. Fourth, Bill 22 declared the Deleted Terms to be void and effectively prohibited traditional collective bargaining (but not consultations) on the Affected Topics for what was anticipated to be one bargaining round. Fifth, two regulations enacted at the same time as Bill 22 provided an opportunity for future consultations with teachers over some of the Affected Topics, thereby mitigating the adverse consequences of the temporary prohibition on traditional collective bargaining on those topics. Taking all of these contextual factors into account, we conclude that Bill 22 did not substantially

interfere with teachers' s. 2(d) freedom to associate and make collective representations, through the BCTF, in furtherance of their shared workplace goals.

[43] With respect to the Bill 28 issues, we conclude the trial judge erred in holding that, because Bill 28 was repealed on 14 April 2012 rather than the day before, Bill 28 was invalid retroactive to July 2002. This holding was made *per incuriam*. The leading authority of the Supreme Court of Canada was not referred to and it militates against a retroactive declaration in these circumstances.

[44] Before turning to a more detailed analysis, a short description of the relevant legal relationships and our terminology is in order.

[45] In British Columbia, teachers are employed by school boards. The Province is not their direct, indirect or *de facto* employer.

[46] The BCTF is a federation of local teachers' associations. It is deemed by s. 6 of the *Public Education Labour Relations Act*, R.S.B.C. 1996, c. 382 ("*PELRA*"), to be the certified bargaining agent for all teachers in the public school system.

[47] The BCTF engages in province-wide collective bargaining with the BCPSEA, which is deemed by s. 4 of *PELRA* to be the certified bargaining agent for school board employers. The Province does not directly participate in the collective bargaining, but it exerts influence by giving bargaining mandates to the BCPSEA.

[48] In these reasons for judgment, we use "collective bargaining" to refer to traditional collective bargaining between certified bargaining agents as defined and governed by the *Labour Relations Code,* R.S.B.C. 1996, c. 244 (the "*Code*"). We use "consultations" or "pre-legislative consultations" to refer to a process by which government discusses, negotiates or consults with workers who will be affected by legislation designed to advance governmental policy objectives. We recognize that the Supreme Court of Canada has used "collective bargaining" to refer loosely to both types of processes. In our view, this usage reflects the fact that both types of processes are capable of satisfying the requirements of s. 2(d). Nonetheless, we prefer to maintain an analytical distinction for the purposes of this appeal.

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Consultations leading to Bill 22

1. Are pre-legislative consultations relevant at the infringement stage of the constitutional analysis in s. 2(d) cases?

[49] Is the existence of a meaningful process for employees to make collective representations and have them considered in good faith relevant to whether subsequent legislation, passed in the absence of agreement, interferes with their s. 2(d) freedom of association? The trial judge concluded it was not, but in our opinion the jurisprudence of the Supreme Court of Canada, particularly *Health Services* and *Meredith*, establishes that it is.

(a) Trial judge's reasoning

[50] The trial judge focused her analysis on *Health Services*, which involved the validity of legislation enacted by the British Columbia Legislature in 2002 as part of a legislative package which also included Bill 28. Like Bill 28, the legislation impugned in *Health Services* was enacted without any prior consultations or negotiation with the unions. It nullified important terms of the collective agreement and prohibited the inclusion of similar terms in future collective agreements. Those terms affected matters such as contracting out, layoffs and bumping, each of which may be characterized as traditional collective bargaining matters engaging and protecting economic interests directly connected to job security, benefits and wages.

[51] The judge noted that the Court in *Health Services* stated that only "substantial interference" with associational activities amounts to an infringement of s. 2(d) (*Health Services* at para. 90). She observed that *Health Services* set out a two-step inquiry for determining whether legislation or government conduct amounts to a substantial interference (at paras. 52-53):

> 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.
>
> 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

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> 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).

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[52] The judge stated that the Court in *Health Services* "raised the possibility" that pre-legislative consultations could be relevant to the infringement analysis but left it unclear and ambiguous as to when, precisely, this would be the case (at paras. 55-56, 74). She noted that, when the Court considered the facts, it did not refer to the lack of pre-legislative consultations (at para. 57).

[53] Turning to *Fraser*, where the claimants were private sector agricultural workers, the judge stated the Court "did not mention anything about prior consultation potentially curing subsequent legislation from its substantial interference with freedom of association" (at para. 66).

[54] The judge then considered the Court's comments in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, a freedom of religion case. She noted that the Court stated that the concept of reasonable accommodation in human rights law is "not an appropriate substitute for a proper s. 1 analysis" in freedom of religion cases (at para. 89, quoting *Hutterian Brethren* at para. 71, *per* McLachlin C.J.C.). She drew an analogy to freedom of association and ultimately concluded that when a law is challenged under s. 2(d), government "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" (at para. 90).

(b) Errors

[55] We consider that the trial judge erred in concluding that the pre-legislative consultations were irrelevant to the question of whether Bill 22 infringed s. 2(d). We have reached this conclusion for four main reasons. First, the judge failed to give effect to the emphasis in *Health Services* on the relevance of pre-legislative consultations. Second, the judge's approach was decontextualized in that it focused solely on the content of the impugned legislation. Relatedly, the judge's interpretation effectively gives employees a presumptive veto over legislative changes to their collective agreement, subject only to s. 1. Finally, the judge's approach does not respect the Supreme Court of Canada's instruction that s. 2(d) does not protect any particular model of labour relations.

(i) Emphasis in **Health Services** *on relevance of process and consultations when changing terms in collective agreements*

[56] First, to conclude that pre-legislative consultations are irrelevant at the infringement stage is to ignore the emphasis in *Health Services* on the process by which government makes changes to a collective agreement.

[57] It is important to remember two facts about *Health Services*. The impugned legislation was enacted without any prior consultations with health sector unions and without any effort by the Province, directly or through the employers' certified bargaining agent, to renegotiate the collective agreement in light of the Province's new fiscal priorities. Second, the deleted collective agreement terms concerned matters such as bumping, lay-offs and contracting out – traditional terms of a collective agreement which do not engage health policy in the same way as the Affected Topics engage education policy. For this reason, direct consultations with the Province (as health policymaker) would perhaps have been less meaningful for health care unions than the consultations with the Province (as education policymaker) were for the BCTF in this case. Although *Health Services* and this case

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both engage the Province's fiscal policy, this case directly engages substantive policy issues (here education policy) for which the Province is responsible under the *School Act*, R.S.B.C. 1996, c. 412, and democratically accountable.

[58] In *Health Services*, McLachlin C.J.C. and LeBel J. stated several times for the Court that, if changes to a collective agreement are preceded by meaningful discussion and consultations with those who will be affected by them, this is relevant to whether those changes amount to an infringement of s. 2(d) (see e.g. paras. 92, 109, 129):

> [U]nilateral nullification of negotiated terms, without any process of meaningful discussion and consultation, may also significantly undermine the process of collective bargaining.
>
> …
>
> 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.
>
> …
>
> Even where a matter is of central importance to the associational right, 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.

[59] McLachlin C.J.C. and LeBel J. also said that nullifying contractual terms "may", rather than must, interfere with the right (at para. 96). In our view, this is in part because the presence or absence of good faith consultations is relevant to whether there has been an infringement.

[60] The relevance of the process by which the impugned legislation was enacted is also reflected in their articulation of the applicable test (at para. 112):

> First, does the measure interfere with collective bargaining, in purpose and effect? Secondly, if the measure interferes with collective bargaining, is the impact, evaluated in terms of the matters affected and the process by which the measure was implemented, significant enough to substantially interfere with the associational right of collective bargaining so as to breach the s. 2(d) right of freedom of association?
>
> [Emphasis added.]

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[61] We interpret *Fraser* to be consistent with our analysis. As the trial judge observed, *Fraser* did not deal directly with the relevance of pre-legislative consultations. That is not surprising, because the case concerned the adequacy of a scheme enacted by Ontario to govern collective bargaining between agricultural workers and their employers. Pre-legislative consultations were not at issue. Nonetheless, in explaining *Health Services*, the Court reiterated that s. 2(d) guarantees workers a meaningful *process* through which they can make collective representations in furtherance of workplace goals and have those representations considered in good faith (see e.g. paras. 2, 37, 38). *Fraser* confirms that s. 2(d) protects process, not outcomes. This is entirely consistent with, and indeed supports, our interpretation of *Health Services.*

[62] Our interpretation of *Health Services* is also shared by the Ontario Court of Appeal. In *Association of Justice Counsel v. Canada (Attorney General),* 2012 ONCA 530, leave to appeal refused, [2012] S.C.C.A. No. 430, the impugned legislation had the effect of imposing terms of a collective agreement on the claimants. Interpreting *Health Services*, Sharpe J.A. for the Court said (at para. 41):

> In my view, the validity of the [legislation] must be assessed on the basis of whether, at the time it was enacted, the parties had had the opportunity for a meaningful process of collective bargaining. If they had, s. 2(d) is satisfied. The faint hope of further negotiations in the shadow of a dispute resolution mechanism not protected by s. 2(d) cannot expand or extend the reach of s. 2(d) beyond its core guarantee.
>
> [Emphasis added.]

[63] As we see it, nothing in the recent cases from the Supreme Court of Canada casts doubt on our interpretation of *Health Services*. Pre-legislative consultations were not a factor in *MPAO* or *SFL*, both of which dealt with the structure of collective bargaining regimes. The issue in *MPAO*, as in *Fraser,* was whether a separate labour relations scheme for a particular type of employee (RCMP officers) was constitutionally adequate. The issue in *SFL* was whether legislation limiting the right to strike, but not otherwise affecting working conditions or the collective agreement, infringed s. 2(d).

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[64] Pre-legislative consultation was a minor issue in *Meredith*. It too supports our interpretation of *Health Services* and our conclusion the trial judge erred in the case at bar.

[65] In June 2008, after considerable discussion with representatives of RCMP employees, the Treasury Board announced salary increases of 3.32%, 3.5% and 2% for RCMP employees for 2008 to 2010. However, as the global financial crisis worsened, the Treasury Board was forced to reconsider. In December 2008, it revised its decision and announced salary increases of 1.5% for RCMP employees for 2008 to 2010. Employee representatives then met three times with Treasury Board officials. In March 2009, legislation was enacted that capped salary increases across the public sector to 1.5%. *Meredith* was a challenge by RCMP employees to both the Treasury Board's December decision and the subsequent legislation. The Court held that the legislation did not infringe s. 2(d).

[66] One of Canada's submissions to the Court was that the three meetings between employee representatives and Treasury Board officials after the December decision but before the March legislation were consultations that were sufficient to meet the requirements of s. 2(d). The majority, again *per* McLachlin C.J.C. and LeBel J., did not address this submission directly, preferring to resolve the appeal on other, albeit related, grounds (discussed below). Abella J., dissenting, did address this submission. She would have found an infringement of s. 2(d) because the pre-legislative consultations were inadequate (at para. 50):

> The absence of any real opportunity to make representations about the extent and impact of the rollbacks before they were approved by Treasury Board had the effect of completely nullifying the right to a meaningful consultation process and thereby denied members their s. 2(d) *Charter* rights.

[67] For the proposition that pre-legislative consultations are relevant to the infringement analysis, Abella J. relied upon *Health Services*. She explained that "what led this Court in *Health Services* to find an unjustified infringement" was the Province's "unilateral" modification of the collective agreement "<u>without any prior consultation</u>" (at para. 62, emphasis added).

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[68] In its supplemental submissions, the BCTF emphasized that the majority in *Meredith* did not address the pre-legislative consultations argument and submitted we should infer from this that the trial judge's interpretation of s. 2(d) was correct. We do not agree. McLachlin C.J.C. and LeBel J. did not cavil with Abella J.'s interpretation of *Health Services*. If they had disagreed on such an important point we think they would have explained their disagreement, especially given their detailed responses to the dissents in *Fraser*, *MPAO* and *SFL*. Rather, McLachlin C.J.C. and LeBel J. chose to resolve the appeal on other grounds. Some of these other grounds were connected to consultation. For example, McLachlin C.J.C. and LeBel J. emphasized that the impugned legislation did not prevent consultations in the future (at para. 29). We conclude that *Meredith* supports our interpretation of *Health Services*.

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(ii) Importance of context

[69] The trial judge also erred in failing to adequately take into account the full context in which Bill 22 was enacted. The trial judge's exclusive focus on the content of Bill 22 led her to relegate contextual factors to her s. 1 analysis and not also consider them as part of the s. 2(d) infringement analysis.

[70] *Health Services* directed that the "inquiry in every case is contextual and fact-specific" (at para. 92). This was repeated in *MPAO*: "the required analysis is contextual" (at para. 93). The point is clearer still in *Meredith*. As noted above, McLachlin C.J.C. and LeBel J. did not directly address the issue of pre-legislative consultations and resolved the appeal on other grounds. The primary ground was contextual in the sense that it went beyond the content of the impugned legislation. McLachlin C.J.C. and LeBel J. referred to the fact that the cap on salary increases of 1.5% was the same across the public sector. Other groups of employees had been consulted, and in that sense the impugned legislation in *Meredith* "reflected an outcome consistent with actual bargaining processes" and "did not disregard the substance" of bargaining (at para. 28).

[71] In its supplemental submissions, the BCTF submitted that the Court in *MPAO* and *SFL* analysed only the content of the legislation and that this supports the trial judge's approach. We do not agree. The Supreme Court focused on more than the content of the impugned legislation in both decisions, taking into account a variety of contextual factors. To pick just two examples, in *MPAO* the Court considered past unionization efforts among RCMP employees (at paras. 107-109); in *SFL* it considered the history of strike activity in Canada and internationally (at paras. 35-50). These discussions were an important part of the infringement analysis, illustrating the importance of context.

[72] It is hardly surprising that context matters. The Supreme Court of Canada has been clear that s. 2(d) protects a right to a process that permits employees to make collective representations in furtherance of their workplace goals. Given the nature of that right, it seems unavoidable that courts assessing legislation must examine the nature and quality of any pre-legislative consultations, the identity of the parties and the history of their bargaining relationship, the circumstances giving rise to any disputes or impasses, the effect of any limitations on future bargaining and many other factors. An examination of the content of the legislation is certainly an important part of the analysis. But an *exclusive* focus on the content of the legislation, at the expense of the circumstances in which it is enacted, impoverishes the infringement analysis and artificially renders important facts irrelevant. We consider that the trial judge erred by narrowing her focus in her s. 2(d) analysis to the content of the legislation. It is necessary to take a broad, fully contextual view, a perspective we will discuss shortly.

(iii) No presumptive veto

[73] Third, to conclude, as the trial judge did, that the infringement analysis considers only the content of the legislation, is to confer workers with a presumptive constitutional veto, subject only to s. 1, over any significant legislative changes to their working conditions. If the Supreme Court of Canada had intended the effects of its decisions to be so dramatic and far-reaching, it would have said so explicitly.

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[74] If the infringement analysis evaluates only the content of legislation, then any legislation which significantly alters collective agreement terms necessarily infringes s. 2(d). Government could not implement policy changes if doing so would undermine a collective agreement unless government could meet the stringent s. 1 test. In substance, significant terms of collective agreements would be afforded constitutional status. This would be a dramatic change in the constitutional structure of Canada. Contracts have never been recognized as constitutionally protected.

[75] *Health Services* did lead some, including Professor Hogg, to conclude that the Court had "elevated collective agreements above statutes in the hierarchy of laws, and granted them virtually the same status as the provisions of the *Charter* itself" (Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed. supplemented (Toronto: Carswell, 2007), ch. 44 at 9). Rothstein J., concurring in *Fraser*, endorsed this perception (at para. 216):

> Although *Health Services* purported to constitutionalize the process of collective bargaining rather than its fruits, it in fact granted constitutional protection to the collective agreements on the basis that they were the fruits of that process. In *Health Services*, the challenged legislation had the effect of invalidating portions of existing collective agreements and consequently "undermining the past bargaining processes that formed the basis for these agreements": *Health Services*, at para. 113.

[76] Rothstein J. criticized the distinction in *Health Services* between the process of collective bargaining and its substantive fruits (at para. 256). He argued the distinction was unworkable because it is "impossible to divorce the process of collective bargaining from its substantive outcomes" (at para. 263). In support of this conclusion, he reasoned that *Health Services* itself (at para. 264):

> did not respect this distinction since the majority granted constitutional protection to "significant" terms of the collective agreements at issue in that very case. The majority found that the challenged B.C. legislation breached s. 2(d) not just by limiting future bargaining but also by invalidating existing collective agreements and consequently undermining the past bargaining process that formed the basis for these agreements. Therefore, the application of the collective bargaining right in *Health Services* had the result of protecting the substance of those agreements.

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[77] However, McLachlin C.J.C. and LeBel J. for the majority in *Fraser* did not accept that these criticisms were valid (at para. 76):

> Our colleague argues that *Health Services* gives constitutional status to contracts, privileging them over statutes. The argument is based on the view that *Health Services* holds that breach of collective agreements violates s. 2(d). In fact, as discussed above, this was not the finding in *Health Services*. The majority in *Health Services* held that the unilateral nullification of significant contractual terms … coupled with effective denial of future collective bargaining, undermines the s. 2(d) right to associate, not that labour contracts could never be interfered with by legislation.
>
> [Emphasis added.]

Here the majority said explicitly that legislation can change a collective agreement without infringing s. 2(d). This could not be the case if workers had a presumptive veto over such changes. We do not think the scope of the majority's comment is limited to legislative changes of an insubstantial nature. We see nothing in *Meredith* that casts doubt on this view.

(iv) No particular model of labour relations

[78] Finally, in our opinion the trial judge gave insufficient weight to statements by the Supreme Court of Canada that s. 2(d) protects a general process (with certain essential features) rather than a particular model of labour relations. There is no principled reason that pre-legislative consultations, outside the formal collective bargaining regime, cannot provide a constitutionally sufficient opportunity for workers to make collective representations in furtherance of workplace goals and have those representations considered in good faith.

[79] The Court held that no particular model is protected by s. 2(d) most explicitly in *Fraser* (e.g. at para. 42). As noted, that case involved the constitutionality of legislation providing limited collective bargaining rights to agricultural workers in Ontario. The Ontario Court of Appeal found the legislation to be unconstitutional because it did not provide the full panoply of rights typically found in Canadian labour legislation, all of which adopts the "Wagner Act" model of labour relations (so called for United States Senator Robert F. Wagner, sponsor of the *National Labor Relations Act of 1935*, 49 Stat. 449, 29 U.S.C. §151-169). The Supreme Court of

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Canada reversed, concluding that the legislation offered sufficient protection to agricultural workers' freedom of association even though not all of the Wagner model features were present. Agricultural workers' associations could make representations and have their views considered in good faith. That was constitutionally sufficient because s. 2(d) protects only "a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion" (at para. 54).

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[80] These points were repeated in *MPAO*. Like *Fraser*, *MPAO* was a challenge to a particular labour relations scheme. The Court held that the separate scheme for RCMP employees was constitutionally inadequate because the employee association created under that scheme did not permit employees sufficient choice concerning which goals to pursue collectively and was not sufficiently independent from management. McLachlin C.J.C. and LeBel J. were careful to emphasize for the Court that "choice and independence can be respected by a variety of labour relations models" and "freedom of association does not guarantee a particular model of labour relations" (at paras. 84, 93).

[81] The BCTF was given an opportunity to make representations directly to the Province, including about the Affected Topics, while collective bargaining was ongoing with the BCPSEA. It was a mistake, in our view, to dismiss the consultations as irrelevant merely because they did not take the same form as the collective bargaining. The consultations supplemented the collective bargaining and it is the overall process, encompassing both forums, that this Court must consider when evaluating the constitutionality of Bill 22.

