IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia Teachers' Federation v. British Columbia,* 2011 BCSC 469

Date: 20110413
Docket: L021662
Registry: Vancouver

Between:

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

Plaintiffs

And

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

Defendant

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment
In Chambers

Counsel for the Plaintiffs:	John D. Rogers, Q.C. Steven Rogers
Counsel for the Defendant:	George H. Copley, Q.C. Neena Sharma Alison Luke
Place and Date of Hearing:	Vancouver, B.C. November 15-19, 22-26, 2010
Place and Date of Judgment:	Vancouver, B.C. April 13, 2011

Cases Cited:

Alberta Union of Provincial Employees v. Alberta Health Services, 2010 ABQB 344

British Columbia Teachers' Federation v. British Columbia (Attorney General), 2008 BCSC 1699

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

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

Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989

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Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27, [2007] 2 S.C.R. 391

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Lax Kw'alaams Indian Band v. Canada (Attorney General), 2007 BCSC 858

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Reference Re Public Service Employee Relations Act,(Alta.), [1987] 1 S.C.R. 313

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199

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Statutes and Regulations Cited

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

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

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

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

Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2

Industrial Relations Reform Act, 1987, S.B.C. 1987, c. 24

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

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

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

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

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

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

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

Teaching Profession Act, S.B.C. 1987, c. 19

The Public Schools Act, R.S.M. 1987, c. P250

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INTRODUCTION

[1] The elementary and high school teachers of British Columbia challenge provincial legislation as unconstitutional on the basis that it deprives them of collective bargaining rights, thereby infringing their freedom to associate guaranteed under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[2] In January 2002, the provincial government of British Columbia introduced legislation that represented a new agenda for dealing with public sector workers in the fields of education and health services, by way of Bills 27, 28, and 29. These were unionized workers, and the legislation dealt with matters that were the subject of collective agreements.

[3] The health services legislation was challenged by various health workers' associations as being contrary to the freedom to associate, constitutionally protected by s. 2 (d) of the *Charter*.

[4] Initially the health workers were unsuccessful at the trial and appellate levels, and the health services legislation, Bill 29, was upheld.

[5] The case went on to the Supreme Court of Canada where the workers ultimately prevailed. In a landmark decision, the Supreme Court of Canada held that collective bargaining was protected by s. 2 (d) of the *Charter*: *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 [*Health Services*]. Professor Hogg described the impact of this decision as "a 180-degree shift": Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed. (Toronto, Ont.: Carswell, 2007), ch. 44 at 44-6. The Supreme Court of Canada had previously held that collective bargaining was not protected by the *Charter* guaranteed freedom of association: *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367.

[6] In *Health Services*, the Supreme Court of Canada struck down several provisions of Bill 29 as being unconstitutional by reason of the legislation's

interference with the workers' freedom to associate guaranteed by s. 2 (d) of the *Charter*. Some provisions were found not to be unconstitutional.

[7] The teachers brought a court challenge to Bill 27 and Bill 28, similar to the challenge brought by the health services' workers. This challenge waited on the sidelines while the *Health Services* case wound its way through the courts. Now the challenge to the legislation affecting teachers' collective bargaining has come before this court for decision.

[8] In this case the legislation dealing with teachers was modelled on the same provincial government theory as in *Health Services*, namely, that the government had the right to impose legislation which unilaterally overrode provisions of existing collective agreements, and which prohibited collective bargaining on the same subject matters in the future. The legislation was enacted without any prior consultation with the teachers' union.

[9] For the reasons that follow, I have found that most, but not all, of the challenged legislation is unconstitutional as violating the s. 2 (d) freedom to associate and to engage in collective bargaining. Specifically, I have found that ss. 8, 9 and 15 of *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3 [*PEFCA*] (Bill 28) and s. 5 of the *Education Services Collective Agreement Amendment Act, 2004*, S.B.C. 2004, c. 16 [*Amendment Act*] are unconstitutional. I have not found s. 4 of *Education Services Collective Agreement Act*, S.B.C. 2002, c. 1 [*ESCAA*] (Bill 27) to be unconstitutional.

Summary of the Parties' Positions

[10] The plaintiffs, the British Columbia Teachers' Federation and a representative teacher (together I will refer to them as "BCTF" or "the teachers" for ease of reference), say that the key provisions of Bills 27 and 28 mirror in spirit and go even further in offending collective bargaining rights than the legislation which was found to be unconstitutional in *Health Services*.

[11] In summary, the teachers' position is that the provincial government by its legislation unilaterally voided existing terms in their collective agreement, and prohibited future collective bargaining, on the subjects of restrictions on class sizes, class composition (number of special needs children integrated in the class), ratios of non-enrolling teachers to students (teachers not assigned to classrooms, such as librarians, counsellors, and special education teachers), and workload. The teachers say that these matters have a substantial impact on their working conditions. The legislation also affected some other related issues, such as school calendaring and hours and days of work.

[12] The government's position is that these subjects are more importantly matters for educational policy decisions, and ought not to be the subject of collective bargaining. The government says that in bringing in the legislation, it was exercising its power and authority to enact education legislation for the public good, its constitutional responsibility under s. 93 of the *Constitution Act,1867* (U.K.), 30 & 31 Vict., c. 3 [*Constitution Act, 1867*]. It also says that the impugned legislation does not have the substantial impact on collective bargaining that the teachers argue it has. Finally, the government argues that even if the legislation does offend the *Charter* protection for collective bargaining, it is saved by application of s. 1 of the *Charter*.

[13] In addition to challenging the legislation, the plaintiffs also say that the government engaged in additional unconstitutional conduct that offended the *Charter*-guaranteed protection for collective bargaining, by engaging in bad faith bargaining in 2001, leading-up to the passage of the impugned legislation. I have not found for the teachers on this issue.

Educational Value of Class Limits Not In Issue

[14] It is worth noting, in this introduction, that both sides agree that what is not at issue in this litigation is whether or not larger class sizes have a deleterious effect on children's ability to learn. There is debate on this issue, and neither side seeks a

determination of the educational impact of class sizes on children or of the optimal class size from an educational perspective.

[15] I accept as a fair premise that both sides sincerely wish to serve the educational needs of children and believe that their respective positions are not contrary to those needs.

[16] At the same time, it is only natural that there exist other factors at play for both sides. It is clear that the more students in a class and the greater the number of integrated special needs students, then the fewer the number of teaching staff who will have to be hired, reducing the employers' costs but also reducing the number of teachers employed. From the teacher's perspective, these considerations not only affect the numbers of teachers employed, they affect the workload for the classroom teacher, both in managing the classroom dynamic, and in performing after-class work such as preparing individualized learning plans and marking tests. From the government perspective, it has the interest of protecting the public purse to ensure that spending on education is neither excessive nor unreasonable.

[17] It is important to first appreciate the contextual background to the legislation. For ease of reference I will also set out a short glossary of terms referred to in this judgment, as well as a very brief chronology of the collective bargaining and legislative history leading up to the challenged legislation.

Glossary

[18] The following terms are used in this judgment for the following meanings:

1998-2001 Collective Agreement	The collective agreement imposed by the *Public Education Collective Agreement Act*, establishing the AIC as a collective agreement for the term July 1, 1998 to June 30, 2001, including the K-3 Memorandum, and including subsequent amendments agreed to by the parties, including Article A.1, LOU #3, LOU #5, and the 2001 K-3 Memorandum.