(c) Conclusion

[82] We conclude the trial judge erred in holding that the pre-legislative consultations were irrelevant at the infringement stage of the s. 2(d) analysis. In our opinion, the jurisprudence of the Supreme Court of Canada mandates the opposite conclusion. The question that must be answered is whether Bill 22 substantially

interfered with teachers' associational right. That question can be answered only by evaluating the legislation in the full context in which it was enacted, because the context might reveal that the legislation offered sufficient protection or respect to the associational right—particularly if affected workers were consulted and thereby given the opportunity to attempt to influence the content of the legislation.

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2. Must pre-legislative consultations be with government acting as employer?

[83] We now proceed to the trial judge's alternative finding that, to be relevant at the infringement stage, pre-legislative consultations would have to be between the BCTF and the Province acting as employer. We agree with the judge that when the Province consulted with the BCTF it was not acting as the employer of teachers. It was acting as government, exercising its responsibility as education policymaker. Nonetheless, in the circumstances of this case, the consultations were capable of providing a forum in which the BCTF could make collective representations in furtherance of its workplace goals. This is particularly so because the subject matter of the consultations was simultaneously teachers' working conditions and matters of education and fiscal policy for which the Province is responsible.

[84] To consider the judge's finding in its full context, we must first review the history of the parties' bargaining relationship from the start of collective bargaining in 1987 to the beginning of the consultations leading to Bill 22.

(a) History of collective bargaining by teachers in British Columbia

[85] The trial judge dealt extensively with the history of the parties' bargaining relationship (see Bill 28 Decision at paras. 60-123). What follows is a summary of some of the pertinent features of that relationship, including the background to the establishment of the "co-management model" of public sector bargaining and the establishment of the BCPSEA as the statutory bargaining agent for school districts.

[86] Teachers gained the right to form a union and bargain collectively in 1987. For the first five years, bargaining was carried on at the local level, between local teachers' associations and 75 local school boards.

[87] In time, local collective agreements were made. These collective agreements typically included provisions dealing with class size and composition that limited the total number of students, and the number of students with special needs, who could be enrolled in any given class. Some local collective agreements included provisions that established ratios, called "non-enrolling ratios", for specialist teacher levels. Collective agreements negotiated in this period contained a range of provisions that, from the perspective of school boards, constrained the operational flexibility of school districts and drove resource allocation decisions.

[88] The local bargaining structure changed after the publication of the *Report of the Commission of Inquiry into the Public Service and Public Sector* (Victoria: Crown Publications Inc., 1993), prepared by Commissioner Judi Korbin. The *Korbin Report* recognized the Province's role in providing public education and facilitating its funding (at vol. 2, F3, F5):

> The Ministry of Education is responsible for the K-12 sector. Funding for the K – 12 system is primarily in the form of direct grants from the provincial government. Those grants are determined by a funding formula which is established in Part 8 of the School Act. … Funding arrangements for public education have undergone many changes in the past ten years. …
>
> As reported earlier, over 90 per cent of the funding for the operation of BC's elementary and secondary school system comes out of the provincial government's Consolidated Revenue Fund. Education is second only to health as an area of provincial expenditure.

[89] To give the Province more control over the bargaining process and its outcomes, the *Korbin Report* recommended that a single employers' association be established for province-wide K-12 bargaining. The *Korbin Report* recommended that representatives of the Ministries of Education and Finance sit on the association's board of directors and that the association be given bargaining mandates from the Province, consistent with the Province's fiscal and policy goals.

[90] These recommendations led to the creation of the BCPSEA as the employers' association for K-12 collective bargaining.

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[91] Originally enacted in 1994 (as S.B.C. 1994, c. 21), *PELRA* partly adopted the recommendation of the *Korbin Report* for province-wide bargaining. Under *PELRA*, the BCTF and the BCPSEA negotiated provincial issues while BCTF locals and school boards bargained local issues. "Cost provisions", which included workload and class size restrictions in addition to compensation, were deemed to be provincial issues. These changes were opposed at the time by the BCTF, which preferred local bargaining on all matters.

[92] *PELRA* continued the previous collective agreement terms in force until a province-wide agreement was reached. Little progress was made. The BCPSEA took the position that province-wide bargaining started from scratch. The BCTF asserted that bargaining started from a floor provided by the most favourable terms of the local collective agreements.

[93] In May 1996, the BCTF and the BCPSEA concluded a Transitional Collective Agreement (the "1996 TCA") to expire on 30 June 1998. The 1996 TCA continued the local collective agreement terms, without prejudice to the parties' competing views of the effect of the local terms on the new bargaining process.

[94] A new, but ultimately unsuccessful, round of bargaining started in 1997. In 1998, without the involvement of the BCPSEA, the Province and the BCTF directly negotiated an Agreement in Committee (the "1998 AIC"). The 1998 AIC carried forward the terms of the 1996 TCA except where modified, established district-wide non-enrolling ratios and included a Memorandum of Agreement on K-3 Class Size.

[95] Through the BCPSEA as their bargaining agent, school boards overwhelmingly rejected the 1998 AIC. Over the BCPSEA's objections, the Province imposed the 1998 AIC as the province-wide collective agreement, for a term to expire on 30 June 2001, by enacting the *Public Education Collective Agreement Act*, S.B.C. 1998, c. 41.

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[96] In June 1999, the BCPSEA and the BCTF agreed to Letter of Understanding #3, adding to the collective agreement certain province-wide language dealing with non-enrolling ratios and class composition.

[97] The next round of collective bargaining began in the spring of 2001, though it did not progress. In the fall, teachers lawfully commenced the first stage of a strike by withdrawing certain services. By early 2002, the parties remained at a bargaining impasse. The efforts of a fact finder and a mediator appointed to facilitate negotiations had achieved little. Teachers' job action was escalating.

[98] On 27 and 28 January 2002, *ESCAA* (Bill 27) and *PEFCA* (Bill 28) were enacted. Their combined effect was to:

- legislate a collective agreement to expire in June 2004 (*ESCAA*, s. 2);
- provide a 2.5% wage increase in each year of the agreement (*ESCAA*, s. 2(a)(ii));
- declare void terms of the expired agreement dealing with class size, composition and non-enrolling ratios as of 1 July 2002, and prohibit bargaining on these issues in the future (*PEFCA*, s. 8);
- enact class size limits for K-3, and aggregate class size limits for all grades (*PEFCA*, s. 12); and
- provide for the appointment of an arbitrator to make a final and binding determination of which provisions in the existing collective agreement which were void for inconsistency with the legislation *(PEFCA*, s. 9).

[99] As contemplated by *PEFCA*, an arbitrator ruled on which provisions in the collective agreement were void for inconsistency. The BCTF petitioned for judicial review of the arbitrator's ruling and it was quashed by the British Columbia Supreme Court due to certain errors of law (see *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2004 BCSC 86). The Province effectively restored the arbitrator's ruling by enacting the *Education Services Collective Agreement Act, 2004*, S.B.C. 2004, c. 16 (the "*Amendment Act*").

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[100] Meanwhile, the BCTF commenced the Bill 28 action. The statement of claim, filed in 2002, was later amended to challenge the *Amendment Act* as well. By consent, the action remained in abeyance pending the outcome of *Health Services*.

[101] In advance of the expiry in June 2004 of the collective agreement imposed by *ESCAA*, the BCPSEA and the BCTF resumed bargaining. Again an impasse was reached. After phased strike action by teachers and the appointment of a fact finder, legislation was enacted in the fall of 2005. The *Teachers' Collective Agreement Act*, S.B.C. 2005, c. 27, continued the existing collective agreement for a two-year term to expire 30 June 2006. In response, teachers began a nine-day illegal strike, resulting in a finding of contempt against the BCTF (see *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*, 2005 BCSC 1490).

[102] Mr. Vince Ready was appointed as an Industrial Inquiry Commissioner to facilitate a return to work and the next round of collective bargaining. On his recommendation, the Province appointed a facilitator/mediator to assist the negotiations.

[103] In June 2006, the BCPSEA and the BCTF concluded a collective agreement for a five-year term, to expire 30 June 2011. It included a cumulative 16% wage increase and a $4,000 signing bonus for each teacher.

[104] Class size, composition and staffing ratios were the subject of further legislation before the Bill 28 action was tried. In 2006, the *Education (Learning Enhancement) Statutes Amendment Act, 2006*, S.B.C. 2006, c. 21 ("Bill 33") amended the *School Act* to provide that a class in grades 4 to 12 could exceed 30 students, or three students with special needs, with the consent of the teacher. The Bill 33 amendments have not been the subject of a constitutional challenge.

[105] It will be clear from this history that collective bargaining over the working conditions of teachers met with difficulties, achieved some successes and confronted certain intractable issues. The Province sometimes resorted to legislation

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when collective bargaining failed to achieve collective agreements. As a result, the collective agreements at issue in this appeal are a complex amalgam of past agreements and continuations or amendments by legislation.

[106] The Bill 28 Decision was released on 13 April 2011. The trial judge declared that ss. 8, 9 and 15 of *PEFCA* and s. 5 of the *Amendment Act* unjustifiably infringed teachers' s. 2(d) rights. She suspended the declaration of invalidity for 12 months to allow the Province time to address its repercussions.

[107] Following the Bill 28 Decision, the Province invited the BCTF to enter into consultations. The Province's proposal was modeled on the consultation process it engaged in with health sector unions following *Health Services*. Representatives of the Health Employers' Association of British Columbia ("HEABC"), the unions and the Province had all participated in that process. The participation of HEABC allowed for changes to collective agreement terms. The legislation at issue in *Health Services* was ultimately repealed and the parties reached a negotiated compromise.

[108] The details of the consultation process in the instant case are canvassed extensively later in these reasons when we consider the trial judge's conclusion that the Province did not consult in good faith. For present purposes it is sufficient to note that the Province proposed combining the consultation process with the collective bargaining that was then occurring between the BCTF and the BCPSEA. The Province suggested a combined process would both provide greater opportunity for meaningful discussion and facilitate changes to the collective agreement, as had happened after *Health Services*.

[109] The BCTF, for its part, advised the Province that it did not want to repeat the *Health Services* process. Importantly, the BCTF rejected the Province's proposal to combine the consultation process with collective bargaining, insisting the consultations should proceed separately. The BCTF's view was that the Bill 28 Decision had restored the Deleted Terms and full bargaining rights in respect of the Affected Topics. It maintained that bargaining on class size and composition should

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begin from the floor of the collective agreement language which had been deleted by Bill 28 and, in the BCTF's view, restored by the Bill 28 Decision.

[110] In keeping with the BCTF's refusal to combine the consultations with collective bargaining, the two processes unfolded in parallel. Two representatives of the BCPSEA attended each consultation meeting, but otherwise the consultations and collective bargaining were kept separate.

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(b) Trial judge's reasoning

[111] The trial judge concluded that if government relies on its pre-legislative conduct as respecting the process protected by s. 2(d), notwithstanding subsequent legislative interference, then its conduct must be judged as employer (at para. 95). This was expressed as an alternative conclusion, in the event that she was wrong in her primary conclusion that pre-legislative consultations were irrelevant at the infringement stage of the analysis.

[112] The judge reasoned that government has different obligations when acting in different capacities (at para. 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.

[113] She held that, in this case, the Province did not and structurally could not act as employer (at para. 167). She observed that the BCPSEA is the bargaining agent for teachers' employers (*i.e.*, school boards) and a separate entity from the Province (at para. 171). She also took the view that, in any event, the BCPSEA had not been an active participant at the consultation table (at para. 177).

[114] The judge concluded the pre-legislative consultations in this case did not constitute a "process of engagement" permitting the BCTF "to make representations to employers, which employers must consider and discuss in good faith", within the

meaning of *Fraser* (at para. 178, quoting *Fraser* at para. 2). As a result, she stated (at para. 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.
>
> [Emphasis added.]

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(c) Errors

[115] We are unable to agree with the trial judge's legal analysis, for three reasons. First, it was artificial and formalistic to disregard the Province's conduct solely because it was not acting as employer. This is particularly so, given the history of these parties' bargaining relationship. Second, the judge failed to give effect to the Supreme Court of Canada's repeated insistence that s. 2(d) does not constitutionalize any particular model of labour relations. Third and finally, the judge failed to appreciate certain distinctive features of public sector bargaining.

(i) Artificiality and formalism

[116] Although we agree with the trial judge that the Province was not acting as employer when it consulted with the BCTF, we consider it to be artificial and formalistic to assign this fact any significance in this s. 2(d) analysis. Section 2(d) confers on workers the right to a process through which they can attempt to influence their working conditions by making collective representations. In most cases only the employer will have control over the working conditions, so the process should be one in which workers can make representations to their employer. Sometimes, however, government will also have influence over the working conditions—for instance because the working conditions also touch on matters of public policy and government is contemplating legislation. In these cases, providing workers with an opportunity to make representations directly to government enhances their ability to attempt to influence their working conditions. It

is irrelevant to the constitutionality of the legislation that government is not their employer and is not acting as their employer.

[117] To put this point another way, the question of whether government has infringed the associational right does not turn on the capacity in which government was acting. What matters for the constitutional analysis is the *effect* of government conduct on associational activity. Where pre-legislative consultations are concerned, the analysis must focus not on the capacity in which government consulted but on the extent to which workers were able to attempt to influence their working conditions. The most important factors will be which topics were open for discussion and whether government listened in good faith and was prepared to modify its plans in response to compelling objections.

[118] While these points are true generally, they are particularly salient in light of the history of these parties' bargaining relationship. Though it is not the employer, the Province has often been involved. It has legislated over a bargaining impasse on several occasions and at least once it negotiated an agreement directly with the BCTF. And, of course, under the co-management model derived from the *Korbin Report*, the BCPSEA bargains within mandates established by the Province. Relying as the trial judge did on technical distinctions about the capacity in which the Province was acting obscures the substantive question, which is whether Bill 22, having regard to both its content and the context in which it was enacted, infringed teachers' freedom of association.

[119] The Province proposed to combine the consultations with the ongoing collective bargaining at a single table at which all issues could be canvassed and discussed. That proposal was rejected by the BCTF and, as a result, the discussions took place at two separate tables. Nonetheless, the BCTF did have an opportunity to make collective representations, including about the Affected Topics, to the entities with the power to influence its members' working conditions. Had agreement been reached at the collective bargaining table, the agreement would have been reflected in a new collective agreement. Had agreement been reached at the consultation

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table, the Province would have ensured that it was incorporated into a collective agreement and that any necessary legislation was enacted.

[120] It might be objected that, due to the separation of powers between the executive and legislative branches of government, the Province (*i.e.*, the executive) could not have ensured that any necessary legislative changes would in fact be enacted. However, this objection overlooks certain longstanding constitutional conventions. The Executive Council is appointed by the Lieutenant Governor (*Constitution Act, 1867 (U.K.),* 30 & 31 Vict., c. 3, s. 63, reprinted in R.S.C. 1985, App. II, No. 5). Pursuant to "constitutional principles of a customary nature", appointees "must be or become members of the Legislature and are expected, individually and collectively, to enjoy the confidence of its elected branch" (*Blaikie v. Quebec (Attorney General)*, [1981] 1 S.C.R. 312 at 320, *per curiam*). Accordingly, there is "a considerable degree of integration between the Legislature and the Government" (*ibid*). Owing to this and to the high degree of party discipline in Canada, "it is the Government which, through its majority, does in practice control the operations of the elected branch of the Legislature" (*ibid*; see also *Arseneau v. The Queen*, [1979] 2 S.C.R. 136 at 149).

[121] Thus, for example, after *Health Services* declared Bill 29 to be invalid, the Province entered into discussions with health sector unions, agreement was reached and legislation giving effect to that agreement was enacted (*Health Statutes Amendment Act, 2008*, S.B.C. 2008, c. 34).

[122] In our view, given the nature of the issues being discussed at the consultation table and the fact that if agreement had been reached on them legislative changes would very likely have been required, the meaningfulness of the overall consultation process was enhanced, rather than diminished, by the opportunity for the BCTF to make collective representations directly to the Province. For all practical purposes, the consultations provided a mechanism through which the BCTF could make representations that were capable of being heard by the entity with the power to

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make accommodations, whether by legislation or through the language of the collective agreement. The overall process was expansive.

[123] This conclusion is not undermined by the fact that the BCPSEA was not technically a party to the consultations held between the Province and the BCTF. Likewise, the fact that traditional collective bargaining was taking place at a different table is immaterial. The trial judge's conclusion produces a startling result: if the BCTF had agreed to combine both discussions at a single table, there would be no question (on the trial judge's first alternative) that the consultations would be relevant at the infringement stage of the constitutional analysis. However, by refusing to combine the discussions, the BCTF ensures the consultations are irrelevant at the infringement stage and thereby makes it much easier to establish an infringement. This must be wrong. The BCTF cannot unilaterally affect the constitutionality of the Province's conduct.

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(ii) No particular model of labour relations

[124] The trial judge fell into a related error. She concluded that only the BCPSEA and the BCTF were engaged in "collective bargaining" of the sort protected by s. 2(d), relying in part on the Province's position in the Bill 28 action that it does not engage in "collective bargaining" because it is not the employer (at paras. 165-167). This analysis asks the wrong question. As we have said, a process can satisfy s. 2(d) even if it does not conform to the traditional Wagner model of collective bargaining.

(iii) Unique features of public sector bargaining

[125] Finally, the judge's distinction between the Province as employer and the Province as legislator or policymaker failed to take account of the features of public sector bargaining that distinguish it from private sector bargaining. Governments are not businesses. Typically in the private sector all that is at stake are the private interests of the employer and the employees. Each side may assert economic pressure on the other in an effort to force or promote agreement. A wider public interest is not typically engaged in the bargaining process. But, in our view,

government's obligation to promote that wider interest must be taken into account when defining the requirements imposed by s. 2(d) on public sector bargaining.

[126] The Affected Topics involve not only working conditions, but matters of education policy. The Province is charged with the democratic responsibility to develop education policy in the public interest and is held politically accountable for the policy choices it makes. Indeed, the provision of public education is one of the longest standing obligations of the provincial government, dating back even before British Columbia joined Canada in 1871.

[127] There is an obvious tension between the Province's democratic accountability to the public for its policy choices and the Province's constitutional obligation to negotiate over the subject matter of public policy with employees, where policy or changes to policy affect those employees' working conditions.

[128] The trial judge accepted that the Affected Topics engaged, at one and the same time, negotiated working conditions encapsulated in collective agreements and matters of public policy. However, in her view, the s. 2(d) inquiry was limited to the working conditions dimension of the issue, with education policy to be considered only as part of the s. 1 inquiry. In part, she reasoned that to conclude otherwise would be to immunize government policy and conduct from *Charter* scrutiny and create a '*Charter*-free zone' (see para. 92). This reasoning ultimately drove her conclusion that the Province as employer must be distinguished from the Province as policymaker.

[129] We disagree with this analysis. In our view, the Province's role as policymaker must be relevant to the scope of its duty under s. 2(d) to consult in good faith with employees whose working conditions are also matters of public policy. In listening to employees, government must evaluate and respond to their representations with an appreciation of the consequences of its policy choices on their working conditions, but also an awareness of its responsibility to act in the broader public interest. Government's role as policymaker is an essential part of the context in which such representations are made, heard, assessed and responded to.

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Ignoring the policy dimension decontextualizes the content of the s. 2(d) obligation to consult in good faith.

[130] An approach to s. 2(d) that has regard to government's responsibility as policymaker does not immunize government policy or conduct from *Charter* scrutiny. Just as employees do not have a presumptive veto over changes to their working conditions, government does not have a free hand to make any unilateral changes it likes to public sector employees' working conditions.

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(d) Conclusion

[131] In conclusion, the process by which the Province consulted with the BCTF at one table while collective bargaining continued between the BCPSEA and the BCTF at a second table was sufficient in principle to allow teachers to pursue their collective workplace goals in a meaningful way. No particular process is required to satisfy s. 2(d), provided there is a proper opportunity for good faith consultations. The parallel process of consultations and collective bargaining was capable in principle of providing teachers with such an opportunity. The question then becomes whether the Province consulted in good faith.

3. Did the Province consult in good faith in this case?

[132] The judge began her discussion of her second alternative finding, that the Province did not act in good faith, as follows (at para. 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.

[133] As we relate the trial judge's analysis here, it is helpful to bear in mind one of her central conclusions, stated in her "Summary" at the beginning of her reasons (at p. 2):

> 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.

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[134] As will be seen, the inference that the Province acted improperly by seeking to provoke a strike, as cover to gain political (*i.e.*, public) support for imposing legislation on the BCTF, is a critical conclusion. The judge's other main factual inference was that the Province had decided, even before the consultations began, that the new legislation would substantially duplicate Bill 28, no matter what the BCTF said. These conclusions very much coloured the judge's analysis and, we conclude, provided the essential basis for her finding that the Province did not act in good faith.

[135] In our opinion, in reaching these conclusions the trial judge made several essential errors, errors which resulted in an approach to the judicial evaluation of the s. 2(d) duty to consult and bargain in good faith that is fundamentally inappropriate and that casts the courts in a role for which they are ill-suited and poorly qualified. There are strong and oft-articulated policy reasons for judicial deference to the expertise of tribunals administering labour legislation in Canada. The result in this case serves to emphatically underline the need to resist judicial incursions into this realm beyond the limited extent required by s. 2(d) of the *Charter*.

[136] In order to better appreciate the errors we discern in the judge's treatment of this issue, it will be best to first outline the essential nature and legal content of good faith in the s. 2(d) context.

(a) Meaning of good faith in s. 2(d) context

[137] The meaning of good faith in the s. 2(d) context has not figured prominently in any of the jurisprudence. It was the subject of some comment in *Health Services* and *Fraser*, but otherwise this is a novel issue. For this reason, after discussing these decisions we will consider the statutory duty to bargain in good faith as interpreted by the British Columbia Labour Relations Board (the "Board"). In doing so, we do not

mean to suggest that the content of the s. 2(d) obligation to bargain and consult in good faith tracks, mirrors or is determined by the ordinary statutory duty to bargain in good faith. The Board's decisions are informative and offer some helpful guidance for the constitutional analysis, but the Supreme Court of Canada has been unequivocally clear that s. 2(d) does not constitutionalize the Wagner model of labour relations that is currently reflected in Canadian legislation. To borrow a phrase from Professor Verge, s. 2(d) is not intended to imprison collective bargaining within a particular legislative regime (Pierre Verge, "L'affirmation constitutionnelle de la liberté d'association: une nouvelle vie pour l'autonomie collective?" (2010) 51 C. de D. 353 at 366). Accordingly, while the current statutory duty to bargain in good faith may be a helpful source of principles, the s. 2(d) obligation to bargain and consult in good faith must be interpreted in more general and flexible terms.

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(i) Section 2(d) jurisprudence

[138] In *Fraser*, McLachlin C.J.C. and LeBel J. helpfully summarized *Health Services* on the issue of the content of good faith negotiation (at para. 41):

> By way of elaboration on what constitutes good faith negotiation, the majority of the Court [in *Health Services*] 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).

[139] While *Fraser* did not discuss good faith any further in the abstract, some additional guidance can be gleaned from the Court's consideration of the facts in

that case. The impugned legislation required an agricultural employer to "listen to" or "read" representations made by an employees' association. The Court interpreted this to mean the employer had to consider the representations in good faith because "*pro forma* listening or reading" or "consideration with a closed mind" would serve no purpose and render the employees' opportunity to make representations effectively meaningless (at para. 103). Thus good faith must require keeping an open mind.

[140] The meaning of good faith was not an issue in *MPAO*, *Meredith* or *SFL*.

(ii) Labour Relations Board decisions

[141] We turn to the statutory duty to bargain in good faith as interpreted by the Board. As we have said, we do not suggest that the test for good faith bargaining in ordinary labour relations is to be imported *in specie* into the law developing around s. 2(d) and the duty of good faith consultation or negotiation. Rather, the law of ordinary labour relations is a useful source of general principles to apply flexibly in the s. 2(d) context.

[142] The British Columbia *Code* requires employers (and unions) to "bargain collectively in good faith" and "make every reasonable effort to conclude a collective agreement" (s. 11(1)). The equivalent legislation at the federal level and in other major common law provinces includes both aspects with substantially identical language (*Canada Labour Code*, R.S.C. 1985, c. L-2, s. 50; Ontario *Labour Relations Act*, S.O. 1995, c. 1, Sch. A, s. 17; Alberta *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 60(1)).

[143] While the Board sometimes refers collectively to both aspects of the statutory duty as "the duty to bargain in good faith" (see e.g. *Re Catholic Independent Schools Diocese of Prince George*, [2001] B.C.L.R.B.D. No. 112 at para. 25), it interprets each aspect quite differently (*Re Naramata Centre Society*, [2014] B.C.L.R.B.D. No. 157 at para. 55):

> Section 11 of the Code has two distinct elements. First, the obligation to bargain collectively in good faith addresses each party's subjective intent to reach a collective agreement. Second, the obligation to make every

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> reasonable effort to conclude a collective agreement addresses the objective means used by each side in carrying out that intent.
>
> [Emphasis added.]

[144] According to the Board, an employer meets its duty to "bargain collectively in good faith" when it subjectively desires and intends to reach agreement with the union. It is a violation of this duty to engage in "surface bargaining", that is, to disingenuously go through the motions of bargaining with no intention of actually agreeing to anything, no matter what the union proposes.

[145] However, when an employer genuinely desires agreement it is free to engage in hard bargaining. According to the Board, the *Code* is premised on the idea that each party "is entitled to adopt the contract proposals which are in its own interest, to stick firmly to its bargaining positions, and then to rely on its economic strength in a strike to force the other side to make the concessions" (*Re Noranda Metal Industries Ltd.*, [1974] B.C.L.R.B.D. No. 149, quoted with approval in *Re IKEA Canada Limited Partnership*, [2014] B.C.L.R.B.D. No. 155 at para. 87; see also *Canadian Union of Public Employees v. Nova Scotia Labour Relations Board*, [1983] 2 S.C.R. 311 at 341). In other words, the function of the subjective duty is not to ensure that bargaining impasses *never* occur. Its function is to promote the formation of a collective agreement where possible.

[146] Collective bargaining is inherently adversarial. The duty to genuinely try to reach agreement does not require an employer to accept a proposal which is unacceptable to it. Thus, when parties fail to reach agreement because one refuses to accept the demands of the other, neither has necessarily failed to meet its duty to bargain in good faith (*Naramata Centre* at para. 56). A failure to reach agreement may be *evidence* of surface bargaining, but a failure to reach agreement is not *itself* inconsistent with the duty to bargain in good faith. The duty is intended to help, but not require, parties to reach agreement. In addition, the *Code* provides mechanisms including strikes and lockouts that can be used to put pressure on the other side to reach agreement.

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[147] Honesty of intention is necessary but not sufficient to comply with s. 11(1). Both parties must undertake "every reasonable effort" to actually reach agreement. Obviously, this duty is measured against an objective standard. Crucially, however, that standard is procedural rather than substantive. With two narrow exceptions not relevant here, the Board will not assess parties' negotiating positions for substantive reasonableness (*Noranda* at 159, cited with approval in *IKEA* at para. 87). Rather, the Board will investigate whether parties are adhering to "certain fundamental principles of reasonable bargaining procedure" (*Noranda* at 161).

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[148] The Board has not attempted to enumerate these principles or otherwise define at an abstract level what constitutes reasonable bargaining procedure. It considers whether this requirement has been met on a case-by-case basis. Most decisions involve the timing or structure of bargaining sessions, or preconditions set by one party. For example, in *Re Insurance Corp. of British Columbia*, [2012] B.C.L.R.B.D. No. 143, the employer was ICBC, a Crown corporation. The Province was engaged in a review process for Crown corporations and ICBC would not receive a financial mandate until it was complete. ICBC refused to bargain with the union on monetary issues until the review was complete. The Board concluded ICBC was not making every reasonable effort to conclude an agreement because it had made bargaining subject to an external precondition. The Board stated that, "Objectively speaking, the Employer's refusal to bargain monetary issues until the Government finishes its core review process places a clear impediment to reaching a collective agreement" (at para. 33).

(iii) Conclusions for good faith in s. 2(d) context

[149] In our view, the following principles relating to good faith in the s. 2(d) context can be distilled from the forgoing discussion:

a) It is inappropriate, for reasons of institutional competence, for a court or tribunal to investigate the factual basis and internal logic of substantive bargaining proposals.

b) The fundamental requirement of good faith is subjective honesty. Surface bargaining is, by definition, inconsistent with this requirement.

c) Hard bargaining is not, as such, inconsistent with good faith. An employer can have firm *objectives* but must consider with an open mind employees' proposals about the *means* to be used to achieve those objectives.

d) An employer may apply pressure employees, but only for certain purposes. One such purpose is encouraging employees to reach agreement.

e) An employer must adhere to objectively reasonable bargaining procedures.

f) Failing to reach agreement does not itself constitute bad faith. It may or may not be *evidence* that one or both of the parties failed to bargain in good faith, but the inquiry focuses on the bargaining process rather than its results.

(b) Consultations and bargaining before Bill 22

[150] We turn now to a summary of the consultations and collective bargaining that occurred before Bill 22 was enacted. As noted, these processes unfolded separately. There were consultations between the Province and the BCTF, with two representatives of the BCPSEA present at each meeting; and there was collective bargaining between the BCTF and the BCPSEA. We concluded above that the discussions at both tables are relevant to whether Bill 22 infringed the s. 2(d) rights of the BCTF's members.

(i) Consultations

[151] The consultations took place from mid-May to late November 2011. There were 13 meetings and a considerable volume of correspondence was exchanged

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between the Province and the BCTF. The Province's chief representative was Mr. Paul Straszak, President and CEO of the Public Sector Employers' Council.

[152] The consultations began with a meeting on 20 May 2011. The trial judge contrasted the very different positions of the parties (at paras. 201-203):

> 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.
>
> 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.
>
> 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.

[153] These positions were essentially repeated by the parties at the meeting of 3 June 2011. At the meeting of 7 July 2011, Ms. Claire Avison gave a presentation on behalf of the Ministry of Education on the Province's essential policy objectives in the process (at para. 210):

- flexible class sizes;
- optimal class composition for educational program delivery, with decisions made at the school level; and
- appropriate allocation of non-enrolling teachers.

[154] Ms. Avison gave examples of ways in which the Province felt the Deleted Terms were inconsistent with those objectives. The BCTF vigorously debated whether the Deleted Terms were, in fact, inconsistent with the Province's objectives.

[155] After the meeting of 7 July 2011, the parties exchanged correspondence. The Province wanted another meeting in July but the BCTF was not available until

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August. During this period, the BCTF brought a fresh court application seeking guidance as to the true effect of the Bill 28 Decision. This was apparently thought necessary in light of the parties' quite divergent views of the meaning of that decision. (That application was not heard until 11 October 2011.)

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[156] At the meeting of 11 August 2011, Mr. Peter Drescher, a retired deputy superintendent of the Surrey School District, made a presentation attempting to illustrate the implications for that district if the Deleted Terms were restored. He developed two overall themes (at paras. 231-233):

> 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.
>
> 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.
>
> 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.

[157] At the meeting of 9 September 2011, the Province made a proposal to address class composition issues, a significant aspect of the Affected Topics. A Class Organization Fund ("COF") was proposed to ameliorate teacher workload and learning challenges by identifying need at the school level. Teachers would be consulted on how it was spent. It would be included in a separate agreement, not within the confines of the collective agreement. The Province said that its plans were presented as a "framework for discussion" and invited comments from the BCTF. The BCTF was not immediately prepared to comment and the meeting ended.

[158] On 13 September 2011, the BCTF issued a press release criticizing the COF and stating it was calling off the negotiations until the judge ruled on the BCTF's application for clarification of the Bill 28 Decision. The next day, the Minister of

Education wrote to the President of the BCTF asking her to return to discussions. Mr. Straszak sent a similar letter on 21 September 2011.

[159] On 3 October 2011, Mr. Straszak again wrote to the BCTF, responding in detail to the BCTF's expressions of concern with the COF proposal.

[160] On 11 October 2011, the judge heard the application for clarification. She declined, quite properly in our opinion, to elaborate on the Bill 28 Decision.

[161] The sixth meeting occurred on 24 October 2011. The BCTF made its first proposal (described by the trial judge at paras. 276-277):

> 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.
>
> 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.

[162] The trial judge related in detail the events of the next day (at paras. 280-282):

> 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.
>
> 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.

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> 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.

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[163] At the meeting of 27 October 2011, the Province produced a revised proposal to the BCTF with more details about its proposed COF and some modifications based on the BCTF's concerns. The Ministry would consult with the BCTF about allocation at the district level. Within each district there would be consultations between principals, superintendents and local union presidents. Initially the proposal had been that superintendents and local union presidents would have to reach agreement, but the BCTF expressed concern (in its press release) that this would hold up funds. The Province responded by proposing that local union presidents have a right to be consulted in good faith, but funding would not be conditional upon agreement being reached.

[164] The BCTF made a counter-proposal at the meeting of 10 November 2011. It contemplated certain changes to the deleted collective agreement language. For example, the BCTF proposed to broaden the exceptions to class size maximums and to agree to bargain that issue only at the provincial level. These were concessions.

[165] Meetings followed on 21 and 23 November 2011. Mr. Drescher responded to the BCTF's second proposal, saying that it was even more costly than its first proposal (made on 24 October). Mr. Straszak thought it moved the parties further apart and "the parties were at an impasse" (at para. 309). The November deadline had also been reached, so the consultations ended.

[166] The trial judge summarized her view of the parties' positions (at para. 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.

(ii) Collective bargaining

[167] Meanwhile, the BCTF was also engaged in collective bargaining with the BCPSEA. Between March 2011 and February 2012, the BCTF and the BCPSEA met 78 times. They did not manage to reach a new collective agreement.

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[168] A significant barrier to successful bargaining in this round was the Province's public sector-wide 2010 collective bargaining mandate. It was known as the "net zero mandate" because it did not allow for any increase in net compensation costs funded by the Province. Further affecting the collective bargaining between the BCTF and the BCPSEA was a developing list of the Province's priorities for those bargaining sessions. As related by the trial judge (at para. 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.

[169] For its part, the BCTF sought substantial salary and benefit increases for its members that exceeded the net zero mandate. Bargaining stalled early over the issue of compensation. It did not progress. A fact-finder appointed by the Province in February 2012 concluded that voluntary settlement was unlikely and that the net zero mandate was a fundamental obstacle to the successful conclusion of a collective agreement.

(c) Legal errors

[170] In our summary of the trial judge's general chronology of the negotiations, we omitted the many comments and observations she made as she outlined these events. These comments and observations were highly critical of the substance of the Province's negotiating position, which she described as "manifestly unreasonable", "unduly alarmist", based on "myth" and "fallacy" and "without any factual or analytical basis" (at paras. 332, 237, 234, 244 and 345, respectively).

[171] For example, the trial judge questioned the factual basis of Ms. Avison's examples of Deleted Terms which the Province felt were inconsistent with its policy objectives (at para. 216):

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> 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[.]

[172] The trial judge was also critical of the substance of Peter Drescher's presentation (at para. 234, 237):

> 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.
>
> …
>
> 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.

[173] As to the Province's concern with flexibility, she said (at para. 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.

[174] Later, the trial judge said (at para. 345):

> 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.

[175] The trial judge also implied that the Province ought to allocate more resources to education (at para. 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.
>
> [Emphasis added.]

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[176] Here the trial judge was evaluating the substantive reasonableness of the Province's positions during the consultations. In our view, this amounts to an extricable error of law, reviewable on a standard of correctness (see *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 34-36; *R. v. D.J.S.*, 2015 BCCA 111 at para. 28).

[177] The factual basis and internal logic of government's negotiating position was not relevant to whether it was negotiating in good faith as required by s. 2(d) of the *Charter*. As discussed above, even the Labour Relations Board does not assess parties' negotiating positions for substantive reasonableness, with two narrow exceptions that do not arise here. In our view, it was an extricable error of law for the trial judge to embark upon an inquiry that even the Labour Relations Board, a specialized tribunal, considers to be inappropriate and beyond its institutional competence. It is also inappropriate for courts to comment on government spending decisions, for example by referring, as noted above, to "an overall resources problem" (at para. 357).

[178] As will be seen, the trial judge inferred that the Province was not truly committed to reaching agreement during the negotiations. We will review the evidence for this inference shortly, but we pause here to observe that this factual conclusion was thoroughly bound up with the trial judge's fundamental legal error. Her analysis began from the proposition that the Province was adopting a "manifestly unreasonable" bargaining position. She was of the view that the Province's concerns were unfounded and that it was acting improperly by raising those concerns with the BCTF. In our opinion, her inference that the Province had no true will to reach agreement followed largely from this view.

[179] The trial judge also commented critically on the Province's position that it would not restore the Deleted Terms pending the discussions. She appears to have treated that position as establishing that the Province refused to consult over the Affected Topics (at para. 173), a conclusion the BCTF urged this Court to confirm.

[180] Again, we view the trial judge's analysis as flawed. Bill 28 prohibited terms covering the Affected Topics from being included in a collective agreement. The trial

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judge reasoned that this effectively prohibited the BCTF from discussing the Affected Topics at the collective bargaining table, which the trial judge saw as the only forum in which meaningful collective representations could be made for s. 2(d) purposes. Similarly, the BCTF submits that it was not "legally entitled" to bargain the Affected Topics at either table.

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[181] This overlooks the actual terms of Bill 28, and the fact that the Province was at liberty to amend Bill 28 at any time. Crucially, nothing about Bill 28 prohibited the parties from discussing the Affected Topics at the consultation table. If agreement had been reached at that table, the Province could have amended Bill 28 to reflect the agreement. In other words, the BCTF had the opportunity to make collective representations about the Affected Topics to the entity with the power to respond to those representations. The BCTF admitted as much by noting that "teachers proposed changes to the deleted collective agreement language" (R.F. at para. 54). That the BCTF proposed such changes at the consultation table rather than the collective bargaining table is immaterial: s. 2(d) does not protect the Wagner model of labour relations.

[182] The Province refused to accede to the position of the BCTF that the Affected Topics had to be negotiated on the premise that the Deleted Terms had already been returned to the collective agreement. The trial judge considered this position to be unreasonable, given her declaration of invalidity in the Bill 28 Decision. She concluded the effect of that declaration to be that the Deleted Terms would be returned retroactively to the collective agreement (at para. 174).

[183] In our view, however, the Province was not required, while the declaration of invalidity was suspended, to proceed on the basis that the Deleted Terms had been restored to the collective agreement. As we have seen, s. 2(d) does not guarantee particular outcomes. It does not require that agreement be reached. It does not require one party to capitulate to the demands of another. The Province was entitled to take the positions that the Deleted Terms were inconsistent with its policy objectives and that it was disinclined to permit a collective agreement that restored

them. Its obligation was to provide a constitutionally adequate process of good faith consultations. It was not required to abandon its policy imperatives or disregard the budgetary consequences of agreeing to restore the Deleted Terms. In effect, the Province's obligation was to consider in good faith the representations made to it by the BCTF, including its representations that discussions should take place on the assumption that the Deleted Terms were returned to the collective agreement and not an impediment to the Province's policy objectives. During the suspension, the Province was not required to *agree* with those representations.

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[184] We turn now to the factual issues.