2001 K-3 Memorandum	An amended Memorandum of Agreement governing classes from kindergarten to Grade 3, negotiated between BCTF and BCPSEA on February 7, 2001. It was incorporated into the 1998-2001 Collective Agreement as Article D.2.
AIC	April 17, 1998 Agreement in Committee reached between the BCTF and the government but rejected by BCPSEA. It included the K-3 Memorandum. This agreement was implemented by the *Public Education Collective Agreement Act*, for a three year term (1998-2001).
Amendment Act	The *Education Services Collective Agreement Amendment Act, 2004*, S.B.C. 2004, c.16, enacted April 2004.
BCPSEA	British Columbia Public School Employers' Association.
BCTF	British Columbia Teachers' Federation, the plaintiff.
Bill 27	The *Education Services Collective Agreement Act*, S.B.C. 2002, c. 1 [*ESCAA*], enacted January 2002.
Bill 28	The *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3 [*PEFCA*], enacted January 2002.
ESCAA	*Education Services Collective Agreement Act*, S.B.C. 2002, c. 1, Bill 27.
K-3 Memorandum	Memorandum of Agreement governing class sizes for kindergarten to Grade 3 class sizes, originally negotiated between BCTF and the government, as part of the AIC in April 1988.
LOU #3	Letter of Understanding #3, agreed to in June 1999 by BCPSEA and BCTF, amending the 1998-2001 Collective Agreement with respect to non-enrolling and ESL ratios.
LOU #5	Letter of Understanding #5, agreed to in June 2000 by BCPSEA and BCTF, amending the 1998-2001 Collective Agreement with respect to ESL ratios.
PEFCA	*Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3, Bill 28.

PELRA	*Public Education Labour Relations Act*, S.B.C. 1994, c. 21 (now R.S.B.C. 1996, c. 382) enacted on June 10, 1994 designating BCPSEA as the employers' association and BCTF as the teachers' bargaining agent.
PSEA	*Public Sector Employers Act*, S.B.C. 1993, c. 65 (now R.S.B.C. 1996, c. 384), enacted on July 27, 1993.
PSEC	Public Sector Employers' Council established under the *PSEA.*
Transitional Collective Agreement	Collective agreement agreed between BCPSEA and BCTF in May 1996, with an effective date of June 17, 1996, and expiring on June 30, 1998. It provided for a rollover of existing language in the previous local collective agreements.

Chronology

[19] For ease of reference, the following is a brief chronology of relevant events and legislation:

DATE	**SUMMARY**
1987	Through amendments to the *Industrial Relations Act* and the *School Act*, teachers for the first time gained the right to engage in collective bargaining.
1987-1993	First period of collective bargaining between local teachers' unions (called associations) and school boards. Several collective agreements were reached during this time period.
1993	The Report of the Korbin Commission was released, recommending changes to the structure of the public sector.
1993	The *PSEA* was enacted. It established the PSEC. It mandated that employers' associations be established for six public sector employers. Soon thereafter, BCPSEA was formed as the employers' association for public schools.
June 10, 1994	*PELRA* was enacted, designating BCPSEA as the employers' association for school boards and as bargaining agent. BCTF was designated as the bargaining agent for public school teachers. *PELRA* required BCPSEA and BCTF to designate the Provincial matters and local matters to be determined by collective bargaining. Cost provisions, including salaries, benefits, workload, and class size restrictions, were deemed to be Provincial matters.

April 28, 1996	The *Education and Health Collective Bargaining Assistance Act*, S.B.C. 1996, c. 1, came into effect. This allowed for means by which a mediator could impose a collective agreement on the parties.
June 17, 1996	BCPSEA and BCTF concluded the Transitional Collective Agreement in May 1996, with an effective date of June 17, 1996, and expiring on June 30, 1998. It rolled over existing language in the 1993-1994 previous local collective agreements.
December 2, 1996	School districts were amalgamated. The total number of school districts was reduced from 75 to 59.
1998	At the invitation of the parties, the government became involved in collective bargaining between BCTF and BCPSEA. Ultimately the government negotiated directly with BCTF.
April 17, 1998	The government and BCTF reached an Agreement in Committee ("AIC") including a K-3 Memorandum of Agreement. It provided for a rollover of other terms of previous local agreements bargained during 1988-1994. BCPSEA members voted to reject the AIC.
May 4, 1998	BCPSEA, BCTF and the government sign Article A.1, agreeing to continue all of the provisions of the Transitional Collective Agreement, unless amended or modified.
June 30, 1998	The Transitional Collective Agreement expired.
July 1, 1998	The *Public Education Collective Agreement Act*, S.B.C. 1998, c. 41 was enacted, imposing a collective agreement on the parties. The collective agreement carried forward the terms of the Transitional Collective Agreement, as well as the terms of the AIC and the K-3 Memorandum, for the term July 1, 1998 to June 30, 2001.
June 1999	BCPSEA and BCTF signed LOU #3, adding certain common provincial language in the 1998-2001 collective agreement dealing with non-enrolling / ESL ratios.
June 2000	BCPSEA and BCTF signed LOU #5 revising the ESL ratios in the collective agreement.
February 2001	BCPSEA and BCTF signed the 2001 K-3 Memorandum incorporating class size provisions for these grades into the 1998-2001 collective agreement.
May 10, 2001	A new provincial government was elected.
August 16, 2001	The *Skills Development and Labour Statutes Amendment Act, 2001*, S.B.C. 2001, c. 33 was enacted to amend the *Labour Relations Code* to include education as an essential service.

2001	Period of collective bargaining between BCTF and BCPSEA. BCPSEA was also consulting with new government on potential legislative changes that could reduce the scope of collective bargaining. BCTF was not consulted about the potential legislation.
January 27, 2002	Bill 27, *ESCAA*, was enacted.
January 28, 2002	Bill 28, *PEFCA*, was enacted.
May 30, 2002	BCTF filed this proceeding alleging that teachers' *Charter*-protected rights had been violated with the passage of Bill 27 and Bill 28.
August 30, 2002	Arbitrator issued his decision deleting extensive provisions in the collective agreement, pursuant to s. 27.1 of the *School Act*, which was added by s. 9 of *PEFCA*.
January 22, 2004	Shaw J. quashed the arbitrator's decision, in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2004 BCSC 86.
April 29, 2004	The *Amendment Act* was enacted. It effectively restored the arbitrator's decision by deleting all sections of the collective agreement that had been deleted by the arbitrator.

ANALYTICAL FRAMEWORK

[20] The SCC in *Health Services* set out a framework for analyzing whether or not legislation impacting on collective bargaining is unconstitutional as contrary to the s. 2 (d) *Charter* freedom of association. Section 2 (d) provides:

> 2. Everyone has the following fundamental freedoms:
>
> ...
>
> (d) freedom of association.

[21] What s. 2 (d) protects is the "right of employees to associate in a process of collective action to achieve workplace goals": *Health Services* at para. 19. If the government "substantially interferes" with that right, it violates s. 2 (d) of the *Charter*.

[22] The freedom in s. 2 (d) does not guarantee any particular outcome of that collective process, or any particular model of that process: *Health Services* at paras. 89 and 91.