(d) Factual errors

[185] The trial judge made two key factual determinations on the issue of whether the Province consulted in good faith:

a) Before the consultations began, the Province resolved that it would not alter Bill 28, no matter what the BCTF said. Its plan was to document that it had consulted, then enact new legislation which re-deleted all the Deleted Terms (paras. 188-194) (the "Closed Mind Finding").

b) The Province's overall strategy was to incite a full scale strike with the goal of providing political cover for this new legislation, which it knew would be controversial (paras. 367-392) (the "Strike Finding").

[186] The Province's obligation to consult in good faith required it to consider with an open mind proposals from the BCTF about how its education policy objectives could be achieved in a manner which was more agreeable to the BCTF than Bill 28. The Closed Mind Finding entails that the Province did not meet this obligation.

[187] The Province's obligation to consult in good faith also limited it to applying pressure to the BCTF only for legitimate purposes. In our opinion, it would not be legitimate for the Province to try to incite a strike solely to gain political advantage. Yet this is what the Strike Finding suggests the Province did.

[188] We remind ourselves of the standard of review. It is well-tilled ground (and a fertile field for appellate error). The trial judge's findings of fact are entitled to deference on appeal and must be accepted absent palpable and over-riding error (*Housen v. Nikolaisen*, 2002 SCC 33 at para. 10). Likewise, the trial judge's inferences of fact must be accepted save where they are not reasonably supported by the evidence (*H.L. v. Canada (Attorney General)*, 2005 SCC 25 at para. 74).

[189] There was no direct evidence before the trial judge for either the Closed Mind Finding or the Strike Finding. They are inferences, drawn by the trial judge from the very frank answers and admissions of the Province's principal agent, Mr. Straszak.

[190] The trial judge made no adverse findings as to Mr. Straszak's credibility. Indeed, she appears to have accepted his evidence at face value. That, said, it is significant that the judge did not expressly note in her reasons the evidence Mr. Straszak gave that directly contradicts the Closed Mind Finding and the Strike Finding. The question before us is whether these two inferences were reasonably supported by the evidence. We conclude that they were not.

(i) Closed Mind Finding

[191] We will first review the portions of Mr. Straszak's testimony that are relevant to the Closed Mind Finding. The key exchanges happened in cross-examination. Counsel for the BCTF presented Mr. Straszak with various documents, most of which were his speaking notes for presentations to Cabinet or various government figures. Counsel for the BCTF attempted to have Mr. Straszak agree that the Province's plan was to re-delete the Affected Topics language, no matter what the BCTF said or proposed during the consultations. However, Mr. Straszak repeatedly insisted that the Province was open to alternatives, although not optimistic any would be found (Trans., p. 415, ll. 20-47; p. 416, ll.1-13):

> Q … I put to you, the direction [from the Province] was throughout, that it would not restore the class size composition language which was determined by the court to be unconstitutionally removed?
>
> A Yeah. So our expectation, in fact, our direction in the consultation process was to find alternatives to language which was found to be unduly restrictive. And so as we were projecting the future, we did not

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project that the future would include a restoration of that language. That was the whole issue that we spent 13 consultations over.

Q That was your direction prior to the consultation meeting, that you would not restore?

A So what we're doing is not closing our minds to alternatives, but we certainly felt that it was unlikely that we would have options provided to us where we felt that it would be impossible to meet these education objectives with that.

So what we are projecting into the future as any strategist is required to do.

Q So you didn't receive the direction that there would be — not to restore the class size composition language determined by the Court to be unconstitutional?

A No. The direction we had was to achieve the policy objectives that were fundamental to the negotiations. We did not achieve a — we did not receive a direction on the outcome. If through the consultation process that the BCTF could have convinced us that they are prepared to accept class size composition language that was aligned [with the Province's policy objectives], then we might have changed our position. We were never ever close to that.

Q So your evidence, as I gather, is you never received that mandate that I've just suggested?

A That's correct.

Q Okay.

A That's correct. The mandate was to achieve policy objectives. Our expectation is we wouldn't be able to do that by reinstating the clauses.

[Emphasis added.]

[192] What we see here, then, is a consultation team led by Mr. Straszak which was directed to achieve firm policy objectives but afforded flexibility in choosing the means to do so. Mr. Straszak and his team, in his words, were "not closing our minds to alternatives". Mr. Straszak was not optimistic that the BCTF would come up with alternatives that would be acceptable to the Province, but his evidence was that he was prepared to consider the BCTF's proposals with an open mind.

[193] The trial judge appears to have overlooked Mr. Straszak's evidence that the Province had an open mind. She makes no mention of it.

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[194] In this regard it is significant that the Province proposed the COF. The COF was an effort to accommodate one aspect of the Affected Topics in an agreement with the BCTF. When the BCTF criticized the COF in a public press release, the Province responded in detail to those concerns, explaining its point of view. It then modified its proposal to respond to some of the BCTF's points. Not only is this suggestive of an open mind and therefore corroborative of Mr. Straszak's evidence; it is a clear demonstration of good faith consultation in action. The Province listened, heard and responded by adjusting its proposal in light of the representations the BCTF had made.

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[195] In our view, the trial judge's categorical conclusion, stated a number of times, that the Province had closed its mind to possible options to be offered by the BCTF, cannot be sustained in light of Mr. Straszak's clear and unequivocal evidence to the contrary. The Closed Mind Finding was therefore not reasonably supported by the evidence. It is a palpable error and its impact is overriding.

(ii) Strike Finding

[196] The learned judge expressed the Strike Finding so (at para. 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.

[197] The trial judge found that the Province expected that collective bargaining would fail because it believed the net zero mandate and its education policy objectives would be unpalatable to the BCTF (at para. 380). The trial judge continued (at paras. 381-384):

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

> 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
>
> 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.

[198] In other words, the trial judge found that the Province was expecting to have to pass controversial legislation addressing the Bill 28 Decision and imposing a new collective agreement. The Province was also expecting teachers to strike. The trial judge found that the Province's plan was to wait for the strike and then enact the legislation. Its theory was that the legislation would enjoy broader public support if it was passed in the context of a teachers' strike.

[199] But a full strike did not materialize. Teachers simply withdrew some non-essential services. The trial judge continued (at paras. 386-387):

> 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 [full] strike.
>
> 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.

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> 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.

[200] The trial judge then critically concluded (at para. 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.

[201] The trial judge has inferred here that the Province secretly wanted the consultations to fail so that the BCTF would strike and the Province would gain certain political advantages. As part of this strategy, when teachers withdrew only some limited services, the Province sought to apply economic pressure in order to push teachers towards a full-scale strike.

[202] It is not in dispute that the Province sought to apply economic pressure to the BCTF. The key question is what the Province was trying to achieve in doing so. As discussed, applying economic pressure to a union is not inconsistent with good faith, provided it is done for a legitimate purpose. In our opinion, the Province did not act in good faith if it tried to incite a strike solely to gain political advantage. However, if the Province's goal was to pressure the BCTF towards agreement (clearly a legitimate purpose), then recognizing that failure would also have certain advantages did not itself constitute bad faith.

[203] Mr. Straszak testified frankly that the Province expected it would have to pass legislation addressing the Bill 28 Decision and imposing a new collective agreement, and that such legislation would be controversial if teachers were engaged in only low-level job action. He also acknowledged that he had given presentations to

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various officials, explaining how the Province might pressure the BCTF to escalate from low-level job action to a full-scale strike.

[204] We consider it important to recognize that, in an adversarial collective bargaining relationship, managing the timing of a dispute and the way in which it may escalate is normal practice. For example, unions may prefer to avoid having their members walk the picket line at certain times of the year. They may prefer to halt work at key periods. In education, this could be at report card time or the start of the school year, thereby maximizing the pressure on school boards. Employers may have an interest in encouraging a strike, if there is to be one, at certain other times of the year. We see nothing sinister in the way the Province recognized, while formulating its strategy, the importance of the timing of the dispute and the circumstances under which it might escalate.

[205] Mr. Straszak, for example, when referred to his speaking notes for a meeting with two top policy advisers in June 2011, explained (Trans., p. 427, ll. 38-45):

> So what we're talking about here is cabinet is going to be in an awkward situation in the context of a low scale strike, meaning it's going to want to put an end to it but the public won't necessarily see the need for the legislation because the kids are still in school.
>
> And so that's a political dynamic that [the advisers] and cabinet will need to be sensitive to.

[206] Similarly, when referred to his speaking notes for a presentation to Cabinet in late September 2011, Mr. Straszak explained (Trans., p. 432, ll. 37-47; p. 433, ll. 1-17):

> What our objective here is explaining the management to a full scale strike. And the big issue, as I said, for government when it interferes in free collective bargaining is the pressure associated with it. So all we had is this kind of low level strike which was having a really significant impact on education but where parents weren't up in arms.
>
> So we're simply describing a political dynamic here that if you do step in with legislation prior to a full scale strike you may have a public problem. And so the notion of how you can get to a full scale strike is outlined here.
>
> And what we have done — in normal labour relations what you try and do is resolve things with balance of power. And I'm not sure exactly when this was, but we had gone to the labour board to see if we can balance the

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> inconvenience of a strike by getting a ruling that would reduce the pay of teachers and that wasn't available. And so the alternative was, you know, let this strike buzz along or have government intervene during a strike that doesn't appear to have the support of the public, and that's a political quandary. That's what these discussions are at cabinet. It's how you deal with political quandaries.

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[207] Because teachers had withdrawn some non-essential administrative services, such as preparing report cards, yet were being paid in full, Mr. Straszak explained that there was a significant imbalance of pressure (Trans., p. 429, ll. 20-38):

> … So a real concern to government was that a partial strike was — the whole notion of strike in labour relations is there be balanced inconvenience associated with a strike. That is, the employer loses services and the employees lose pay. But what was happening here was a little different than the typical model one would expect for a strike. What was happening was the teachers were withholding service — we guessed about 15 percent of what they did in the day, and yet they were receiving full pay.
>
> So this was a very effective tactics that the teachers pursued. One where there was tremendous pressure put on [school] boards, put on the education system, but no countervailing difficulty on teachers as well. So this was problematic to us. We felt at this time that this was an imbalance we might be able to rectify by going back to the board.

[208] The Province sought to balance the economic pressure by enticing school districts to cancel teachers' leaves and professional development days, and trying to vary previous essential services orders so that school districts could reduce teachers' pay.

[209] Mr. Straszak acknowledged that he told Cabinet in early September 2011 that, if the Province could apply pressure in this way, he felt teachers would likely escalate to a full-scale strike. Referring to his speaking notes, he explained (Trans., p. 430, ll. 11-26):

> … So what I'm saying here is if government were to do that and were to be successful we think that it would probably escalate to a full scale strike.
>
> When we originally came to cabinet to talk about how we thought the strike would develop we didn't have in mind the kind of tactics that the [BC]TF actually undertook. We expected that there would be negotiations. And when there was a strike we expected a full strike. We expected that to happen on a timing in spring.

> So what we're communicating to cabinet here is given the developments that have happened, you might see something different than what happened the last time we were here to talk to you about it.

[210] Mr. Straszak also acknowledged that he made another, similar presentation to Cabinet in late September 2011. Counsel for the BCTF again asked him to explain why the Province had sought to put economic pressure on teachers. He concluded his answer as follows (Trans., p. 435, ll. 9-15):

> And all of this is in the context of a strike putting tremendous pressure on the delivery of education services that doesn't have a balanced impact, and so what we're seeking to do is balance the impacts. The best of all worlds, I guess, is if government did take the action to reduce teachers' pay, that didn't escalate in a strike and put enough pressure for the parties to come to an agreement at the table. We did not think that there was any chance of that happening given the dynamics of the negotiations.
>
> [Emphasis added.]

[211] Mr. Straszak stressed throughout this part of his evidence the need for a "balance of inconvenience" to both parties, such that "the employer loses services and the employees lose pay". This is what drove his acknowledgment that taking steps to reduce teachers' pay to reflect their partial withdrawal of services might put pressure on the BCTF to escalate to a full-scale strike.

[212] Mr. Straszak testified that the "best of all worlds … is if government did take the action to reduce teachers' pay, that didn't escalate in a strike and [did] put enough pressure for the parties to come to an agreement". *Failing that*, a full strike would improve public perception of the legislation that the Province expected would be necessary, but Mr. Straszak's evidence was clear that this was "Plan B".

[213] The trial judge seems to have overlooked this crucially important portion of Mr. Straszak's evidence. She did not refer to it.

[214] The trial judge also ignored the fact that at this time there were two separate processes unfolding, the collective bargaining and the consultations. The trial judge appears to have conflated the dynamics of these two forums, which were kept separate at the BCTF's insistence.

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[215] In the context of the collective bargaining, Mr. Straszak was speaking to the fact that the BCTF had adopted a successful tactic in withdrawing only some services, thereby creating "tremendous pressure" on the education system, without creating any "countervailing difficulty on teachers", that is, any loss of pay.

[216] Coincidentally, a full scale strike caused by events at the collective bargaining table would have served the Province's timeline at the consultation table. But that is not to say that triggering a strike was the Province's overall preoccupation or ultimate objective in both processes. It was fortuitous timing, in part created by the suspension of the declaration of invalidity, that an anticipated impasse in collective bargaining would allow the Province to resolve the entire matter, including appointing a mediator, in a single legislative initiative, if it was forced to legislation. It appears to us that the trial judge conflated the two processes then ongoing by inferring from a legitimate response to the union's tactics in collective bargaining that the Province had not acted in good faith while consulting.

[217] We conclude that the trial judge's inference that the Province desired a strike is not supportable on the evidence. To the contrary, the evidence demonstrates that the Province's efforts to exert economic pressure on the BCTF and its members were legitimate and conducted in good faith, with the goal of moving the BCTF towards agreement. Although the Province anticipated that this strategy would likely not succeed, its goal was to reach agreement if possible. There is a fundamental difference, overlooked by both the trial judge and the BCTF in its submissions before this Court, between desiring a strike and predicting one. There is nothing sinister in a party to negotiations looking ahead and making contingency plans. In this case, it was the Province's responsibility – and Mr. Straszak's job – to do so.

(e) Remaining factors

[218] The trial judge identified four indicia of good faith which we have not yet addressed. As described by her headings, these are:

> Opportunity to Influence Employer
> Commitment of Time and Preparation

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A Willingness to Exchange and Explain Positions
Avoidance of Unjustified Delays in Negotiations

[219] The judge concluded that although the Province committed time, none of the other indicia were present. We can deal with that conclusion briefly.

[220] With respect to the BCTF's opportunity to influence its employer, the complaint was that the BCPSEA is the employer and it did not formally take part in the negotiations as a party, though representatives were present. This overlooks two important facts: the Province directs the positions to be taken by the BCPSEA, and only the Province has the power to amend legislation. As discussed above, the BCTF's opportunity to make representations was not somehow *less* meaningful because it spoke directly to the Province. To achieve its objectives the BCTF had to influence the Province and the Province was at the consultation table.

[221] The judge held that the Province was insufficiently prepared because its representatives did not read the Deleted Terms until after the sixth meeting (at para. 344). However, that formal reading by its representatives did not alter the Province's overwhelming opposition to the terms and its perception that they unduly limited the flexibility of the Province and school boards.

[222] The judge held that the Province was not sufficiently willing to exchange and explain its position because, notwithstanding the many meetings and voluminous correspondence, the Province 'lectured' the BCTF and on at least one occasion found its questions disruptive (at paras. 347-348). To this we would say simply that it was inconsistent to hold, as the trial judge effectively did, that the Province spent both too much and too little time explaining its position.

[223] The trial judge concluded that Mr. Straszak's team "wasted time" in the first four months of the consultations and took too long to make a substantive proposal (the COF) (at paras. 361-362). But this overlooks the fact that the BCTF knew full well what the Province wanted to achieve. Given that its position was clear to the BCTF, the Province was not required to make any particular proposals. Its obligation

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was to listen to proposals made by the BCTF and consider them in good faith. The BCTF declined to make any proposals until the sixth meeting, on 26 October, four months after the consultations began and one month before they would have to conclude. The BCTF also declined to meet a second time in July and called off the consultations for more than a month pending its application to the trial judge for clarification. It cannot be said that the Province was responsible for unjustified delays. It was a two-way street. The situation facing both parties was difficult: it was dynamic and fluid, and it was complicated by ongoing collective bargaining, unclear jurisprudence, teachers' job action and the parties' radically divergent views on how to proceed.

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[224] In our opinion, the judge engaged in her own assessment of the merits and reasonableness of the Province's "bargaining strategy". This is something that even specialized labour tribunals do not do and a fundamental source of error.

[225] For all of these reasons, the trial judge's conclusions cannot be sustained. We conclude that the Province consulted with the BCTF in good faith in the months leading up to the enactment of Bill 22.

Bargaining impasse and deadline from Bill 28 Decision

[226] We turn now to the remaining contextual factors bearing on whether Bill 22 substantially interfered with teachers' s. 2(d) rights. The first of these is that Bill 22 was enacted in the face of a bargaining impasse and a deadline to address the Bill 28 Decision.

[227] The legislative nullification of the Deleted Terms occurred after extensive, detailed, protracted collective bargaining and meaningful consultations which had failed to reach agreement and which showed no prospect of reaching one. Teachers were engaged in strike action at no economic cost to themselves. The parties were at an impasse at both tables. The Province faced a deadline to resolve the issues arising from the Bill 28 Decision. This deadline was the result of the trial judge's suspension of her declaration of invalidity in the Bill 28 Decision. The collective agreement expired two months into the suspension, in June 2011. This placed the

Province in a difficult position. If it had to act through legislation, it would almost certainly be interfering with the terms of a collective agreement, with all the constitutional risks that involves. In any event, the Province had to act, one way or another.

[228] The Province did not submit that Bill 22 was adopted in a situation of particular urgency or exigency. Nonetheless, the Supreme Court of Canada instructs that regard must be had to the circumstances surrounding the adoption of the impugned legislation (*Health Services* at para. 107; *Meredith* at paras. 40-41). The bargaining impasse and deadline are relevant to the infringement analysis especially in circumstances where government and the employers' bargaining agent had, respectively, consulted and bargained extensively.

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Deleted Terms and cooling off period

[229] The next contextual factor which must be considered is the content of Bill 22 itself. It declared void many terms of the collective agreement (the Deleted Terms) and provided that no terms about the Affected Topics could be included in a collective agreement for 14 months.

1. Deletions

[230] The deletions were effected by ss. 8, 13 and 24 of Bill 22, which came into force on 14 April 2012.

[231] Section 8 amended s. 2(1)(a)(v) of *ESCAA* (Bill 27), effectively deleting from the collective agreement the Non-Enrolling Staffing Formula, the K-3 Primary Class Size memorandum and various letters of understanding. Section 24 gave s. 8 retroactive effect to 1 July 2002.

[232] Section 13 amended s. 27 of the *School Act*, including subsections (3) and (5):

> 27(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.
>
> …
>
> (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.

[233] The collective agreement expired on 30 June 2011 and no new agreement was reached by 14 April 2012. However, as the trial judge explained (at paras. 144-145), the collective agreement provided that its terms would remain in effect after its date of expiration, if by that date no new agreement had been reached. Accordingly, Bill 22 effectively eliminated many terms which continued to be in force after the collective agreement expired but while collective bargaining was ongoing.

2. Cooling off period

[234] As amended by Bill 22, s. 27(7) of the *School Act* provided that s. 27(3)(d)-(j) "is repealed on June 30, 2013". Effectively, then, collective bargaining (but not consultations) on the Affected Topics was prohibited from 14 April 2012 to 30 June 2013, corresponding to one bargaining round. During that time a mediator would attempt to get the parties to reach agreement (not including on the Affected Topics). After 30 June 2013, the Affected Topics would be returned to collective bargaining.