[23] The analytical framework established in *Health Services* at paras. 87-109 involves examining the following questions:

> 1. What is the importance of the matter affected by the legislation to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert? This involves examining:
>
> a) does the legislation interfere with collective bargaining?
>
> b) if so, how substantial is that interference? This requires considering the importance of the provisions and how they impact the process of collective bargaining rights, if at all. The inquiry in every case is contextual and fact-specific. There are two aspects to the inquiry:
>
> i) The first consideration is the importance of the matter affected to the capacity of the union members to come together and pursue collective goals in concert. The relative significance of the provision in question to the workers must be considered: was it an important matter, from the workers' perspective, for example, involving working conditions; or was it relatively minor, for example, involving the design of uniforms, cafeterias or parking lots?
>
> ii) The second consideration has to do with the process by which the measure was implemented: how does the measure impact on the collective right to good faith negotiation and consultation? In this regard, does the legislative measure in issue respect the fundamental precept of collective bargaining -- the duty to consult and negotiate in good faith? Important changes effected through a process of good faith negotiation may not violate s. 2(d). Conversely, less central matters may be changed more summarily, without violating s. 2(d). Situations of exigency and urgency may be taken into account.

> Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty to consult and bargain in good faith, will s. 2 (d) be breached.

2. If a s. 2 (d) violation is established, is it justified under s. 1 of the *Charter*, as a reasonable limit demonstrably justified in a free and democratic society? As established by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*] and confirmed in *Health Services* at para. 138, there are four stages to this analysis which the government must demonstrate:

> (a) the objective of the law must be pressing and substantial;
>
> (b) there must be a rational connection between the pressing and substantial objective of the law and the means chosen to achieve the objective;
>
> (c) the challenged law must minimally impair the *Charter* right; and
>
> (d) there must be proportionality between the legislative objective and measures, more specifically, between the salutary and deleterious effects of the law.

[24] The above general analytical framework applies not only to legislation but also to government conduct which is alleged to violate the s. 2 (d) protection for collective bargaining.

[25] I will therefore approach the issues with regard to the above framework.

THE CHALLENGED LEGISLATION

[26] The challenged legislation is attached as Appendix A to this judgment.

[27] The plaintiffs challenge the following legislation:

a) Sections 8 and 9 of *PEFCA,* and section 5 of the *Amendment Act*;

b) Section 15 of *PEFCA*; and

c) Section 4 of *ESCAA*.

Sections 8, 9 of *PEFCA* and Section 5 of the *Amendment Act*

[28] *PEFCA*, or Bill 28, was enacted on January 28, 2002. Section 8 of *PEFCA* amended s. 27 of the *School Act*, R.S.B.C 1996, c. 412 (as amended) [*School Act*]. In summary, s. 8 of *PEFCA* removed the teachers' ability to have included in a collective agreement terms relating to the subjects of class size, class composition, and ratios of teachers to students. It also rendered void any terms in a collective agreement related to these matters, and prohibited any terms that might require negotiations to replace the voided terms.

[29] For ease of reference, the changes brought about by s. 8 of *PEFCA* were reflected as underlined in the following amendments to what was then the content of s. 27 of the *School Act*:

> Terms and conditions of teachers' employment and restricted scope of bargaining
>
> 27 (1) Despite any agreement to the contrary, the terms and conditions of a contract of employment between a board and a teacher are
>
> (a) the provisions of this Act and the regulations,
>
> (b) the terms and conditions, not inconsistent with this Act and the regulations, of a teachers' collective agreement, and
>
> (c) the terms and conditions, not inconsistent with paragraphs (a) and (b), agreed between the board and the teacher.
>
> (2) A provision of an agreement referred to in subsection (1) (b) excluding or purporting to exclude the provisions of this Act or the regulations is void.
>
> (3) There must not be included in a teachers' collective agreement any provision
>
> (a) regulating the selection and appointment of teachers under this Act, the courses of study, the program of studies or the professional methods and techniques employed by a teacher,
>
> (b) restricting or regulating the assignment by a board of teaching duties to administrative officers,
>
> (c) limiting a board's power to employ persons other than teachers to assist teachers in the carrying out of their responsibilities under this Act and the regulations,
>
> (d) restricting or regulating a board's power to establish class size and class composition,

> (e) establishing or imposing class size limits, requirements respecting average class sizes, or methods for determining class size limits or average class sizes,
>
> (f) restricting or regulating a board's power to assign a student to a class, course or program,
>
> (g) restricting or regulating a board's power to determine staffing levels or ratios or the number of teachers or other staff employed by the board,
>
> (h) establishing minimum numbers of teachers or other staff,
>
> (i) restricting or regulating a board's power to determine the number of students assigned to a teacher, or
>
> (j) establishing maximum or minimum case loads, staffing loads or teaching loads.
>
> (4) Subsection (3) does not prevent a teachers' collective agreement from containing a provision respecting hiring preferences for teachers who have previously been employed by the board.
>
> (5) A provision of a teachers' collective agreement that conflicts or is inconsistent with subsection (3) is void to the extent of the conflict or inconsistency.
>
> (6) A provision of a teachers' collective agreement that
>
> (a) requires the employers' association to negotiate with the Provincial union, as defined in the *Public Education Labour Relations Act*, to replace provisions of the agreement that are void as a result of subsection (5), or
>
> (b) authorizes or requires the Labour Relations Board, an arbitrator or any person to replace, amend or modify provisions of the agreement that are void as a result of subsection (5),
>
> is void to the extent that the provision relates to a matter described in subsection (3) (a) to (j).
>
> [New provisions via s. 8 of *PEFCA* are underlined.]

[30] *PEFCA* did not expressly identify which sections of the parties' existing collective agreement were rendered void by the new legislation. Instead, section 9 of *PEFCA* provided for the appointment of an arbitrator who was charged with determining which provisions of the provincial collective agreement were void and deleting those provisions from the collective agreement. Section 9 of *PEFCA* was given effect by the addition of s. 27.1 of the *School Act*.

[31] BCTF opposed the arbitration process. After some procedural wrangling, the arbitrator, Mr. Eric Rice, Q.C., now Mr. Justice Rice, ultimately issued a decision deleting many provisions from the Collective Agreement.

[32] Subsequently, Mr. Justice Shaw of the British Columbia Supreme Court held that the arbitrator appointed pursuant to s. 9 had made errors of law, and so quashed the decision of the arbitrator: *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2004 BCSC 86 [*BCTF v. BCPSEA (2004)*]. I will return to the judgment of Shaw J. later. However, the government reacted to this court decision by enacting legislation which in substance reinstated and implemented the arbitrator's decision, by deleting those provisions of the collective agreement which the arbitrator had identified as requiring deletion by virtue of *PEFCA*. The new legislation is the impugned s. 5 of the *Amendment Act*.

[33] Section 5 of the *Amendment Act* provides:

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

[34] Section 1of *the Amendment Act* deleted all terms from the collective agreement that had been deleted by the arbitrator.

[35] Since the *Amendment Act* retroactively imposed the substance of the arbitrator's decision deleting terms from the collective agreement, there was no

longer was any need for the appointment of an arbitrator to do this, and so s. 3 of the *Amendment Act* repealed s. 9 of *PEFCA.* Nevertheless, BCTF, which commenced this proceeding in 2002, maintains its constitutional challenge of both s. 9 of *PEFCA* and s. 5 of the *Amendment Act*.