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[235] The trial judge took the view that the time-limited nature of the effective prohibition on collective bargaining did not materially ameliorate the effect of Bill 22 on teachers' s. 2(d) rights, for three reasons. First, she found there was no valid reason for a prohibition of even 14 months (at paras. 410-411). Second, she noted that the Province introduced the prohibition at the end of the 12-month period during which the declaration of invalidity from the Bill 28 Decision was suspended (at para. 413). In effect, she reasoned, the collective bargaining prohibition was not 14 months but somewhat over two years. Third, she stated that, properly interpreted, the collective bargaining prohibition might actually be indefinite (at para. 448).

[236] We come to a different conclusion about the legal significance of the time limit on the effective prohibition on collective bargaining on the Affected Topics.

[237] The Province explained that by early 2012 collective bargaining was at an impasse and it thought that adding many more contentious topics would be counterproductive (see paras. 407-408). (Bargaining on the Affected Topics had also been effectively prohibited by Bill 28, which remained in force while the trial judge's declaration of invalidity was suspended, although consultations over the Affected Topics occurred during that period as we have discussed.) Section 6 of Bill 22 provided for the appointment of a mediator charged with assisting the parties to reach a collective agreement for a term from 1 July 2011 to 30 June 2013. At that time, the Affected Topics would be returned to collective bargaining.

[238] The trial judge was highly critical of the Province's reasoning, and of its decision to wait until the end of the 12-month suspension to bring Bill 22 into force. This criticism appears to be driven by her view that it was unreasonable for the Province not to immediately return the Deleted Terms to the collective agreement as the "floor" from which bargaining would start. In our view, the Province was not under any such obligation, even though the Deleted Terms would have been returned to the collective agreement at the end of the 12-month suspension (when Bill 28 became of no force or effect). During the suspension, the Province was entitled to consult from the position that it would not accept a return of the Deleted

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Terms to the collective agreement for policy reasons it considered appropriate. Equally, the BCTF was entitled to assert the position that the Deleted Terms should be returned. The Province was not acting improperly or unconstitutionally by attempting, during the suspension period, to resolve the issue in its favour. Nothing prevented the BCTF from making collective representations to the Province and the BCPSEA. When it became apparent that the Province and the BCTF would not come to an agreement, legislation ensued. No adverse inference should be drawn against the Province based on the timing of the legislation.

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[239] Moreover, as we have emphasized, the Province consulted the BCTF about the Affected Topics during the 12-month suspension. The BCTF had ample opportunity to make collective representations about the Affected Topics during this period. It was an error to expand the effective length of the prohibition based on the timing of the legislation, to include a period in which there had in fact been consultations on the Affected Topics.

[240] The trial judge's third point, that the prohibition might actually be indefinite rather than temporary (at para. 448), was grounded in s. 24 of Bill 22. It provides:

> 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.

[241] The trial judge noted that (at para. 450):

> Section 24 of Bill 22 … 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 by the trial judge.]

She went on to conclude that future collective agreements could not contain any of the words or phrases deleted by s. 8 (at paras. 451-453). Her position seems to be

that s. 24 prohibited future collective agreements from containing words like "kindergarten", "professional development", "class", "teacher's assistant" and even "teacher", because these words were contained in the provisions deleted by s. 8.

[242] This interpretation of s. 24 is artificial and erroneous. The legislative intent is clear. Section 24 gave retroactive effect to s. 8. It did not somehow prevent the parties from using certain basic vocabulary in subsequent agreements. The governing provision is not s. 24 of Bill 22, but s. 27(7) of the *School Act*.

[243] The trial judge asserted that the Province "did not deny that [her] interpretation is correct" (at para. 452). This is contradicted by the transcript, which shows that counsel for the Province specifically argued against this interpretation in closing submissions. In fact, the trial judge asked "if they negotiated a similar clause to what used to exist, that would be fine?" and counsel answered "yes" (Trans., p. 1197, ll. 38-41).

[244] It follows then that the relevant length of the prohibition was 14 months. It is apparent that the 14-month prohibition corresponds to what was anticipated to be one round of collective bargaining. In effect, Bill 22 made provision for a "cooling off" period to assist the parties in reaching a collective agreement that would expire on 30 June 2013. The effect of the prohibition on bargaining the Affected Topics was, in substance, to take them off the bargaining table only for one round of bargaining, until the end of the school year, but to leave them on the consultation table throughout.

[245] Whether the interference was so substantial as to amount to an infringement of the s. 2(d) rights of teachers must be assessed practically, taking an accurate measure of the scope and length of the prohibition.

Associated regulations

[246] The final relevant contextual factor involves two regulations enacted at the same time as Bill 22. In our view, these regulations are important because they preserve a process through which teachers could make meaningful collective

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representations on some of the Affected Topics, notwithstanding the temporary prohibition on collectively bargaining them.

1. Learning Improvement Fund

[247] Sections 18 and 19 of Bill 22 enacted s. 115.2 of the *School Act* to provide for the establishment of a "Learning Improvement Fund" (the "LIF"). The LIF is the legislated successor to the COF, which had been offered by the Province during the consultation process as a partial substitute for the Deleted Terms.

[248] Every year, the Minister must make grants to the LIF "for the purpose of enabling [school boards] to address learning improvement issues" (s. 115.2(2)). Before making the first grant in any given year, the Minister must consult with the BCTF about the allocation between school boards (s. 115.2(3)(a)). School boards may make submissions to the Minister about how they would like to spend grants but must first consult with the president of the local teachers' union (*Learning Improvement Fund Regulation*, B.C. Reg. 103/2012, s. 2(1)(b)). Overall, the LIF is designed to provide additional resources for classes according to the number of students in the classroom, their learning needs and the experience and capacity of the teacher (s. 2(1)(a)(iv)-(v)).

2. Class Size and Compensation Regulation

[249] A further regulation, the *Class Size and Compensation Regulation*, B.C. Reg 52/2012 (the "CSCR"), provides for additional compensation in the form of extra preparation time, pay, professional development allowances or allowances for classroom supplies and equipment, in certain circumstances depending on class size and composition. Again this regulation addresses some of the Affected Topics that were the subject of consultations before the enactment of Bill 22.

3. Discussion

[250] The judge stated that the Province did not argue that the LIF or CSCR "ameliorate" Bill 22's interference with teachers' s. 2(d) rights or provide a "substitute for collective bargaining" (at para. 22). Certainly, the Province did not argue the LIF

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and CSCR were intended to *replace* collective bargaining (see e.g. Trans. p. 1106, ll. 18-23). However, the basis for the judge's statement that the Province did not rely on the LIF and CSCR as ameliorating factors is unclear. The judge provided none.

[251] In response to a question from the trial judge, counsel for the Province did at one point refer to the LIF and CSCR as a "separate policy piece" that was not intended to remedy or address the repercussions of the Bill 28 Decision (Trans., p. 1204, ll. 45-47; p. 1205, l. 1). However, the Province's written statement of argument before the trial judge described the LIF as "evidence of [its] good faith attempts to engage the BCTF in meaningful consultation" (R.A.B., vol. VI, p. 1793). More to the point, the Province's factum in this Court relies on the LIF as a factor that shows it offered the BCTF a constitutionally sufficient process (A.F. at para. 128).

[252] It seems to us that the LIF, and the CSCR, are relevant to whether Bill 22 as a whole respected a meaningful process of good faith consultation. We are entitled to consider them in those terms.

Conclusion on the Bill 22 issues

[253] We have now reviewed each of the relevant contextual factors. The ultimate question is whether the BCTF has shown that, taking all of these factors into account, Bill 22 "substantially interfered" with the s. 2(d) rights of its members to a meaningful process by which they can make collective representations in furtherance of workplace goals and have those representations considered in good faith by those who have the power to respond and give effect to them. We have concluded that Bill 22 did not substantially interfere with teachers' s. 2(d) rights.

[254] Before explaining that conclusion, we pause to comment on the analytical approach taken by the trial judge. Her approach had two distinct steps. She first focused exclusively on the content of Bill 22. Relying on the Bill 28 Decision, she stated it was "obvious" that Bill 22 was unconstitutional "unless there are new circumstances" (at para. 14). She then considered whether the two new "circumstances", the pre-legislative consultations or time limit on the bargaining

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prohibition, "save" the content or "change" the finding that the content was unconstitutional (at para. 28).

[255] In our opinion, this approach was in error. It was artificial to first assess the constitutionality of the content of the impugned legislation and then ask whether the surrounding circumstances changed that assessment. The Supreme Court of Canada has instructed that the s. 2(d) inquiry must be "contextual and fact-specific" (*Health Services* at para. 92; see also *MPAO* at para. 93). In our view, the proper analytical approach considers the content and context of the impugned legislation as part of a single holistic constitutional assessment. The inquiry ought not to be divided in two.

[256] As discussed above, we interpret the jurisprudence of the Supreme Court of Canada to endorse the principle that legislation may interfere with or delete terms in collective agreements without violating s. 2(d), depending on the manner and context in which it was enacted. Even if the interference or deletions are serious, the legislation may not amount to an infringement if those affected by it were afforded a constitutionally adequate process to advance collective representations concerning workplace goals and have those representations considered in good faith. We are of the opinion that teachers were afforded such a process and that the Province acted in good faith.

[257] Bill 22 deleted many terms of a collective agreement and effectively prohibited collective bargaining (though not consultations) on the Affected Topics for one bargaining round. This clearly interfered with associational activity.

[258] However, Bill 22 was enacted (and the Deleted Terms were deleted, and collective bargaining the Affected Topics was temporarily prohibited) only after extensive discussions between the parties. The fact is that the BCTF was provided with ample opportunity to attempt to influence the working conditions of its members, including in relation to the Affected Topics. There were 13 consultation meetings and 78 collective bargaining sessions. The BCTF refers to the consultations as "settlement discussions", as did the trial judge — but that label mischaracterises

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what happened. They were much more than settlement discussions. The Province encouraged the BCTF to make proposals about how the Province could achieve its policy objectives, including in relation to the Affected Topics, other than through deletions of the sort imposed by Bill 28. While the Province was not optimistic that mutually acceptable alternatives could be found, it was prepared to listen to the BCTF in good faith and honestly consider modifying its plans.

[259] In the event, the BCTF largely declined to take the opportunity offered to it. It attempted to convince the Province the Deleted Terms were not in fact inconsistent with its objectives and it made one proposal about how the collective agreement language might be modified. Otherwise it chose to focus on other matters. That was its choice to make, but the constitutional analysis must focus on the process the Province offered rather than what the BCTF chose to take.

[260] Further, the short duration of the temporary prohibition on bargaining the Affected Topics, which corresponded to just one bargaining round, had only a minor effect on the associational right (a similar conclusion was reached in *Canada (Procureur général) c. Syndicat canadien de la fonction publique, section locale 675,* 2014 QCCA 1068 at paras. 63, 68). Whether the prohibition, when set in its full context, undermined collective bargaining is at best speculative on the facts. It is possible that, by removing one major obstacle to achieving a collective agreement, collective bargaining on a range of other issues was enhanced. One cannot know. The task facing the mediator can be viewed only as daunting, given the bargaining impasse arising out of the BCTF's wage demands and the Province's determination to bargain within the net zero mandate. The prospects of achieving any collective agreement would appear to have been remote. The BCTF went so far as to challenge in court the appointment of the mediator (see *British Columbia Teachers' Federation v. British Columbia (Minister of Education)*, 2012 BCSC 960). It is possible that if the Affected Topics could have been bargained in mid-2012, the prospect of achieving agreement would have been even more remote. A collective agreement was in fact reached in June 2012. Ultimately, then, the temporary prohibition of bargaining on some contentious matters may have facilitated the

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parties' reaching a collective agreement, potentially opening the door for agreements on the Affected Topics in the future. One cannot know any of this with confidence. We can say, however, that the BCTF has not established that removing the Affected Topics from bargaining for one round was a major interference with its members' freedom of association.

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[261] Also of considerable significance is the fact that the LIF ameliorated the impact of Bill 22 on teachers' associational activity by providing an opportunity for meaningful consultation with the BCTF and its local presidents on certain Affected Topics. Although the BCTF had rejected the proposed COF as an adequate substitute for the Deleted Terms and instructed its members not to participate in the LIF's consultation process, it remains the case that the LIF created an additional and meaningful venue through which teachers could attempt to collectively influence their working conditions, even during the term of a collective agreement. Again, the analysis must look to the process the Province offered rather than what the BCTF chose to take.

[262] Finally, we would attach some significance to the fact that Bill 22 was enacted in the face of an impasse after good faith consultations and extensive collective bargaining, with a looming deadline to address the Bill 28 Decision.

[263] The Province had certain policy objectives. It is not for this Court to comment on the desirability of those objectives, or to purport to decide, as the trial judge did, whether the collective agreement and legislative regime adequately met those objectives. Rather, our role is to decide whether Bill 22, having regard to both its content and the context in which it was enacted, substantially interfered with teachers' s. 2(d) right to a meaningful process by which they could make collective representations to advance workplace goals and have those representations considered in good faith by the entity with the power to respond and give effect to them. While Bill 22 interfered with teachers' freedom of association, the BCTF has not persuaded us that, on balance, that interference was "substantial". We find no infringement of s. 2(d). This means Bill 22 has been in force since 14 April 2012.

Bill 28 issues

[264] In the application for additional remedies in respect of Bill 28, the trial judge found that Bill 22 had been enacted one day too late to prevent the declaration of invalidity in the Bill 28 Decision from taking effect. She stated that the suspension of that declaration of invalidity expired at midnight on 12 April 2012 (at para. 563). In her view, this meant that as of 13 April 2012, Bill 28 was invalid from the date on which it purported to come into force, 1 July 2002 (at para. 564). Accordingly, she held that the Deleted Terms were retroactively restored from 1 July 2002 to 14 April 2012, the date on which Bill 22 came into force and re-deleted them (at para. 565).

[265] This holding permits the BCTF to file a labour grievance for breaches of the Deleted Terms between 1 July 2002 and 14 April 2012, a time when the Province and the BCPSEA understood the Deleted Terms to have been removed from the collective agreement and no longer in force. The trial judge seemed to have accepted the Province's estimate that such grievances could give rise to retroactive liability of approximately $500 million (at para. 148).

[266] The BCTF did in fact file a labour grievance and the hearing is scheduled to begin in June 2015.

[267] The Province challenged the trial judge's retroactive declaratory relief on several grounds. We will address only its most persuasive submission, which we accept, that the declaration was made *per incuriam.* The trial judge overlooked *Canada (Attorney General) v. Hislop*, 2007 SCC 10.

[268] The BCTF observed that the Province did not rely on *Hislop* at trial. Accepting that is the case, we see no impediment to considering the argument now since all relevant facts are before this Court.

[269] The trial judge was of the view that when legislation is found to be unconstitutional and declared to be of no force or effect, the declaration must always apply retroactively so that it is as if the legislation never existed. Admittedly, this view has a certain theoretical attractiveness. To paraphrase Blackstone, if judges do not

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create law but discover it, then a law which is declared to be unconstitutional must always have been so (see Blackstone, *Commentaries on the Laws of England* (1765), vol. 1, at 69-70). In that sense, it must never truly have had any effect. However, the Supreme Court of Canada recognized in *Hislop* that, attractive though this idea may be in principle, it may be insensitive to practical realities (at para. 101, *per* LeBel and Rothstein JJ.):

> Fully retroactive remedies might prove highly disruptive in respect of government action, which, on the basis of settled or broadly held views of the law as it stood, framed budgets or attempted to design social programs. Persons and public authorities could then become liable under a new legal norm. Neither governments nor citizens could be reasonably assured of the legal consequences of their actions at the time they are taken.

[270] *Hislop* instructs that whether a declaration of invalidity should apply retroactively is within the discretion of the court. The relevant factors include "reasonable or in good faith reliance by governments" and "whether a retroactive remedy would unduly interfere with the constitutional role of legislatures and democratic governments in the allocation of public resources" (at para. 100).

[271] In our view, the trial judge's declaration of invalidity in respect of Bill 28 should not apply retroactively. It is important to remember that when Bill 28 was enacted in 2002, the conventional wisdom was that s. 2(d) did not protect collective bargaining. *Health Services*, decided in 2007, represented a substantial change in the law. The Province could not reasonably have known, at the time it enacted Bill 28, that the interpretation of s. 2(d) would change in a way that would render Bill 28 unconstitutional.

[272] Also, as noted, a retroactive declaration could expose the Province to liability in the order of $500 million. In our opinion, that sum is such that a retroactive declaration would unduly interfere with the Legislature's constitutional role in allocating public resources.

[273] Accordingly, whether Bill 28 was repealed while the declaration of invalidity was still suspended or one day late is irrelevant to the retroactivity issue. In either

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case, *Hislop* implies the trial judge erred in declaring Bill 28 to be of no force or effect retroactively to 1 July 2002.

Final conclusion

[274] We would allow the appeal. The judge's declaration that Bill 28 was unconstitutional does not apply retroactively. Bill 22 is constitutional. Accordingly, the Deleted Terms have not been included in any collective agreements since 1 July 2002. We would set aside the trial judge's award of *Charter* damages against the Province.

"The Honourable Chief Justice Bauman"

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Saunders"

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Dissenting Reasons for Judgment of the Honourable Mr. Justice Donald:

Introduction

[275] I have had the privilege of reading the draft reasons for judgment of Chief Justice Bauman and Mr. Justice Harris. Insofar as my colleagues have determined the trial judge erred in her primary conclusion that pre-legislative consultation is always irrelevant for the purposes of determining a constitutional breach, and her secondary alternative conclusion that pre-legislative consultation was irrelevant in this case because the Province of British Columbia (the "Province") was not acting *qua* employer, I agree with those conclusions, but I prefer to give my own reasons for doing so.

[276] However, insofar as my colleagues have also found that the trial judge erred in her tertiary alternative conclusion – that the Province breached the teachers' s. 2(d) *Charter* right to freedom of association by failing to negotiate and consult in good faith – I must respectfully disagree. In my opinion, an appropriately deferential approach to the trial judge's findings of fact, along with an application of the constitutional test as set out by the Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 [*Health Services*], and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3 [*Fraser*], inexorably leads to the conclusion that the trial judge's finding that the passage of Bill 22 was unconstitutional must be upheld.

[277] In my opinion, the reasons given by my colleagues make an error similar in principle to that made by the Ontario Court of Appeal in *Fraser*, subsequently overruled by the Supreme Court of Canada, in that they have read into the constitutional good-faith test elements of a "Wagner-style" collective bargaining regime; specifically, a prohibition on reviewing the substantive reasonableness of the Province's negotiating position. The Supreme Court of Canada has made clear that s. 2(d) does not protect a particular regime for collective bargaining, but instead is a bulwark that protects the ability of employees to pursue workplace goals collectively: see *Fraser* at paras. 44-46.

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[278] This error has led my colleagues to disregard key findings of fact made by the trial judge – findings that colour and characterize the lengthy history of the dispute between the Province and the British Columbia Teachers' Federation ("BCTF"). These findings of fact were made by a trial judge with particular knowledge of the relationship between the parties. Between the original Bill 28 Decision (2011 BCSC 469) and its follow-up, the Bill 22 Decision (the case under appeal, 2014 BCSC 121), the trial judge had the benefit of 29 days of evidence and submissions pertaining to this dispute over a period of more than three years, not to mention additional time spent on applications, etc. The appellate function is not to substitute the findings and inferences made by a judge who has had the full benefit of the trial process with an appeal division's own opinions of the facts, unless the trial judge has made such palpable and overriding errors of fact that the conclusion cannot stand. As I will explain, I disagree that the trial judge made any palpable and overriding errors of fact.