Section 15 of *PEFCA*

[36] Another aspect of Bill 28 dealt with school calendaring and hours and days of work. In summary, it amended the *School Act* to render void provisions of a collective agreement limiting or restricting the board's powers with respect to school calendaring and hours and days of work.

[37] Section 15 of *PEFCA* amended the *School Act* to add a new s. 78.1, as follows:

> Extended day and year-round schooling
>
> 78.1 (1) If a board satisfies the conditions under section 78 (3.1), a provision of a teachers' collective agreement that limits or restricts, or purports to limit or restrict, the board's power to adopt and implement the school calendar approved under section 78 (3.1) for the school or the group of students concerned is void, but only to the extent that the provision limits or restricts the power in respect of that school or group of students.
>
> (2) Without limiting subsection (1), a provision of a teachers' collective agreement is void to the extent that it limits or restricts, or purports to limit or restrict, the power of the board to establish, vary, extend or amend, in respect of the school or group of students referred to in subsection (1),
>
> (a) the schedule of delivery of educational programs in a day of instruction,
>
> (b) the schedule of delivery of health services, social services and other support services under section 88, in a day of instruction,
>
> (c) the hours of the day, days of the week or months of the year on or within which educational programs are to be provided, or
>
> (d) the days on which teachers, or persons providing services referred to in paragraph (b), are scheduled to be available for instructional, non-instructional or administrative activities.

[38] Section 78.1 referred to the requirement that the board first satisfy the conditions under s. 78 (3.1). Section 78 (3.1) of the *School Act* required the board to consult with parents and representatives of employees of the board assigned to the school before adopting a school calendar. There was also an amendment to s. 78

(2)(e), replacing "school week" with "school year". The amendments to s. 78 of the *School Act* were as underlined as follows:

> 78 (1) The Lieutenant Governor in Council must, by regulation,
>
> (a) set a standard school calendar that is applicable to a period of 5 consecutive school years,
>
> (b) set the first of the standard school calendars required by this section for the 1993-1994 school year and the 4 subsequent school years, and
>
> (c) on or before May 31 of the fourth school year in each period of 5 consecutive school years covered by a standard school calendar, set a new standard school calendar to take effect on the expiry of the then existing standard school calendar.
>
> (2) Without limiting subsection (1), the Lieutenant Governor in Council may, in a standard school calendar set under subsection (1),
>
> (a) set the days in session in a school year,
>
> (b) set a minimum number of days within the days in session that must be days of instruction,
>
> (c) set a maximum number of non-instructional periods within the days in session,
>
> (d) set the number of days in a calendar week within the days in session that are to be school days,
>
> (e) set the minimum number of hours of instruction that must be provided in a school <u>year</u>,
>
> (f) specify the opening and closing dates for schools,
>
> (g) specify the dates of vacation periods and holidays within the days in session, and
>
> (h) set the date for the administrative day.
>
> (3) A board may adopt, in accordance with the regulations, a school calendar that differs from the standard school calendar for one or more
>
> (a) schools in its school district, or
>
> (b) groups of students in a school in its school district.
>
> (3.1) <u>A board may not adopt a school calendar under subsection (3) unless, in accordance with the regulations, parents of the students enrolled in the school and representatives of employees of the board assigned to the school have been consulted</u>.
>
> (4) Subject to subsection (5), a school calendar adopted under subsection (3) need not be based on the school year but must cover a period of 12 consecutive months.

> (5) A school calendar adopted under subsection (3) must cover a period of more than 12 months if necessary to ensure that it applies immediately on the expiration of the previous school calendar.

[39] The legislation before the amendments provided that the standard school calendar, including the days and hours of instruction, was set by the Lieutenant Governor in Council, but school boards could adopt a different calendar for any particular school or group of students. The effect of the legislative changes was: first, to require boards to consult with parents and some local teachers before amending the standard school calendar (new s. 78 (3.1)); and second, to provide that so long as a school board did so, any provision of a collective agreement was void if it purported to limit or restrict the board's power to adopt, implement or amend the school calendar, or to vary the hours and days on which educational programs were to be provided or days on which teachers were to be available for instructional, non-instructional or administrative activities.

Section 4 of *ESCAA*

[40] *ESCAA*, or Bill 27, was enacted on January 27, 2002. Section 4 of *ESCAA* can best be understood as the "merger amendment". While there was one overall provincial collective agreement in 1996, that collective agreement carried forward a number of terms previously agreed to in local school districts for teachers in that district only. There was one collective agreement with general provincial terms applying to all teachers, with attached schedules for each school district containing local terms unique to teachers in that district.

[41] When the provincial government amalgamated a number of school districts in 1996, some school districts ended up with two such schedules to the collective agreement: one group of teachers in the newly amalgamated School District had one set of terms in accordance with past negotiated agreements; and another group of teachers in the same district had other terms in accordance with their own past negotiated agreements.

[42] What s. 4 of the *ESCAA* did was to delete all local terms in such cases, except for those contained in one of the agreements. The government in essence chose one of the two negotiated local agreements and deleted the other so that all teachers in one School District would be subject to one set of local terms.

[43] However, s. 4 was not effective until July 1, 2002.

Legislated Class Size Maximums Are Not Challenged

[44] At the same time as class size and other matters were removed from the scope of collective bargaining, s. 12 of *PEFCA* introduced statutory class size limits, by adding s. 76.1 to the *School Act*, providing:

> 76.1(1) A board must ensure that the average size of its classes, in the aggregate, does not exceed
>
> (a) for kindergarten, 19 students,
>
> (b) for grades 1 to 3, 21 students, and
>
> (c) for grades 4 to 12, 30 students.
>
> (2) Despite subsection (1), a board must ensure that the size of any primary grades class in any school in its school district does not exceed
>
> (a) for kindergarten, 22 students, and
>
> (b) for grades 1 to 3, 24 students.
>
> (3) The Lieutenant Governor in Council may, by regulation,
>
> (a) establish the methods to be used by a board for determining average class size in the aggregate, including, without limitation, methods of providing for students with special needs,
>
> (b) exclude any type of class, course, program, school or student from the determination of average class size in the aggregate,
>
> (c) set dates by which determinations must be made under this section,
>
> (d) define terms used in this section for the purposes of a regulation under this section,
>
> (e) require boards to prepare, submit to the minister and make publicly available, in the form and manner specified by the Lieutenant Governor in Council, for each school district and each school within the school district,
>
> (i) reports respecting class size, and
>
> (ii) plans respecting allocation of resources, services and staff in order to comply with subsection (1),

> (f) specify matters that must be considered by a board in preparing a plan under paragraph (e) (ii) and the information required to be included in reports or plans under paragraph (e), and
>
> (g) require a board to establish, in respect of plans and reports under paragraph (e), a process of consultation with parents of students attending school in the school district.
>
> (4) The limits and requirements of subsections (1) and (2) do not apply for the purposes of the 2001-2002 school year.

[45] BCTF does not challenge the constitutionality of the legislated class size average maximums and composition provisions.

[46] The statutory class size provisions were amended in May 2006 by Bill 33-2006, the *Education (Learning Enhancement) Statutes Amendment Act, 2006*, S.B.C. 2006, c. 21. This Act left unchanged the class size average maximums for K-3. However, the Act amended the above s. 76.1 of the *School Act* by replacing the single average cap of 30 for grades 4 to 12 with an average cap of 28 for grades 4 to 7, but leaving the average cap of 30 for grades 8 to 12. The Act also contained new provisions allowing the class size limits to be exceeded for grades 4 to 12, subject to the consent of the teacher of the class.

[47] The parties have made it clear that they do not consider the legislative changes to the average class size maximums set out in s. 76.1 of the *School Act* to be subject to the present constitutional challenge. I will therefore not review the process which preceded the *Education (Learning Enhancement) Statutes Amendment Act*, including the Learning Roundtable process which commenced in October 2005 and involved meetings between government representatives, three administrator groups (trustees, superintendants and principals and vice-principals), parents, and BCTF.

CONTEXTUAL BACKGROUND

[48] Any constitutional analysis has to begin with an understanding of the context in which the challenged government conduct or legislation occurred. This requires consideration of the history of collective bargaining by teachers in British Columbia,

and the nature of the collective bargaining relationship just prior to the first impugned legislation being introduced in January 2002.

Nature of Proceeding and Evidence

[49] By agreement of the parties the hearing before me proceeded as a summary trial. Rather than relying on witnesses testifying before me, the parties relied on affidavit evidence, transcripts of cross-examination on affidavits, documents, and excerpts from examination for discovery. For the most part the factual background is uncontroversial.

[50] To the extent there was a factual dispute between the parties, it had to do with characterizing the nature of the collective bargaining relationship between BCTF and BCPSEA in 2001, in the lead-up to the impugned legislation. From the parties' submissions and evidence arose two areas of factual dispute:

a) did the government face exigent or urgent circumstances prior to the passage of the challenged legislation, due to "labour unrest and virtual paralysis of the public school system", as asserted by the government?

b) did the government act in concert with the BCPSEA to engage in bad faith "surface bargaining" during collective bargaining in 2001, prior to the passage of the challenged legislation, as asserted by BCTF?

[51] I will address these areas of dispute when reviewing the background factual context.

[52] I must note as an overview that not all evidence placed before the court on this hearing was entitled to the same weight -- there were differing degrees of reliability and relevance, and differing purposes for the evidence.

[53] With respect to controversial factual assertions, I have approached the affidavit evidence cautiously. I have attempted to distil the objective facts and to ignore conclusory statements in the affidavits which attempt to characterize past events in an opinionated and argumentative way.

[54] In considering the evidence I have also kept in mind the passage of time, the fact that each side to this dispute has different perspectives through which they have naturally filtered a distant recollection of past events, and the fact that evidence given by affidavit may at times be gilded by the influences of litigation and hindsight.

[55] I have also been careful not to ascribe motives to an institutional party (here, the government, BCPSEA, or BCTF) or to determine legislative purpose, based on the evidence of individuals or a few documents.

[56] Some, but certainly not all, of the evidence placed before the court could be described as falling into the category of legislative fact, relating to the policy purpose behind legislation. In *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2007 BCSC 858 Madam Justice Satanove summarized the principles to be applied by the court in the consideration of the admissibility of evidence with respect to legislative facts, at para. 2:

> 1. Legislative facts relate to the constitutionality of legislation or policy. They should not relate to the adjudication of the matters in issue ("adjudicative facts") but rather to the socio/economic framework within which that adjudication takes place.
>
> 2. Legislative facts establish the purpose and background of legislation, the social and economic conditions under which it is enacted, the mischief at which it is directed and the institutional framework in which it is to operate.
>
> 3. Examples of materials admitted under the legislative facts rule include reports of parliamentary committees, Law Reform Commission reports, white papers, green papers, Royal Commission reports, government reports and independently commissioned studies relied upon by government.
>
> 4. Legislative facts are an expanded form of judicial notice but they may not have the indisputable character traditionally required for judicial notice.
>
> 5. The permissible scope of judicial notice should vary according to the nature of the issue under consideration. The closer the legislative fact is to the subject of dispute, the more it should be notorious and accurate because it can become determinative. If the legislative fact simply forms part of the context in which the dispute is to be resolved, then its reliability, accuracy and notoriety is of less concern.
>
> 6. Where the legislative facts may be disputed, they should be proved by the opinion of expert witnesses in the relevant field of knowledge. The expert can be cross-examined or contradicted by another expert witness as to the value and weight to be given to certain reports. The result is some assurance of reliability for factual findings of controverted legislative facts.

> 7. Studies done after enactment of legislation can be legislative fact used to analyze the legislation.

[57] With respect to legislative purpose, the courts must be careful not to become a forum for political debate, where subjective intentions of individual members of government or individual public servants are weighed and tested. What is important for judicial determination of constitutionality is the purpose of the legislation, not individual motives or statements of intent of individual politicians or government officials. As held by the Supreme Court of Canada in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 [*Delisle*] at para. 17:

> Although extrinsic sources may be used to interpret legislation and to determine its true meaning, when the meaning of the challenged provision is clear, they are of little assistance in determining the purpose of a statute in order to evaluate whether it is consistent with the *Charter*. Generally, the Court must not strike down an enactment which does not infringe the *Charter* in its meaning, form or effects, which would force Parliament to re-enact the same text, but with an extrinsic demonstration of a valid purpose. That would be an absurd scenario because it would ascribe a direct statutory effect to simple statements, internal reports and other external sources which, while they are useful when a judge must determine the meaning of an obscure provision, are not sufficient to strike down a statutory enactment which is otherwise consistent with the *Charter*. Legislative intent must have an institutional quality, as it is impossible to know what each member of Parliament was thinking. It must reflect what was known to the members at the time of the vote. It must also have regard to the fact that the members were called upon to vote on a specific wording, for which an institutional explanation was provided. The wording and justification thereof are important precisely because members have a duty to understand the meaning of the statute on which they are voting. This is more important than speculation on the subjective intention of those who proposed the enactment.

[58] The *Delisle* authority was relied on by this court in *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2008 BCSC 1699, where Rice J. held at para. 78:

> As the Court in *Delisle* recognized, paying heed to documents or testimony of persons who are in government, and particularly on the "political side" of government (to use the plaintiffs' term), would simply invite politicians and civil servants to make self-serving statements of high purpose and pure intent in an effort to save an otherwise unconstitutional statute. In the same way that a bad governmental purpose cannot render otherwise constitutional legislation invalid, likewise a demonstration of pure motives has never (and should never) weigh to save a statute that goes beyond legislative authority or constitutes an unjustifiable infringement on the rights of the citizenry.

[59] I consider it helpful to begin with the factual background, aware of its relevance to the question of the importance of the matters affected by the legislation, and mindful of the s. 1 *Charter* analysis which I will address later in these reasons.

Summary of History of Collective Bargaining by B.C. Teachers

[60] The BCTF was formed in 1916, prior to any legal right for collective bargaining. However, acting as a collective association of teachers, it has attempted to advance the interests of teachers since then. Other teachers' organizations have also attempted to advance teachers' working conditions.