[279] After oral submissions were given in this appeal, the Supreme Court of Canada released three consequential decisions on freedom of association: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 [*MPAO*]; *Meredith v. Canada (Attorney General)*, 2015 SCC 2; and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 [*SFL*]. Accordingly, the parties subsequently provided additional written submissions to this Court on the application of those decisions to the case at bar. In those decisions, the Supreme Court of Canada has now held that employees are entitled to constitutional protection for not only collective representation, but independent representation selected by the employees: *MPAO*. As well, employees have a constitutionally protected right to strike in order to protect an approximately equal bargaining position with their employer: *SFL*. Most importantly, the Court has reiterated and emphasized that at the centre of s. 2(d) is a *Charter*-protected balance between employees and employer that will allow for meaningful collective bargaining: *MPAO* at para. 72.

[280] As Madam Justice Abella wrote for the majority in *SFL* at para. 1: "Clearly the arc bends increasingly towards workplace justice." The case before us tasks this

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Court with determining whether workplace justice was provided to the teachers of the BCTF.

[281] In these reasons, I will first discuss the constitutional test for s. 2(d) compliance as set out by the Supreme Court of Canada in *Health Services* and why this test requires consideration of pre-legislative consultation when the government has unilaterally deleted important terms in a collective agreement. Next, I will provide a concise summary of the lengthy dispute between the Province and the BCTF, followed by a discussion on why the trial judge's characterizations and findings pertaining to this relationship should be given deference by an appellate court. I will then explain how my colleagues have incorrectly inserted new requirements into the good faith analysis as described by the Supreme Court of Canada – requirements that amount to selective incorporations of Wagner-style collective bargaining and are incompatible with a constitutional test. I will follow that with an explanation of how an application of the good faith analysis, as described by the Court in *Health Services* and *Fraser,* to the findings of fact made by the trial judge leads to a conclusion that the Province unconstitutionally interfered with the BCTF's s. 2(d) rights by making collective bargaining an ostensibly futile act. Finally, I will discuss how this breach is not saved by s. 1 of the *Charter* and the appropriate remedy in this case.

[282] For clarity, I will refer to the subjects and the terms of the collective bargaining agreement under dispute as the "Working Conditions", as this is the phrase adopted by both the trial judge and the parties on appeal, and I see no reason to depart from this language.

The *Health Services* Test and Pre-Legislative Consultation

[283] The freedom of association protected under s. 2(d) of the *Charter* in the labour relations context is the right of employees to associate in pursuit of workplace goals and to a meaningful process within which to achieve these goals: *Fraser* at paras. 40-43. This freedom is breached if government legislation or actions substantially interfere with collective bargaining in purpose or effect in such a way

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that does not respect a process of good faith consultation: *Health Services* at para. 129.

[284] It is important to note that collective bargaining is a derivative right, in that it is not directly protected by the *Charter*: see *Fraser* at para. 46. However, this does not mean it is secondary or subservient to other rights; it is derivative in the sense that it is necessary in order to meaningfully exercise the right to free association: *MPAO* at para. 79. Collective bargaining is protected in the sense that substantial interference with past, present, or future attempts at collective bargaining can render employees' collective representatives effectively feckless, and thus negate the employees' right to meaningful freedom of association. Actions by government that reduce employees' negotiating power with respect to the employer can satisfy this standard of substantial interference: *MPAO* at para. 71. At the very least, interference of such a degree that the associational process is rendered effectively futile would qualify as substantial interference: *Fraser* at para. 46.

[285] The act of associating for the purpose of collective bargaining can also be rendered futile by unilateral nullification of previous agreements, because it discourages collective bargaining in the future by rendering all previous efforts nugatory: see *Health Services* at para. 96. This is not an exercise in "constitutionalizing" the terms of a collective agreement or the result of collective bargaining, but is instead the result of constitutionalizing the right to a meaningful process that is not continually under threat of being rendered pointless.

[286] Associational activity can also be rendered futile by the government through bad faith negotiation or the refusal to consider submissions. As recently emphasized by the Supreme Court of Canada in *SFL* at para. 29, "a meaningful process under s. 2(d) must include, at a minimum, employees' rights … to make collective representations to the employer, and to have those representations considered in good faith" [emphasis added]. Of course, imposing absolute barriers to collective bargaining, or prohibiting collective bargaining entirely, also makes associational activity essentially futile. In *Fraser* at para. 46, the Court explained that "[l]aws or

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government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association, by making it pointless" [emphasis in original].

[287] If the act of associating in order to collectively negotiate to achieve workplace goals is not substantially interfered with, the government has not breached s. 2(d). The mere act of passing the terms of employment through legislation rather than a traditional collective agreement makes no difference to whether the employees were given the opportunity to associate and effectively pursue workplace goals. If the government, prior to unilaterally changing terms of employment, gives a union the opportunity to meaningfully influence the changes made, on bargaining terms of approximate equality, it will likely lead to a finding that the union was not rendered feckless and the employees' attempts at associating to pursue workplace goals were not pointless or futile: see *SFL* at para. 55. Thus, the employees' freedom of association would likely not therefore be breached.

[288] In this context, a *Charter* breach cannot always be seen within the four corners of legislation, but must sometimes be found to occur *prior* to the passage of the legislation, when the government failed to consult a union in good faith or give it an opportunity to bargain collectively. If the breach *is* the lack of consultation, then surely this Court must consider such a lack of consultation when determining whether a breach occurred.

[289] It is true that any pre-legislative consultation in this context would inevitably be done by the executive, rather than the legislative, branch of government. I do not believe this creates any practical difficulty in the analysis. The Supreme Court of Canada addressed the issue of the theoretical "distinction" between the legislative and executive branch of government in the context of public employment contracts in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 at paras. 52-54, where Major J., writing for the Court, accepted that a legislative enactment of employment contracts was, essentially, a fulfillment of the executive's agenda; he said, "[t]he Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and *de facto* controls the legislature": *Wells* at para. 54. The

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same acknowledgement of reality is required in this case. Thus, the unilateral imposition, alteration, or deletion of employment terms by the Legislature is, in most circumstances, the final step in an agenda of the executive branch; the same executive branch that both develops policy and has a constitutional obligation to consult or negotiate with collective representatives.

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[290] This view of pre-legislative consultation is consistent with the Supreme Court of Canada's recent decision in *Meredith*. In that case, the collective representative of RCMP employees proposed certain wage levels for the years 2008-2010, which were initially accepted by the Federal Government. For the purposes of that decision, this was analogous to a collective bargaining process. The Federal Government subsequently unilaterally replaced this wage increase with a lesser one – essentially unilaterally replacing employment terms. The majority in *Meredith* found that this did not constitute substantial interference with freedom of association, partly because the new wage rate was "consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes": *Meredith* at para. 28. The Federal Government had negotiated and consulted with various collective representatives, and had unilaterally imposed an outcome consistent with that process. It was clear that the Federal Government had listened to and incorporated the priorities and interests of the public employees. This can only occur, of course, if there actually is pre-legislative consultation. If no consultation or bargaining occurs, there will be no "actual bargaining process" to be consistent with. I would also note that both Rothstein J., in his concurring reasons, and Abella J., in her dissent, made numerous express references to the importance of pre-legislative consultation, and the majority did not disagree with these sentiments: see *Meredith* at paras. 47, 69.

[291] Pre-legislative consultation, then, can be seen as a replacement for the traditional collective bargaining process, but only if it truly is a <u>meaningful</u> substitution. To be meaningful, the bargaining parties must consult from an assumed position of "approximate equality". I note here that in *SFL*, Abella J., writing for the

majority of the Court, found that a right to strike was essential in order to maintain "approximate equality" between employees and employers in the collective bargaining process: at para. 55, quoting Judy Fudge and Eric Tucker, "The Freedom to Strike in Canada: A Brief Legal History" (2009-2010), 15 C.L.E.L.J. 333 at 333.

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[292] It should be acknowledged that, absent checks and balances, the government may not feel obligated to maintain a bargaining position of approximate equality with employees. This Court should not be "indifferent to power imbalances in the labour relations context": *MPAO* at para. 80. It is the ability of the courts to monitor and restrain government action that militates against this power imbalance. To use another constitutional right as an example, even though the *Charter* may not compel the distribution of locks, it still prohibits unreasonable searches by the state. Similarly, the *Charter* prohibits an abuse of any power imbalance by the government during the consultation process. As I will discuss in these reasons, this prohibition requires a sufficiently probing analysis of the government's actions and positions by a court.

[293] In my view, an obligation to consult in this context does not unduly restrict the Legislature any more than all the other rights and freedoms enumerated in the *Charter* restrict the Legislature. As I will discuss in greater detail below, if the government negotiates or consults with an association in good faith and nevertheless comes to an impasse, it will likely have satisfied its constitutional duty and may unilaterally pass necessary legislation consistent with that consultation process. If the government does not have time to consult or negotiate with a collective bargaining unit because of exigent circumstances or emergency, it may then be found to have breached s. 2(d), but such a breach may be saved under s. 1.

[294] My colleagues have repeatedly made reference to the importance of the Province's ability to craft and pursue education policy. But granting broad protections to *Charter* rights is not incompatible with the government's obligations to compose and pursue policy goals. For example, the Supreme Court of Canada has defined the protections granted under freedom of expression so broadly that it can be seen

to protect the illegal parking of a vehicle, if such actions are undertaken for an expressive purpose: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 969. This has obviously not prevented municipalities from passing bylaws and pursuing parking policies. I am similarly unconvinced that imposing an obligation on government to respect the freedoms granted under s. 2(d) would prevent the pursuit of government policy.

[295] Also, as was repeatedly made clear in *Health Services*, I would stress that not all legislation that impugns the interests of a collective bargaining unit will be considered to infringe s. 2(d). Only substantial interferences, such as unilateral nullification of important employment terms, will possibly lead to such a finding: see *Health Services* at para. 92; *Meredith* at para. 30.

[296] However, this does not mean that consultation is some sort of constitutional panacea, even in a s. 2(d) context. If the government were to pass legislation that permanently prohibits collective bargaining or associational activities, for example, I do not believe that any amount of pre-legislative consultation could give appropriate effect to a union's freedom of association so as to prevent a finding of unconstitutionality. By definition, an express legislative negation of associational rights makes associational activities effectively pointless; giving a union the opportunity to make its voice heard "one last time" would not change that fact.

[297] In my opinion, this is why the trial judge was so reluctant to find that consultation could be relevant in a case like this. Bill 28 had previously included such an express prohibition, and the position of the Province through much of the consultation period was that collective bargaining on the Working Conditions would not be returned. The trial judge understandably felt that such negotiating positions were of little curative value, and I will give further explanation later in these reasons why I agree that these facts are of relevance for determining whether the consultation process was conducted in good faith.

[298] Of great concern is the notion that government can unilaterally delete provisions in a collective agreement, or temporarily prohibit collective bargaining,

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and "cure" such unconstitutional behaviour through the notion of "consultation". This is precisely why courts must inquire into the existence of good faith on the part of government. As I will explain in greater detail in these reasons, if the government were permitted to hold out all of its positions as "final offers" and "skip" rounds of bargaining at its own whim through temporary prohibitions on collective bargaining, this would have the effect of making the act of associating essentially futile. But a sufficiently probing analysis of a government's good faith while engaged in consultation would ameliorate this threat to a large degree.

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[299] It must be acknowledged that Bill 22 as passed does not contain a permanent negation of collective bargaining rights. Thus, in my opinion, the legislation should be seen as primarily a unilateral deletion of employment terms. While the existence of a temporary prohibition on collective bargaining complicates this analysis, I believe that, in the specific facts of this case, the "temporary prohibition" in Bill 22 was collateral to the bill's primary purpose of enshrining the deletion of the Working Conditions. Therefore, the bill is best understood as one of unilateral deletion or alteration of a collective agreement. For the reasons I have discussed, pre-legislative consultation was therefore relevant for this constitutional analysis.

[300] The trial judge's secondary conclusion was that consultation was not relevant in this case because the Province was not acting *qua* employer. While a distinction between government *qua* employer and *qua* legislator might be important in a case involving legislative interference in collective bargaining between two truly private parties, I do not agree that the Province was not acting as an employer in this case.

[301] The British Columbia Public School Employers' Association ("BCPSEA") is a creature of statute, established by s. 6 of the *Public Sector Employers Act*, R.S.B.C. 1996, c. 384. It was given exclusive authority to bargain with the BCTF through s. 4 of the *Public Education Labour Relations Act*, R.S.B.C. 1996, c. 382. It currently is managed by a public administrator appointed by the Province pursuant to s. 9.1 of the *Public Sector Employers Act*. The BCPSEA is therefore a government creation, managed by a government officer appointed by the government. The government

gave BCPSEA its negotiating mandate and dictated the level of funding available. The BCPSEA's authority is whatever is delegated to it by the government. As a statutory creation managed by public officers appointed by the government, for constitutional purposes, the BCPSEA is a government entity.

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[302] The Supreme Court of Canada has repeatedly stressed that entities created and empowered by statute to carry out public duties are, for constitutional purposes, a part of the government. For example, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 35, La Forest J., writing for the Court, emphasized that "since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so". Justice La Forest acknowledged that it would be strange "if the legislature and the government could evade their *Charter* responsibility by appointing a person to carry out the purposes of the statute", at para. 42, quoting *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 265. The Province cannot avoid its constitutional responsibilities by delegating its authority; therefore, the Province still had a constitutional responsibility to consult in good faith in this case, either on its own behalf or through the mechanism of the BCPSEA if it so chose. For a myriad of reasons owing to the history of the dispute, the Province engaged in most of the negotiation with the BCTF on its own behalf prior to the passage of Bill 22. It was entitled to do so, and such consultation could, if carried out in good faith, give effect to the teachers' s. 2(d) rights.

[303] For these reasons, consultation was relevant and should be considered when assessing the constitutionality of the Province's actions in this case.

[304] With this in mind, I will now consider the trial judge's findings on whether the Province's legislation and actions in this case constituted a breach of s. 2(d).

The Trial Judge's Findings on Substantial Interference

[305] In this case, Bill 22 and its precursor, Bill 28, unilaterally nullified a series of terms of employment dealing with important Working Conditions. The Bills also permanently – and in the case of Bill 22, temporarily – barred collective bargaining

on the subjects of the Working Conditions so as to prevent the union from regaining the terms in future agreements.

[306] The importance of these terms was discussed by the trial judge in the Bill 28 Decision. In coming to the conclusion that the unilateral nullification of the Working Conditions, and the prohibition on future collective bargaining, constituted substantial interference, she said:

> [283] There can be little doubt that issues of class size and composition, non-enrolling ratios, work load, and hours and days of work, are important issues to teachers. These matters can greatly affect their working conditions.
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> [284] Teachers have been trying to influence these working conditions since they first began to form associations.
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> [285] Irene Lanzinger, the president of BCTF since July 2007, was involved in the collective bargaining negotiations in 2001. She explained that while salary and benefits are always at the top of the list of teachers' issues, class size and composition are also a high priority for teachers, as they "have a direct and fundamental impact on the ability of teachers to do their jobs well." These matters affect teachers' workloads, job stress and job satisfaction.
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> * * *
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> [289] The number of hours of work required of a worker to perform his or her job is one of the most fundamental of working conditions. In *Health Services*, the Supreme Court of Canada referred to the typographers' strike of 1872, calling for a nine-hour work day, as initiating legislation which marked the beginning of the era of tolerance and protection of workers' organizations in Canada: at para. 51. The Canadian *Trade Unions Act* of 1872 protected workers from criminal prosecution for conspiracy based solely on attempts to influence the rate of wages, hours of labour, or other aspects of the work relation…
>
> [290] Here, all of the subjects of [Bill 28] dealing with class size and composition, non-enrolling teacher ratios, and work load, directly affect teachers' hours of work. The more children in a classroom, the greater number of special needs children in a classroom, or reduced support from other specialist teaching staff, correspondingly increases the amount of time the classroom teacher must spend outside of the classroom in preparing for the class, marking, and preparing individualized learning plans.
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> * * *
>
> [293] Taking away the right to bargain these matters seriously eroded the bargaining strength of teachers and increased the bargaining strength of the employer. Without the ability to collectively bargain these issues, teachers can have little individual influence over these matters.

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[307] In the Bill 22 Decision, the trial judge explained why the Province's second attempt at passing similar legislation also constituted substantial interference:

> [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).
>
> * * *
>
> [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.

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[308] It is to be noted that Bill 22 was not exactly duplicative of Bill 28. As the trial judge acknowledged, Bill 22 made the prohibition on collective bargaining temporary, and also removed some provisions that were of less importance to both parties. I will discuss these differences later in these reasons when I discuss the s. 1 analysis. For now, it will suffice to say the trial judge determined that most of the key Working Conditions of importance to the BCTF continued to be deleted, and this constituted a substantial interference with the BCTF's s. 2(d) rights.

[309] In these reasons, I want to emphasize the importance of scale in drawing boundaries around the government's power to legislate and a union's s. 2(d) protections. The scale of the infringement in this case can be contrasted with the comparatively small scale of the infringement in, for example, *Meredith*. In that case, the majority of the Court said the following:

> [28] The facts of *Health Services* should not be understood as a minimum threshold for finding a breach of s. 2(d). Nonetheless, the comparison between the impugned legislation in that case and the *ERA* [*Expenditure Restraint Act*, S.C. 2009, c. 2] is instructive. The *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, Part 2, introduced radical changes to significant terms covered by collective agreements previously concluded. By contrast, the level at which the *ERA* capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes. The process followed to impose the wage restraints thus did not disregard the substance of the former procedure. And the *ERA* did not preclude consultation on other compensation-related issues, either in the past or the future.

[310] Bill 22 flowed from the same legislative agenda as the unconstitutional legislation in *Health Services*, and took similar approaches to imposing that agenda. The wholesale deletion of terms gave no regard to the substance of the Working Conditions or the union's interests. The smaller wage increase at issue in *Meredith* can be distinguished from the complete rejection of the employees' position on the important Working Conditions. Where the legislation in *Meredith* allowed for and encouraged continued discussion and negotiation in the immediate period following the imposition of the new wages, Bill 22 temporarily continued a complete bar to collective bargaining on the Working Conditions.

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[311] In my opinion, the trial judge was correct in her assessment that the Working Conditions were of substantial importance to the union, such that their unilateral nullification without proper consultation would render the previous attempts at collectively bargaining largely pointless (and encourage the view that future associational activity would be similarly futile). The central issue in this case, however, is whether this unilateral nullification came after a point of impasse following good faith consultation, and thus gave effect to the BCTF's right to a form of collective bargaining, or whether the Province's "consultation" was treated merely as a formality preceding the passage of equivalent legislation to what was already found to be unconstitutional.

[312] In my opinion, this issue can be resolved by determining whether the trial judge made any appealable error in concluding that the Province did not consult in good faith. Before considering the trial judge's findings of bad faith, I will first give some context as to the lengthy dispute between BCTF and the Province, as this context is necessary for understanding the scale of impact the Province's actions had on the BCTF in this case.

The Dispute between BCTF and the Province

[313] The dispute between the parties underlying both this appeal and the Bill 28 Decision can be traced back to before the passage of Bill 28, 13 years ago. It is important to stress that this case is not an examination of a single isolated

government action, nor is this case an examination of the effects of a single statute. Rather, this case is the culmination of at least 13 years of systemic and institutionalized negation of the BCTF's s. 2(d) right to associate collectively to achieve important workplace goals.

[314] As my colleagues have explained, the collective bargaining scheme pertaining to teachers in this Province historically involves three parties: the BCTF, bargaining on behalf of teachers; the BCPSEA, bargaining on behalf of school boards on provincial issues; and the Province, which provides funding and mandates to the BCPSEA and has on multiple occasions directly negotiated with one or both of the BCTF and the BCPSEA on the subject of collective agreements.