[61] In 1985, following the passage of the Canadian *Charter of Rights and Freedoms*, BCTF and a number of other teachers' associations initiated a lawsuit against the government of British Columbia. The lawsuit claimed that B.C. legislation that excluded teachers from the ability to engage in collective bargaining was contrary to teachers' *Charter* rights. Before the merits of that lawsuit were determined, the provincial government acted in 1987 by passing the *Teaching Profession Act*, S.B.C. 1987, c. 19 and the *Industrial Relations Reform Act, 1987*, S.B.C. 1987, c. 24. This legislation allowed teachers to collectively bargain with respect to their working conditions.

[62] Thus, teachers in British Columbia have only had the right to collectively bargain since 1987.

[63] There were two collective bargaining regimes prior to 2002 and the impugned legislation. For the first period, 1988 - 1993, local teachers' associations engaged in collective bargaining with local school districts. For the second period, from 1994 and forward, there was province-wide bargaining. In the second period, BCTF acted as bargaining agent for employee teachers, and BCPSEA as bargaining agent for employer school boards.

First Period: Local Collective Bargaining 1988-1993

[64] In the period from 1988-1993, local teachers' organizations in school districts across British Columbia obtained certification as bargaining agents for teachers.

These local teachers' unions negotiated with local school districts the terms of their collective agreements. Approximately 200 collective agreements were negotiated over this time period.

[65] The parties in this proceeding agreed that it was unnecessary to tender evidence of all collective agreements negotiated during the first period of collective bargaining. However, the plaintiff produced samples from the Saanich, Vancouver, North Vancouver, and Terrace school districts.

[66] These sample collective agreements made during the 1988-1993 time period illustrate that the local teachers' associations all sought to include terms relating to their working conditions. Those terms went beyond remuneration and included limits on class sizes, terms with respect to integration of special needs students in classes, and the ratio between teachers with classrooms and "non-enrolled" teaching staff, such as librarians and teaching assistants.

[67] These issues were considered very significant to teachers. The teachers say they have a substantial impact on their working conditions, because a teacher's workload increases both inside and outside of the classroom the greater the number of students per class, and the greater number of special needs students integrated in the class without additional supports. The teachers were also concerned that there be sufficient other staff to service students (learning assistants, librarians, counsellors and the like). Many teachers felt that these working conditions would impact their effectiveness as teachers.

[68] During this first period of collective bargaining, some teachers' associations took job action as a tool to try to achieve their goals in bargaining, including on terms related to class size and class composition, and non-enrolling teacher ratios. As well, some teachers' associations agreed to less favourable terms relating to salary and benefits in order to achieve their goals with respect to these issues.

[69] While there was a variety of job action during the first period of collective bargaining, there were other tools employed to discourage job action. On May 30,

1993, the provincial government enacted the *Educational Programs Continuation Act*, S.B.C. 1993, c. 5 (Bill 31). This Bill was intended to end job action by teachers in Vancouver and gave the government authority to appoint a special mediator to any dispute in any school district, and to have that mediator's recommendations for settlement imposed on the parties. As a result, this encouraged both parties to teachers' labour disputes to attempt to reach agreement through the collective bargaining process, rather than have an agreement imposed by a mediator.

[70] In 1992, the government commissioned an inquiry into the human resource practices of the public service and public sector, with the mandate to propose a new framework that would be more cost effective, and appointed Judi Korbin to conduct the inquiry. She released her report in July 1993, the title being self-explanatory: *Report of the Commission of Inquiry into the Public Service and the Public Sector* (the "Korbin Report").

[71] Volume 1 of the Korbin Report dealt with the public service, direct employees of the government, as well as contractors. Volume 2 dealt with the public sector, including the fields of health, community social services, education (K-12), colleges and institutes, universities, crown corporations and agencies, and municipalities.

[72] The provincial government estimated that human resource costs in the public sector consumed approximately 60% of the government's expenditures. Of approximately 300,000 public sector workers at the time of the Korbin inquiry, the two largest sectors were health, with 100,000 employees, and education (K-12) with 60,000 employees.

[73] The Korbin Report identified a large systemic problem in the public sector, namely, that government which funded public bodies typically had no means by which to exercise control over human resources policies and agreements. This meant that an individual employer could exceed the government's assigned budget expenditures in negotiating agreements with employees.

[74] In the education sector, the problem identified by Korbin was the disconnection between individual school districts and the provincial government which raised and allocated funds for education.

[75] Korbin's highlighting of the problem of public sector employers being disconnected from government funding accountability, led to her recommendation of the establishment of a Public Sector Employers' Council ("PSEC"). She believed that the model of this council would provide the framework for all the public sectors to consult and collaborate with government over where public resources would be best spent. Korbin ultimately proposed a new *Public Sector Employers Act* which would establish PSEC, comprised of employer-side representatives from each public sector and from Cabinet, each public sector being responsible for coordinating human resource issues within its sector.

[76] The Korbin Report did not suggest that the teachers' unions approach to class size and composition was a systemic problem in the collective bargaining process. The report only briefly dealt with class size. This was raised in the context of the potential cost of "levelling up" if there was to be a single provincial collective agreement, bringing all local agreements up to the scale of the highest common denominator. The Korbin Report noted that the proponents of merging local agreements into a single province-wide bargaining unit had not presented an assessment of the costs of levelling up: at p. F22. There were a number of significant differences between local agreements. For example, in urban school districts, issues of class size and composition were of high priority. The Korbin Report stated that the cost of levelling up was an issue of importance that should be reviewed by the government and the school boards together.

[77] The Korbin Report also briefly commented on the fact that some submissions to the commission had raised a question about whether class size should be a negotiable item. The report commented that class size was both a public policy issue regarding educational values, as well as a workload issue dealt with in

collective bargaining: Korbin Report at p. F23. The Korbin Report noted that class size was a negotiable item in collective bargaining in seven other provinces.

[78] The Korbin commission sent out a questionnaire to school boards which inquired about strengths and weaknesses in the present system. As for weaknesses, the school boards perceived that having so many local associations and school districts conduct individual bargaining weakened the employer's balance of power; that teachers' unions were more focussed on bargaining issues than elected school trustees; and that teachers' unions were able to focus on provincial goals through the BCTF. The school boards described this as "whipsawing". Korbin recommended the establishment of a single, province-wide employer organization responsible for human resource issues in education, to review collective bargaining structures and, if necessary, to recommend changes, in consultation with the BCTF.

[79] To the extent that Korbin wished to modify the balance of power in collective bargaining, she was not suggesting that the power be imbalanced in favour of the employer. Her report recognized the importance of equal bargaining power in the collective bargaining process.

[80] A theme of the Korbin Report was the necessity of incorporating meaningful consultation between government, employer, and employee, in order to have a workable collective bargaining model. Korbin noted that some of the frustration arising from the then existing model of collective bargaining was due to the fact it had been imposed without real input from the educational community: Korbin Report at p. F25. Her recommendations made it clear that one purpose of PSEC was to ensure that public sector employees and employers would be consulted on policy issues that directly affect employees.

Second Period: Provincial Collective Bargaining 1994 Forward

[81] The Korbin Report ultimately led to the government imposing a province-wide collective bargaining model.

[82] As of July 27, 1993, the province enacted the *Public Sector Employers Act*, S.B.C. 1993, c. 65 (now R.S.B.C. 1996, c. 384) [*PSEA*]. This legislation established PSEC. PSEC had a mandate to advise the government on human resource issues with respect to the public sector and to facilitate consultation between government and public sector employees, including teachers and health workers. The *PSEA* also required the creation of six public employers associations, on the boards of which would include government representatives. BCPSEA became the association for employers of teachers in the K-12 grades.