[315] In 1998, the government at the time negotiated an Agreement in Committee with the BCTF, which included the now disputed Working Conditions. This agreement was a result of collective bargaining between the BCTF and the Province. Like any collective agreement, both sides were negotiating in a somewhat zero-sum environment, and the terms desired by teachers were often at odds with the goals of the Province. It can be presumed, therefore, that the union's success in achieving agreement on the Working Conditions was obtained at the expense of other terms desired by the union. Teachers determined that the Working Conditions were a priority and placed their efforts accordingly. The 1998 Agreement in Committee was rejected by the BCPSEA, and was therefore imposed unilaterally by the Province through legislation.

[316] In 2001, the next round of collective bargaining between the BCTF and the BCPSEA also came to an impasse. In early 2002, the then-new government again passed legislation to unilaterally impose a collective agreement on the BCTF and the BCPSEA ("Bill 28"). This time, the collective agreement stripped out the Working Conditions achieved by the union in the previous round of negotiations. More importantly, the legislation barred any future collective bargaining on the Working Conditions. The union was given no advance notice of this legislation, and the Province did not negotiate or consult with the union as to the legislation's content.

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The Working Conditions obtained by the union through its previous round of negotiations were stripped away, and the union was informed that it would no longer be able to bargain collectively for their return.

[317] As discussed previously, the new government's passage of Bill 28 was part of a legislative agenda that also included similar unilateral collective agreements imposed on the public health sector. Health sector unions were also barred from collectively bargaining certain terms as well: see *Health Services* at para. 113.

[318] The BCTF subsequently filed a challenge against Bill 28, which was delayed until after the Supreme Court of Canada had ruled on similar proceedings launched by health sector unions against the same legislative agenda. In 2007, the Court ruled in *Health Services* that the government had interfered with the collective bargaining rights of health sector unions by both unilaterally deleting important terms of a collective agreement and making any subsequent negotiations on those terms illegal: see *Health Services* at paras. 135-136. Despite the fact that the Court had now ruled that the government's legislative agenda of 2002 in regard to the health sector was unconstitutional, the Province made no efforts to repeal or amend the analogous and largely equivalent legislation imposed on teachers. Instead, the BCTF was forced to continue litigating the now substantially suspect legislation. Following a lengthy trial process, Bill 28 was also declared unconstitutional in 2011, by the same trial judge in this case: see the Bill 28 Decision.

[319] For the nine years between 2002 and 2011, the BCTF was denied the previously obtained Working Conditions and was prevented from negotiating for their reinstatement. Any collective bargaining that occurred during this period could only be on terms that the Province allowed the other parties to discuss. Teachers that desired improvement or alterations to the Working Conditions found that their own union was rendered ineffectual and unable to represent their interests.

[320] Finally, in 2011, teachers obtained a judicial declaration in the Bill 28 Decision that the Province could not shut the door to collective bargaining, and instead must respect the teachers' right to associate and bargain collectively. The trial judge

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delayed the effect of her judgment by a year in order to give the parties time to reach a settlement on the effect of the judgment and to give the Province time to pass revised, constitutionally compliant legislation.

[321] According to the trial judge, the Province saw the Bill 28 Decision as an indictment of a procedural failure prior to the passage of Bill 28. Equivalent legislation would be constitutionally compliant so long as it was preceded by a "consultation" period. The trial judge found that the Province then decided, in advance, to re-enact the same legislation already struck down, following such a consultation period. I will return to this finding again below, but for now it will suffice to emphasize that the BCTF, after years of having their right to collectively bargain over Working Conditions rendered futile by the Province's actions, was confronted with an intention to maintain the status quo. The success of winning a declaration that the Working Conditions had been removed unconstitutionally was short lived, as the Province informed the union that it did not intend to reinstate the Working Conditions, and in fact would not allow BCPSEA to negotiate collectively on their reinstatement: Bill 22 Decision at para. 191. The Working Conditions would continue to be off limits, and all the Province would allow is the chance for the union to have its voice heard as to exactly what language would be used by the Province in passing replacement language that would accomplish the same thing: Bill 22 Decision at paras. 188-191.

[322] In essence, the Province was informing the union that it intended to keep the door shut on the subject of Working Conditions, but it would allow the union to have input on exactly what kind of door would be used.

[323] It is at this point the trial judge recounted much of the "pre-legislative" consultation that the Province engaged in with the union prior to the passage of Bill 22, the replacement legislation for Bill 28. As I have already stated, the trial judge's factual conclusions with respect to what actually occurred during this alleged "consultation" period deserve much deference from this Court. Before summarizing

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the trial judge's findings, I would like to first discuss why deference is so important in this context.

The Importance of Deference to the Trial Judge's Findings of Fact

[324] According to the Supreme Court of Canada, when assessing the constitutionality of government legislation or actions with respect to a union's freedom of association, "[t]he inquiry in every case is contextual and fact-specific": *Health Services* at para. 92. In a case like this, we are not dealing with abstract questions of rights and freedoms. Rather, a case like this deals entirely with discrete actions of government and the relationship between actual, identifiable, and knowable parties – albeit parties representing the interests of large groups of people. The actions of the Province, its motivations, and the consequent effects on teachers and the BCTF are facts that are best determined by a trial judge with the necessary fact-finding tools, such as *viva voce* testimony.

[325] The Supreme Court of Canada has gone to great lengths to emphasize the importance of deference to the trial judge when it comes to determinations of fact or questions of mixed fact and law. An appeal is not an opportunity for a *de novo* hearing or an attempt to roll the dice again with potentially more sympathetic judges. As quoted by the Court, "[t]he appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities": *Housen v. Nikolaisen*, 2002 SCC 33 at para. 3 quoting *Underwood v. Ocean City Realty Ltd*. (1987), 12 B.C.L.R. (2d) 199 (C.A.) at 204.

[326] Findings underlying the trial judge's conclusion that the Province substantially interfered with the teachers' freedom of association are findings in the nature of social or legislative fact. These findings deserve the same deference by this Court as bestowed on all factual adjudications made by a trial judge; the standard of review is palpable and overriding error: *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 53-56; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 109.

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[327] A palpable and overriding error is one that is so obvious that it can be plainly seen and also has led the trial judge to an incorrect conclusion: *Housen* at para. 5. In *Housen*, the Court emphasized that "[t]he trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole" at para. 18. As stated previously, the trial judge in this case had the benefit of 29 days of testimony and submissions over the course of two trials and three years – important context for the necessary infringement analysis. The intimate familiarity with the case that the trial judge obtained should not be lightly ignored. It would negate the usefulness of our trial system for an appeal court to substitute its own opinions of the facts, absent palpable and overriding error.

[328] Inferences of fact deserve the same level of deference from appellate courts as primary findings of fact: *Housen* at para. 22. An appellate court should not hold itself out to verify that a trial judge's inferences are correct, or even verify if the trial judge's inferences can be reasonably supported by the evidence. Rather, an appellate court must restrain itself to determining whether the trial judge made a palpable and overriding error of fact, which is a stricter standard than mere unreasonableness: *Housen* at para. 21.

[329] As I will discuss, in my opinion, none of the trial judge's findings of fact can potentially rise to this level of error.

The Test for Good Faith Was Correctly Laid Out by the Supreme Court of Canada in *Health Services* and *Fraser*

[330] Before moving on to a discussion of the trial judge's finding pertaining to good faith negotiation, I will discuss why the test for determining such good faith negotiation was accurately laid out by the Supreme Court of Canada in *Health Services* and *Fraser*, and it would not be appropriate for this Court to add additional requirements selectively culled from labour tribunal decisions made in a Wagner-style context.

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[331] The Supreme Court of Canada described the components of good faith negotiation in *Fraser* at para. 41, as follows: "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." In *Health Services* at para. 98 this was described as parties "endeavoring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith." Parties must be willing to exchange and explain their positions: *Health Services* at para. 101.

[332] The Supreme Court of Canada found that good faith negotiation is not determined by the traditional components of Wagner-style collective bargaining: *Fraser* at paras. 44-45. Importantly, although a court does not generally inquire into the content of bargaining positions, in some circumstances, even though a party is participating, "that party's proposals and positions may be 'inflexible and intransigent to the point of endangering the very existence of collective bargaining'": *Health Services* at para. 104, citing *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 at para. 46. Parties must "honestly strive to find a middle ground between their opposing interests": *Health Services* at para. 101, citing *Royal Oak Mines* at para. 41.

[333] In *Fraser*, the Court found that the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16, provided a statutory system requiring consideration of an association's representations, which included an obligation to listen to oral representations, read written representations, and acknowledge having read them. The Court then read in an implicit requirement for the employer to consider those representations in good faith: at paras. 101-103.

[334] To summarize, good faith negotiation, from a constitutional perspective, has been described by the Supreme Court of Canada as requiring parties to meet and engage in meaningful dialogue where positions are explained and each party reads, listens to, and considers representations made by the other. Parties' positions must

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not be inflexible and intransigent, and parties must honestly strive to find a middle ground.

[335] Any vagueness in this description and definition is necessary as the assessment is always context specific and fact-based. A single, specific test for finding good faith would be inflexible and unable to assist in the fact-based and context specific assessment that a trial judge must carry out.

[336] However, my colleagues have expanded upon this test and adopted an additional principle that "[i]t is inappropriate, for reasons of institutional competence, for a court or tribunal to investigate the factual basis and internal logic of an employer's substantive bargaining proposals" when conducting a good faith analysis (at para. 149). This principle was derived primarily from a review of five decisions of the British Columbia Labour Relations Board: *Re Catholic Independent Schools Diocese of Prince George*, [2001] B.C.L.R.B.D. No. 112; *Re Naramata Centre Society*, [2014] B.C.L.R.B.D. No. 157; *Re Noranda Metal Industries Ltd.*, [1974] B.C.L.R.B.D. No. 149; *Re IKEA Canada Limited Partnership*, [2014] B.C.L.R.B.D. No. 155; and *Re Insurance Corp. of British Columbia*, [2012] B.C.L.R.B.D. No. 143. With respect, I must disagree with my colleagues that this is an appropriate component of the good faith test from a constitutional perspective. There are at least three reasons why such a component should not be included in the good faith analysis under s. 2(d).

[337] First, the decisions of the Labour Relations Board were not made in a constitutional context, but were instead made in the context of the *Labour Relations Code*. This code was expressly acknowledged as being traced to the U.S. "*Wagner Act*" in *Catholic Independent Schools Diocese of Prince George (Re)* at para. 23, one of the cases cited by my colleagues. In my opinion, incorporating selective elements of traditional good faith analyses under a Wagner-style scheme makes the same error as the Ontario Court of Appeal in *Fraser* when it suggested that *Health Services* constitutionalized traditional Wagner-style collective bargaining. As was

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later made clear by the Supreme Court of Canada, *Health Services* did no such thing.

[338] Instead, a good faith analysis from a constitutional perspective must be approached from a different perspective. The Supreme Court of Canada was not ruling out Wagner-style collective bargaining in *Fraser* because such standards would be too onerous. Rather, the Court did so because the traditional approach to collective bargaining in the private marketplace is not equivalent to what is constitutionally protected. Wagner-style schemes are largely predicated on an antagonistic relationship between private parties. A government, in contrast to private sector employers, is elected to serve all of society's stakeholders, including labour. As my colleagues acknowledge in their reasons: "Governments are not businesses" (at para. 125).

[339] There is less of a need to inquire into the rationality of internal logic of substantive positions in the context of private parties because Wagner-style collective bargaining imagines resolution of impasse through mediation, arbitration, or the economic pressure of strikes. However, in the constitutional context, the government always has the power to unilaterally resolve impasse through legislation, or force workers to end a strike through constitutionally compliant back-to-work legislation. This is a huge power imbalance that fundamentally alters the calculus of how negotiations unfold.

[340] My colleagues state, "[j]ust as employees do not have a presumptive veto over changes to their working conditions, government does not have a free hand to make any unilateral changes it likes to public sector employees' working conditions" (at para. 130). But if courts were barred from inquiring into the substantive reasonableness of the government's position, a "free hand" is exactly what the government would have. The government could declare all further compromise in any context to be untenable, pass whatever it wants, and spend all "consultation periods" repeatedly saying "sorry, this is as far as we can go". This would make a mockery of the concept of collective bargaining. An impasse created by the Province

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through the adoption of unwavering, unreasonable positions and a lack of good faith is not a legitimate impasse. Section 2(d) of the *Charter* does not incorporate a traditional Wagner-style scheme; it especially does not incorporate selective excerpts of a traditional Wagner-style scheme.

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[341] Second, the inapplicability of the "hands off" principle taken from these labour decisions is made even clearer if the decisions themselves are explored. In *Re Naramata Centre Society*, another case relied on by my colleagues, the Board makes clear that such a "hands off" approach does not apply to negotiating positions that would be "improper" when taken to impasse, including matters that would be "inconsistent with the law and policy of the Code": at para. 58. These include "bargaining demands for changes to the scope of a bargaining unit or the waiver of statutory rights such as access to adjudication at arbitration or before the Board": at para. 58.

[342] It should be clear that such an exception is a problem when applied to bargaining between an association and the government. The positions of the government, if taken to impasse and passed unilaterally through legislation, *become* the law, and therefore could never be "inconsistent with the law". If directly applied to constitutional analyses, therefore, this exception would never occur, and courts would be completely barred from assessing the respective positions of the parties. Certainly the scope of judicial review when it comes to *Charter* rights is not smaller than the scope of a tribunal's competence under the *Labour Code*.

[343] More importantly, if the facts of the case at bar are considered, it is clear that if this *were* a dispute to be considered by a labour tribunal under the *Code*, it would be one such exception where the tribunal would consider the respective substantive positions of the parties. The Province in this case was advocating for a restriction on traditional collective bargaining rights. Throughout the negotiations, the Province suggested that it would not return the right to collective bargaining to the union, and would instead replace it with some unnamed alternative. The Province eventually

proposed the "Learning Improvement Fund" ("LIF") as a component of such replacement legislation.

[344] The LIF, as passed in ss. 18-19 of Bill 22, established a legislative mechanism for teachers to have input into how additional funds were to be used in order to ameliorate the removal of the Working Conditions. The LIF regulations required school boards to submit spending plans to the Minister before any decisions were made on how to allocate the additional funds. The legislation and regulations provide for opportunities for teachers individually to have input into each board's proposed spending plans. Although the LIF legislation also contemplates a role for the BCTF in this consultation process by including the local union president as one of the several parties to be consulted, the trial judge found that this was "clearly a process meant to dilute the influence and role of the BCTF": Bill 22 Decision at para. 497. I would note that, in *MPAO* at para. 288, the majority of the Court said: "A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(*d*)." As the trial judge acknowledged in this case, the LIF proposal appeared to seek BCTF's agreement to give up its negotiating power: Bill 22 Decision at para. 288.

[345] The LIF was originally proposed by the Province at a time when it continued to suggest that collective bargaining on the Working Conditions would not be restored: Bill 22 Decision at paras. 287-288. Therefore, If this were reviewed under the *Code*, much of the Province's positions could be seen as forcing the BCTF to accept a waiver of collective bargaining rights – precisely the kind of position that apparently cannot be taken to impasse and one in which the tribunal would investigate substantive positions, including the "factual basis" and internal logic of such.

[346] Third, in my opinion, the suggestion by my colleagues that a court should not investigate the factual basis and internal logic of the position of the government is inconsistent with the history of judicial review for *Charter* compliance. As is well-

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known, the *Oakes* test includes an analysis of whether the purpose of potentially unconstitutional legislation is pressing and substantial and has a "rational connection" to the means used: see *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-139. Such an analysis cannot occur without considering the substantive position of the government, since the substantive position of the government is equivalent to the purpose of and the means used in the legislation.

[347] If a court were barred from examining the substantive position of the government, this could create a constitutional loophole: legislation deleting important work terms that would otherwise fail the s. 1 analysis, because the deletion has no rational connection to the stated policy goals of the government, would sometimes not even reach the s. 1 stage because the court was barred from probing the substantive position of the government and therefore took the government at its word that no alternative was possible.

[348] In summary, the constitutional test for bad faith on the part of government should be expressed in the same language used by the Supreme Court of Canada in *Health Services* and *Fraser*. Parties are required to meet and engage in meaningful dialogue where positions are explained and each party reads, listens to, and considers representations made by the other party. Parties' positions must not be inflexible and intransigent, and parties must honestly strive to find a middle ground. In order to determine whether the government is bargaining in good faith, it may sometimes be necessary to probe and consider the government's substantive negotiating position.

[349] With that in mind, I will now discuss the trial judge's findings pertaining to bad faith on the part of the Province.

The Trial Judge's Findings of Bad Faith

[350] The trial judge gave numerous examples of the bad faith displayed by the Province in its engagement with the BCTF. I do not intend to recount them in their entirety. Rather, I will discuss the most important factual findings of the trial judge and explain why my colleagues have mistakenly ignored many of her conclusions.

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[351] According to the trial judge, the Province came into these negotiations with its mind made up and a strategy in place. The Province intended to re-enact equivalent legislation to what was struck down in the Bill 28 Decision. Any disagreement or negotiation on the part of the union was futile; the die was cast.

[352] This characterization of events is evidenced by two related findings of fact by the trial judge. First, the Province's stated position was predicated on false assumptions. Second, the Province spent large portions of the consultation period refusing to consider the union's position. In my opinion, the trial judge's finding that the Province negotiated in bad faith can be upheld on these facts alone.

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The Province's Position Was Based on Fallacy

[353] In the Bill 28 action, the Province argued that the Working Conditions were unworkable and could not be included in a collective agreement, as they did not provide the necessary flexibility to the employer. The trial judge concluded in the Bill 28 Decision that, despite these claims, the Working Conditions contained substantial flexibility, and the Province had failed to explain why this flexibility would be insufficient for the Province's purposes (at paras. 128-130).

[354] Despite this conclusion of the trial judge, the Province again began negotiations following the Bill 28 Decision from the position that there was no room for movement on the Working Conditions: Bill 22 Decision at para. 253. The Province continued to assert throughout the consultation period its "policy position" that the Working Conditions did not grant the needed flexibility. This was a seemingly unwavering position, and it appeared impossible to convince the Province otherwise. The union repeatedly asked for an explanation why the Working Conditions could not meet the flexibility needs of the Province, but was repeatedly rebuffed: see e.g., Bill 22 Decision at paras. 288, 301, 308.

[355] As an example of the Province's reliance on false assumptions, Mr. Drescher, a retired deputy superintendent of the Surrey School District, made a presentation to the BCTF on behalf of the Province during the consultation process on 11 August 2011. In Mr. Drescher's presentation, he asserted and attempted to illustrate the

Province's position that the Working Conditions were unworkable. Mr. Drescher later testified at the Bill 22 trial, and the judge found much of his presentation and assertions to be based on unsubstantiated hearsay and unfounded myth: Bill 22 Decision at para. 234. In fact, many of the assumptions made by Mr. Drescher in this presentation had already been shown by the trial judge to be unfounded in the Bill 28 Decision: Bill 22 Decision at para. 236. This is evidence that throughout the entirety of the consultation period, the Province maintained a position and assumptions that had already been found to be false by the trial judge in the Bill 28 Decision.

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[356] In the Bill 22 Decision, the trial judge again reviewed the substantive positions taken by the Province. Unsurprisingly, the trial judge determined again that there was no "factual or analytical basis" for the Province's position that the Working Conditions were inflexible and could not be restored: Bill 22 Decision at para. 345.

[357] Governments, as employers, are allowed to take firm positions, even extreme ones. But the government must be open to compromise. And taking a position that has been already shown to be based on invalid premises can lead to a finding of bad faith negotiation. This finding can be arrived at in one of two ways: either the government is hiding its true purpose for taking such a position, and is therefore negotiating in bad faith through dishonesty, or the government is just not listening to the union or the courts and has closed its mind to alternatives. The trial judge found, in this case, that it was the latter.