[83] On June 7, 1994, the government enacted the *Public Education Labour Relations Act,* S.B.C. 1994, c. 21 (now R.S.B.C. 1996, c. 382) [*PELRA*]. Whereas in the past school boards had negotiated individual collective agreements with local teacher unions which represented their teacher employees, section 5 of *PELRA* established a single bargaining unit of all public school teachers. Section 6 of *PELRA* deemed the BCTF to be the certified bargaining agent for the employees in that bargaining unit.

[84] Under section 4 of *PELRA,* the employers' association in education, BCPSEA, was deemed to be the accredited bargaining agent for every board of education in British Columbia. The composition of BCPSEA includes representatives of government on the board of directors.

[85] Having a single bargaining agent on each side provided a balance between the management side and labour side of human resource issues.

[86] The two-tiered scheme of provincial bargaining envisaged by *PELRA* drew a distinction between "provincial matters" and "local matters." The determination of what matters were bargained at what table was a matter to be agreed to by the parties: *PELRA s.* 8.

[87] However, all "costs provisions" were deemed to be provincial matters. This included all provisions related to salaries and benefits, workload, including, without

limitation, class size restrictions; and time worked and paid leave, that could affect the cost of the collective agreement: *PELRA* ss. 7 (3) and 7 (4).

[88] *PELRA* thus expressly recognized that class size restrictions were working conditions that affected the cost of a collective agreement, and were to be collectively bargained provincially.

[89] A transitional section rolled over local agreements until replaced by a provincial agreement to be bargained: *PELRA* s. 10 (4).

[90] The first order of business in the new bargaining model was determination of what matters would be "provincial" and what matters would be "local". BCPSEA and BCTF negotiated these issues and reached agreement, and amended these by agreement, in 1995, 1996 and 1997. The agreed provincial matters included as "Section D Working Conditions" the following topics:

1. Class Size and Class Composition
   - *1.25 Staffing Formula, Relief Fund, Class Size, Teacher Workload, Class Composition*
   - *1.39 ESL*
2. Professional Teach Staff Formula
   - *1.25 Staffing Formula, Relief Fund, Class Size, Teacher Workload, Class Composition*
   - *1.39 ESL*
   - *1.93 Discretionary Staffing, Unique Leaning Needs*
   - *1.93 Discretionary Staffing, Special Needs Students*
   - *4.9 Committee - Staffing Advisory*
3. Mainstreaming/Integration
   - *1.68 Integration, Mainstreaming, Special Needs Students*
   - *1.91 School Based Team - Committee, Resource group for Assisting Teacher With Problem Solving*

[91] After province-wide bargaining was introduced in 1994 through *PELRA*, BCTF informed itself of its members' views by conducting surveys of the local teachers' associations as to what bargaining objectives it should advance. It also conducted other research on teacher working conditions. It concluded that priority should be

given to improve class size and class composition provisions, and staffing levels with respect to non-enrolling teachers, amongst other things.

[92] In 1995 and 1996, the BCTF and BCPSEA bargaining teams exchanged proposals and counter-proposals towards the goal of achieving a province-wide collective agreement. It was no small task to try to come up with a single agreement, given that there were so many local agreements in place with a wide variety of terms and conditions.

[93] When no global agreement was reached, the government increased the pressure on the negotiating parties by enacting legislation that could impose a mediated settlement. On April 28, 1996, the B.C. Provincial Government enacted the *Education and Health Collective Bargaining Assistance Act*, S.B.C. 1996, c.1 [Bill 21]. Under Bill 21, the provincial government could appoint a mediator or commission to provide recommendations for settlement, which would be binding upon BCTF and BCPSEA as deemed provisions of a collective agreement between the parties.

[94] Neither party invoked the provisions of Bill 21. Rather, they decided to enter into a transitional collective agreement which provided for a rollover of existing language in the 1993-1994 local collective agreements plus some new province-wide terms (the "Transitional Collective Agreement"). This first collective agreement between BCPSEA and BCTF was entered into in May 1996, with an effective date of June 17, 1996 and an expiry date of June 30, 1998. In addition to the rollover of provisions from the previously bargained local agreements, the parties had agreed to some common province-wide language in the Transitional Collective Agreement.

[95] The government conceded in argument that the Transitional Collective Agreement was a collective agreement in fact and in law. However, it argued that it was not "freely negotiated". The government argued that the Transitional Collective Agreement was simply to get the parties through a new election period without a labour dispute, and that it was not considered to be the new provincial collective agreement.

[96] The government's argument goes more to the motive for entering into the agreement. The fact is that the Transitional Collective Agreement was not legislatively imposed. The majority of the provisions were from previous local agreements freely bargained between employers and employees. The provisions that were new were negotiated by the new provincial bargaining agents. The Transitional Collective Agreement was, in fact, a freely negotiated collective agreement.

[97] In December 1996, a number of school districts were amalgamated, decreasing the overall number of school districts to 59 from 75.

[98] It continued to prove difficult for BCPSEA and BCTF to negotiate a new single collective agreement.

[99] As the June 30, 1998 expiry date of the Transitional Collective Agreement approached, the parties asked the government to participate in negotiations. The government stepped in and began to negotiate directly with BCTF. This resulted in an Agreement in Committee being reached on April 17, 1998 (the "AIC"). The AIC included a Memorandum of Agreement dealing with class size and composition for grades Kindergarten to grade 3 (the "K-3 Memorandum"). All other terms of previous local agreements were again rolled forward and continued, including class size and composition provisions not modified by the AIC. The AIC included fixed teacher-to-pupil ratios for non-enrolled teachers such as counsellors, librarians, learning assistants, special education and ESL teachers.

[100] BCTF members ratified the AIC.

[101] BCPSEA recommended that its members reject the AIC. BCPSEA was unhappy with the government funding which it felt was insufficient to meet the provisions, and with a perceived lack of flexibility on the part of boards dealing with class sizes. BCPSEA also felt that the agreement failed to address its concerns regarding evaluation of teachers and filling vacant positions. It also felt that the AIC was poorly drafted and could give rise to interpretation issues.

[102] Interestingly, BCPSEA's May 21, 1998 memorandum to its school board members criticized not just the result but the fact that it had been left out of the process of coming to the agreement. BCPSEA complained to its members "[i]it becomes impossible to separate process from product ... [the] outcome is a result of a process in which the local governors of the education system were not present nor consulted". This sentiment underscores the point that it is necessary for government to consult with both employer and employee if it hopes to achieve a harmonious labour relations model.

[103] On June 18, 1998, BCPSEA announced that its members had rejected the AIC.

[104] The government then enacted legislation imposing the AIC, including the K-3 Memorandum, as the parties' collective agreement for the term July 1, 1998 to June 30, 2001 (1998-2001 Collective Agreement). On July 30, 1998, the B.C. Legislature passed Bill 39, the *Public Education Collective Agreement Act*, S.B.C. 1998, c. 41 [*Public Education Collective Agreement Act*] which it brought into effect retroactive to July 1, 1998, implementing the terms of the negotiated AIC and the K-3 Memorandum. This Act also provided that the AIC could be varied by agreement between the parties.