[358] I note here that, as already discussed, a key component of my colleagues' reasons is their conclusion that it is inappropriate for a trial judge to consider the substantive reasonableness of the government's position. My colleagues then use that conclusion to disregard large portions of the foundations for the trial judge's finding of bad faith, including the findings I have just discussed. As I have explained, I believe that conclusion is in error. The trial judge was correct to analyze the substantive reasonableness of the Province's position.

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The Province Closed Its Mind to Alternatives

[359] The trial judge's finding that the Province continued to push false premises and unfounded claims is closely linked to the trial judge's finding that the Province failed to consider any alternative proposals. One cogent example will illustrate how this displayed bad faith.

[360] Much of the consultation period was spent with the two parties talking past each other. The first meeting between the two parties following the Bill 28 Decision occurred on 20 May 2011: Bill 22 Decision at para. 201. At that meeting, BCTF made clear its position that the Working Conditions should be restored to the collective agreement immediately: Bill 22 Decision at para. 202. An absolute minimum requirement for good faith consultation is that the government must read and consider the proposals made by the other side. But the Province did not read the content of the terms of the Working Conditions, and thus the BCTF's negotiating position, until after 25 October 2011, five months later: Bill 22 Decision at para. 290. The Working Conditions were the basis of the BCTF's position. The Province had already engaged in an entire trial that revolved around the substantial importance of these Working Conditions. And yet, for the five months after the BCTF had put forward its initial position that these Working Conditions should be restored, the Province's representative did not even take the time to read those proposed clauses.

[361] The trial judge recounts in her reasons how the BCTF "correctly perceived" that the government representatives had not even read the Working Conditions terms in the collective agreement, and thus spent much of the "consultation period" attempting to get the Province to listen: Bill 22 Decision at para. 279.

[362] My colleagues take issue with the trial judge's finding that the Province "wasted time" in the first four months of the consultations. My colleagues state that the Province was not required to make any particular proposals during this period, and instead was only obligated to listen to proposals made by the BCTF in good faith (at para. 223). But listen in good faith was precisely what the Province did *not* do. Listening in good faith requires consideration and understanding of the position

of the other side: see *Fraser* at paras. 42, 103. In fact, consideration of the representations from the other side is the absolute minimum that is required from the employer: *SFL* at para. 29. The failure of the Province to even read the clauses that underlay this entire dispute for a full five months during the consultation period is a breach of this minimum standard, and cogent evidence of bad faith.

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The Trial Judge's Consideration of the Evidence

[363] My colleagues point to testimonial evidence of Mr. Straszak, the chief negotiator on the part of the Province, as evidence that the Province approached the negotiations with an open mind (at paras. 191-195). For example, when Mr. Straszak was asked, "That was your direction prior to the consultation meeting, that you would not restore [the Working Conditions]?", he replied, "So what we're doing is not closing our minds to alternatives, but we certainly felt that it was unlikely that we would have options provided to us where we felt it would be impossible to meet these education objectives with that" [emphasis added]. In this line of questioning, Mr. Straszak is recounting the expressed position of the Province prior to and during the consultation period. This testimony was not specifically discussed by the trial judge. My colleagues suggest that the absence of such a discussion suggests that the trial judge failed to consider this evidence, and as such the trial judge's closed-mind finding cannot be sustained. With respect, I do not agree with this conclusion.

[364] The trial judge began her discussion on the content of the negotiations by expressly stating that "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": Bill 22 Decision at para. 184. The quote of Mr. Straszak that my colleagues point to is testimonial evidence of a government negotiator recounting the "manifest expressions of good faith" that the Province had put forward. The trial judge had already stated she was discounting such self-serving statements and would be conducting her analysis of the existence of good faith from a more objective viewpoint. With respect, I cannot see how this leads to the conclusion that the trial judge failed to consider this evidence.

[365] Trial judges are not required to exhaustively discuss "every argument or alleged problem in arriving at a particular conclusion": *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 60. A failure to discuss one piece of testimonial evidence, especially when the trial judge has already announced that she has discounted all similar types of self-serving statements, does not lead to a conclusion that the evidence was not considered. In this case, the trial judge implicitly explained that she considered that testimony, but gave it little weight as it was self-serving.

[366] As well, the trial judge made reference to numerous statements and actions of Mr. Straszak and the Province that contradicted the notion that it approached the consultation period with an open mind. The following two examples from the Bill 22 Decision are particularly illustrative.

[367] First, at the 11 August 2011 meeting:

> [253] … 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.
>
> [Emphasis added.]

[368] Second, despite numerous meetings and correspondence between the BCTF and Mr. Straszak:

> [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.

and:

> [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.

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As discussed, good faith negotiation obligates parties to explain their positions to the other side.

[369] Instead of explaining its position, the trial judge found that the Province repeatedly reiterated similar presentations on the Province's "policy goals": Bill 22 Decision at paras. 347-348. While it is laudable that the Province set out to explain why it was seeking changes to the Working Conditions in the first place, explaining the importance of why some changes needed to be made does not explain why these changes needed to be made. I do not accept, therefore, that the lengthy and repetitive presentations on the Province's "policy goals" qualify as a satisfactory explanation of the Province's negotiating position for the purposes of a good faith analysis.

[370] These two examples are indicative of the factual circumstances of the "consultation" period as found by the trial judge. It was perfectly reasonable for the trial judge to conclude that these facts evidenced a position of bad faith on the part of the Province, despite the self-serving statements of Mr. Straszak to the contrary. In summary, the trial judge found that 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 assessing good faith consultation": Bill 22 Decision at para. 398. I cannot accept that the trial judge made any palpable and overriding errors in coming to this conclusion.

Associated Regulations

[371] I pause to make brief note on the two associated regulations passed by the government in connection with Bill 22: the *LIF* and the *Class Size and Compensation Regulation*, B.C. Reg. 52/2012 ("CSCR"). As I have explained, the trial judge found that the *LIF* was a process intended to dilute the influence and role of the BCTF: Bill 22 Decision at para. 497. This reduces the negotiating power of the teacher's independent associative representation, and exacerbates, rather than mitigates, the substantial infringement on the BCTF's s. 2(d) freedoms: see *MPAO* at para. 288. The CSCR, for its part, provides additional compensation for teachers, but was

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passed without any consultation with the BCTF: Bill 22 Decision at para. 505. While one or both regulations may be appreciated by the teachers and students they are intended to benefit, this is not relevant to whether their passage ameliorated the substantial interference with s. 2(d) freedoms that occurred when the Province failed to consult in good faith before unilaterally altering the terms of teachers' employment. Passing helpful legislation unconstitutionally is still passing legislation unconstitutionally.

Conclusion on Good Faith and the Province's s. 2(d) Breach

[372] The trial judge found as a fact that the Province began the consultation process with the BCTF with its mind made up. It intended to re-enact the same provisions already found to be unconstitutional in the Bill 28 Decision. The Province's stated purpose for doing so was already found by the trial judge to be unfounded and based on myth and hearsay. For a substantial portion of the consultation period, the Province refused to answer the BCTF's requests for the Province to explain its position, nor did the Province even read the substantive content of the BCTF's proposal: the terms of the Working Conditions.

[373] In my opinion, it was reasonable on these facts alone for the trial judge to come to the conclusion that the Province was not consulting in good faith. As was made clear in *Fraser*, good faith negotiation requires parties to explain their position and read and consider the positions of opposing parties. The Province failed to meet this minimum standard in this case.

[374] My colleagues suggest that the trial judge did not properly weigh five important contextual factors in her infringement analysis. While the trial judge's assessment of these "practical and contextual realities" should be assessed on a standard of palpable and overriding error, that makes no difference in this case because I am of the opinion that the trial judge's assessment in this regard was correct and I disagree with my colleagues' assessment. I will not repeat my colleagues' enumeration of the five factors, found at para. 42, but I will now address them.

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[375] First, the Province did not give the BCTF a meaningful opportunity to make representations. To be a meaningful opportunity, the Province must have considered the BCTF's representations in good faith, which it did not do. Second, the trial judge gave full consideration to the Province's policy objectives in her infringement analysis: see e.g., Bill 22 Decision at paras. 243, 244, 250, 308, 347, 349, 361, 394, 417. As I explained, I am confident that the Province is able to pursue its policy goals while respecting the fundamental freedoms protected by the *Charter*. Third, the Province cannot rely on a claim that the parties were at an impasse when Bill 22 was passed, because as I explained, a legitimate impasse can only occur if the Province had been negotiating in good faith. Fourth, as I will explain in greater detail below in my s. 1 analysis, the temporally limited prohibition on collective bargaining did not mitigate, but in fact entrenched, the substantial infringement resulting from the deletion of the Working Conditions. Fifth, as I explained above, the associated regulations passed by the Province do not mitigate the Province's substantial interference with the BCTF's freedom of association.

[376] In summary, I agree with the trial judge that the Province did not consult in good faith. Since the Province did not consult in good faith, it did not retain a meaningful process that protected the BCTF's s. 2(d) right to collectively bargain toward important workplace goals. The unilateral deletion of the Working Conditions, which were of significant importance to the teachers, was therefore a substantial interference with BCTF's associational activity and a breach of s. 2(d).

[377] I would also like to take this opportunity to express my concern with the comments of my colleagues at para. 260, regarding the speculative nature of determining whether a prohibition on collective bargaining for one bargaining round constituted a substantial interference. My colleagues suggest that this prohibition had only a minor effect on the association right because it is possible that

> … by removing one major obstacle to achieving a collective agreement, collective bargaining on a range of other issues was enhanced…. Ultimately, then, the temporary prohibition on bargaining on some contentious matters may have facilitated the parties' reaching a collective agreement, potentially opening the door for agreements on the Affected Topics in the future.

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As I understand this argument, it suggests that teachers may have benefitted by having their right to collective bargaining abridged, because such collective bargaining may not have resulted in a better outcome. One is left to conclude that these comments suggest that teachers would be better off if not "inconvenienced" by the "distraction" of "*Charter* rights". I do not agree with these comments. As I will explain in further detail below, the temporary prohibition was a serious infringement in these circumstances, even if less serious than a permanent prohibition.

[378] I will now discuss whether the Province's breach of s. 2(d) can be saved under s. 1 of the *Charter*.

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Section 1 Analysis

Pressing and Substantial Objective and Rational Connection

[379] In the Bill 28 Decision, the trial judge determined that the disputed legislation failed the s. 1 test at the minimal impairment stage after finding that the legislation had a pressing and substantial objective that was rationally connected to the means chosen: Bill 28 Decision at paras. 341, 346, 376. The objective of the legislation, as found by the trial judge, was to "provide greater flexibility to school boards to manage class size and composition issues, to respond to choices of parents and students, and to make their own decisions on better use of facilities and human resources": Bill 28 Decision at para. 339. This had a rational connection to the means chosen because the effect of barring collective bargaining on the Working Conditions was to give school boards greater independence by removing the requirement that they deal with union demands on these issues: Bill 28 Decision at para. 343.

[380] At the Bill 22 trial, the trial judge came to the conclusion that since Bill 28 was found to be unconstitutional, the Province could no longer rely on the same pressing and substantial objective. The trial judge found that the legislation therefore failed all stages of the *Oakes* test: Bill 22 Decision at para. 477. With respect to the trial judge, I cannot agree with her reasoning that passing Bill 22 altered the nature of the objective or the rationality of the connection. Government is not to be prevented from

attempting to pass similar, but modified, legislation after an initial finding of unconstitutionality. The Supreme Court of Canada has endorsed the idea that judicial *Charter* review is to be seen as part of a "dialogue" between the legislative and the judicial branches of government: see e.g. *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 137-139; *M. v. H.*, [1999] 2 S.C.R. 3 at para. 328, per Bastarache J. This concept promotes the idea that the Legislature is to be given a "second try" at passing legislation that it feels is in the public interest, even though a court may have struck down previous, similar legislation.

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[381] For this reason, the trial judge must be bound by her previous finding that the purpose of the legislation is pressing and substantial and contains a rational connection to the means chosen, unless some evidence exists to suggest that the purpose has changed in some way. The trial judge found no such change of purpose.

[382] In my opinion, the reasons of the trial judge in the Bill 28 Decision remain cogent in this regard. The legislation has a pressing and substantial purpose and that purpose has a rational connection to the means chosen.

Minimal Impairment

[383] The Province placed substantial emphasis in this case on the ways in which Bill 22 interfered with the BCTF's s. 2(d) right to a lesser degree than Bill 28. The clearest example of this is the fact that the prohibition on collective bargaining was temporary, rather than permanent. The Province argues that a temporary prohibition, which has already expired, should be seen as reducing the impairment to a constitutionally compliant level.

[384] While a temporary prohibition is obviously less impairing than a permanent prohibition, it cannot be ignored that the temporary prohibition in this case exacerbated the effect of all the previous unconstitutional actions of the Province, including the passage of Bill 28 and the bad faith consultation following the Bill 28 Decision. As I have discussed, the teachers had been fighting for years to have the Working Conditions that were unconstitutionally removed reinstated into their

collective agreement. Taking collective bargaining rights away once again, even as a temporary measure, after so much effort was made to regain them, is yet another example of how the Province's actions would have caused even the most heartened observer to see the union's associational activities as something akin to a Sisyphean effort.

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[385] As well, regardless of the temporary nature of the prohibition, in my opinion, the effect of this legislation cannot be seen as merely "temporary", even though collective bargaining was eventually reinstated. It is important to remember that the teachers' union had been fighting for a return of the Working Conditions for 13 years. If the Working Conditions had remained a part of the collective agreement, any future negotiation would take place with that as a floor. If the union were to give up some of the Working Conditions, presumably it would receive some benefit in return. Unilaterally deleting these provisions without consulting with the teachers' union set the BCTF back substantially in its efforts to represent teachers' interests. After winning a substantial victory in the Bill 28 Decision, Bill 22 effectively sent the union right back to the beginning. Even if collective bargaining on Working Conditions were reinstated sometime down the road, the BCTF would be starting from scratch, and would likely have to give up other benefits in order to reinstate even some of the Working Conditions into the collective agreement. After 13 years of fighting and continual disregard by the Province, it would be reasonable for the teachers to question whether they would ever get the Working Conditions reinstated. This, essentially, is why the Province's actions were so damaging to the union's s. 2(d) rights and why they seemed to render the teachers' attempts to associate and collectively bargain futile in regard to the Working Conditions.

[386] Permanence or transience of the prohibition on collective bargaining aside, it is important to stress that the minimal impairment stage of the s. 1 analysis does not look at whether the Province has taken a less damaging approach to the legislation compared to some even more egregious alternative, but whether the Province took a *least* damaging approach within a range of reasonable alternatives. In my opinion,

despite attempts made to reduce the impairment of the legislation, it cannot be said to be minimally impairing within a range of reasonable alternatives.

[387] In the Bill 28 Decision, the trial judge made specific note of the fact that the original Working Conditions contained in the collective agreement gave substantial flexibility to school boards with respect to class size and class composition. The trial judge said the following in this regard in the Bill 28 Decision:

> [129] … 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 teachers' total workload was not increased.
>
> [130] 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. …

[388] The trial judge brought the Province's attention to ways in which the original Working Conditions were already consistent with the Province's purpose of increased flexibility, yet the Province provided no explanation why these aspects of the original Working Conditions, and their established flexibility, could not be retained.

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[389] The Province has still provided no explanation for why the flexible provisions, which the trial judge found were consistent with the Province's position and purpose, could not be retained in a collective agreement. It cannot be said that it took any approach to minimally impair in this context, let alone a reasonable one. As such, I am left to conclude that Bill 22 as drafted does not minimally impair the BCTF's s. 2(d) rights.

[390] Since I have concluded that the legislation does not minimally impair BCTF's s. 2(d) rights, it is not necessary for me to consider the proportionality of its measures.

Remedy

[391] In addition to a finding of invalidity of Bill 22 under s. 52 of the *Constitution Act, 1982*, the trial judge gave the following additional remedies. First, the trial judge granted a damages remedy in the amount of $2 million awarded to "the BCTF as the bargaining agent representing teachers": Bill 22 Decision at para. 635. This award was motivated by the fact that "the government temporarily re-enacted legislation it knew to be constitutionally invalid" in relation to the "fourteen months from the enactment of [Bill 22] until the expiry of the extended prohibition on collective bargaining over Working Conditions, June 30, 2013": Bill 22 Decision at para. 625. Essentially, the trial judge appeared to award the damages as a punitive measure in response to an attempt to unilaterally extend the enforceability of unconstitutional legislation.

[392] With respect, I cannot agree with this interpretation of the Province's actions. The Province passed similar legislation, this is true, but it must be acknowledged that small attempts were made to mitigate the legislation and bring it into constitutional compliance. The fact that these attempts were insufficient does not lead to a finding that additional remedies are warranted. As stated previously, the dialogue principle states that governments must be allowed to attempt to revise unconstitutional legislation without the threat of further liability should those attempts prove unsuccessful.

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[393] In my opinion, the additional damages award is inappropriate, and I would allow the appeal in this regard.

[394] The second additional remedy provided by the trial judge was a clarification that her previous ruling in the Bill 28 Decision meant that Bill 28 was of no force or effect from the date it was passed in 2002. This also meant that the Working Conditions had thereafter been a part of the collective agreement, and the BCTF would have certain grievances available to it since the Province had been operating in breach of the collective agreement since that time by disregarding the Working Conditions.

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[395] I agree with my colleagues that this declaration was made without full consideration of the impact such grievances will have on the Province, as is required in these circumstances: see *Canada (Attorney General) v. Hislop*, 2007 SCC 10. In most cases, governments must be permitted to presume that in-force legislation is constitutionally sound without concern for future liability should this turn out to be false.

[396] As such, I would agree with my colleagues that Bill 28 should be seen as being of no force or effect strictly from the date of said declaration. In addition, I would find that Bill 22 is also of no force or effect from the date of this declaration.

[397] However, in my opinion, more is required to constitute an appropriate remedy. As stated previously, the effect of delaying invalidity to the present is that the Working Conditions will continue to be absent from the current collective agreement. This places the teachers at an unfair disadvantage due to egregious and unconstitutional government conduct. Such a result would be unfair and, in my opinion, cannot stand.

[398] The BCTF has asked for the terms to be reinstated into the collective agreement as part of its remedy. Section 24(1) of the *Charter* states, "[a]nyone 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". This provision gives a court broad powers to fashion an appropriate remedy to do justice in the circumstances. For example, in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, McLachlin C.J.C., writing for the Court, used the powers available under this section to make an "order in the nature of mandamus", and ordered the Minister of Health to grant a statutory exemption in order to put a stop to a continuing *Charter* infringement: at para. 150.

[399] In my opinion, allowing the Working Conditions to remain deleted would force teachers to continue to suffer from unconstitutional government action and legislation. Therefore, I would order, pursuant to s. 24(1), that the Minister of Education direct the public administrator for the BCPSEA appointed under s. 9.1 of the *Public Sector Employers Act* to reinstate the Working Conditions into the collective agreement immediately. Any future deletion or alteration of these terms must occur as the result of the collective bargaining process or after a constitutionally compliant process of good faith consultation.

Conclusion

[400] In my opinion, the trial judge did not err in concluding that the unilateral nullification of the Working Conditions substantially interfered with the BCTF's s. 2(d) rights and the Province did not give effect to those rights through good faith consultation, as the Province's consultation efforts were not in good faith.

[401] As such, I would dismiss the appeal in regard to the trial judge's finding that Bill 22 is unconstitutional. I would allow the appeal in regard to the trial judge's additional damages remedy and her declaration that Bill 28 was of no force or effect as of the date of its passage, but I would substitute a remedy pursuant to s. 24(1) of the *Charter* and order the Minister of Education to direct the public administrator for the BCPSEA appointed under s. 9.1 of the *Public Sector Employers Act* to reinstate the Working Conditions into the collective agreement immediately.

"The Honourable Mr. Justice Donald"

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