[105] Because the 1998-2001 Collective Agreement was negotiated by the government instead of BCPSEA, and then imposed by legislation, the government now takes the position in this litigation that the collective agreement was not freely negotiated. Because of this, the government argues that the subsequent impugned legislation voiding provisions of this collective agreement does not engage the *Charter* analysis set out in *Health Services*. I will come back to this argument when dealing with the constitutional analysis, but the following facts are relevant to this issue.

[106] The bulk of the terms of the 1998-2001 Collective Agreement were simply a carry-forward of previous agreements that had been freely negotiated between the BCPSEA and BCTF, apart from the AIC and K-3 Memorandum. The majority of the

1998-2001 Collective Agreement terms carried forward the Transitional Collective Agreement, which included all of the individual local agreements that had been negotiated in individual school districts.

[107] BCPSEA expressly agreed to carry-forward the terms of the Transitional Collective Agreement in the 1998-2001 Collective Agreement. One article of the AIC, article A.1 entitled "Term, Continuation and Renegotiation", was signed by the government, BCPSEA and BCTF on May 4, 1998. By this article, all terms of the Transitional Collective Agreement were continued, except where modified or amended.

[108] There were also a number of subsequent amendments to the 1998-2001 Collective Agreement that were made by way of negotiated agreement between BCPSEA and BCTF. An easy reference to these can be found in BCPSEA's submissions to the arbitrator appointed under *PEFCA*, in which BCPSEA set out the existing terms of the collective agreement and those terms it thought ought to be deleted based on s. 8 of *PEFCA* (and new s. 27 (3)(d) through (j) of the *School Act*). These negotiated amendments to the 1998-2001 Collective Agreement, as acknowledged by BCPSEA, included:

a) a letter of understanding #3, signed in June 1999 ("LOU #3");

b) a letter of understanding #5, signed in June 2000 ("LOU #5"); and

c) article D.2 -- K-3 Class Size, signed in February 2001 (the "2001 K-3 Memorandum").

[109] The matters dealt with in LOU #3 included common provincial language in the 1998-2001 Collective Agreement dealing with non-enrolling/ESL ratios and funding of the same; determination of non-enrolling ratios in specific school districts; and terms dealing with an expedited process for a grievance filed by BCPSEA with respect to class sizes and special needs reductions.

[110] The matter dealt with in LOU #5 was revision of ESL ratios in specific school districts.

[111] As for the 2001 K-3 Memorandum, the legislatively imposed K-3 Memorandum was due to expire on June 30, 2001. BCTF sought to include it in the body of the 1998-2001 Collective Agreement before expiry, to ensure it would continue to apply during any bridging period until a new collective agreement could be negotiated.

[112] The provincial government had committed funding to school boards based on the K-3 Memorandum. In the fall of 2000, BCTF representatives approached the provincial government to see if it would consider funding the class size limits beyond June 30, 2001. The response was positive. The BCTF then approached BCPSEA to propose moving the K-3 class sizes into the collective agreement.

[113] To encourage BCPSEA to do so, in late 2000, a Deputy Minister suggested to BCPSEA that it might lose $43 million in funding committed to school districts based on the K-3 Memorandum, unless it agreed to open up the collective agreement before its expiry and negotiate these provisions with BCTF.

[114] Ultimately BCPSEA agreed to an amended K-3 Memorandum to be incorporated into the collective agreement, and both parties signed it on February 7, 2001. This 2001 K-3 Memorandum was incorporated into the 1998-2001 Collective Agreement as Article D.2. School districts ratified it by an 80% majority.

[115] The 2001 K-3 Memorandum replaced the previous K-3 Memorandum. It provided that all current class size and composition provisions in the previous collective agreement would continue to apply, with the exceptions noted in articles D.2.2(a) through D.2.4, which set limits for classes from kindergarten through grade 3.

[116] In article D.2.2(a), maximum class sizes effective September 30 were to be 20 students in Kindergarten; and 22 students in each of Grades 1 through 3.

[117] The 2001 K-3 Memorandum provided that the Ministry of Education would provide each district with funding to achieve the goals of the class size maximums,

and this would be considered trust funding for the purposes of hiring K-3 classroom teachers to maintain the class size maximums.

[118] Extensive mechanisms to deal with exceptions to the class limits were also included in the 2001 K-3 Memorandum.

[119] The 2001 K-3 Memorandum further provided in article D.2.10 that if class size limits were lower in the previous collective agreement, the lower maximums would apply. This was in recognition of the fact that the existing 1998-2001 Collective Agreement had rolled forward all the local agreements, some of which may have contained lower class size provisions in a particular school district. By agreeing to this article, BCPSEA and BCTF both recognized the continued existence of the local agreements, which had been negotiated before province-wide bargaining, and then rolled into the province-wide collective agreement.

[120] Article 1.20 of the 1998-2001 Collective Agreement also provided that if a new collective agreement was not reached by June 30, 2001, the terms of the collective agreement would continue to apply until the date a new agreement is reached. This is not an uncommon term in collective agreements.

[121] As of June 30, 2001, no new collective agreement was reached, and so the 2001 K-3 Memorandum and other terms of the 1998-2001 Collective Agreement continued to apply while collective bargaining took place.

[122] Collective bargaining proposals were exchanged through the summer and fall of 2001 dealing with many issues, including class size, composition, and non-enrolling ratios.

[123] No new collective agreement was reached before the impugned legislation was enacted by Bills 27 and 28 in January 2002. I will now turn to examine the collective bargaining relationship leading up to the legislation, in more detail.

The Nature of the Collective Bargaining Relationship Just Prior to 2002

[124] The government argues that it faced the exigent circumstances of "labour unrest and virtual paralysis of the public school system" prior to the passage of the challenged legislation. The suggestion is that this was justification for the government introducing the impugned legislation in 2002 without any consultation with BCTF.

[125] The teachers argue that the government acted in concert with BCPSEA in 2001 to engage in bad faith bargaining, while the government was preparing the impugned legislation. Surface bargaining by BCPSEA ensued, resulting in no collective agreement being reached until the government's legislation in January 2002.

[126] The evidence does not persuade me of either conclusion.

Allegation of Exigent Circumstances and Allegation of Bad Faith

[127] The very nature of the collective bargaining relationship presumes that there will at times be fundamental disagreement. Collective bargaining models employ a variety of tools for resolving fundamental disagreement when negotiations reach an impasse, including job action.

[128] The individual local agreements that had been negotiated across the school districts in the province in the 1987-1993 timeframe showed a variety of terms and conditions regarding class size and composition. Of 75 school districts, some 58 negotiated provisions related to class size and composition. Sometimes the process of collective bargaining had involved job action.

[129] Many local teachers' associations agreed to class size and composition provisions which were not rigid but which allowed for exceptions or alterations, thereby providing flexibility to school boards with respect to class size and class composition. The following are some examples of the variety of provisions that existed in the local teachers' agreements, which permitted school districts to exceed class size limits or class composition restrictions:

(a) if a student joined the school late in the year;

(b) with the consent or request of a teacher;

(c) with the consent of the teacher for educationally sound reasons;

(d) if external financial constraints were imposed on the Board;

(e) for band, choir, or physical education classes, at the request of the teacher;

(f) where it was not "possible" to stay within limits;

(g) if the student could not be reassigned to a different class at the same school with fewer students;

(h) if the student could not be reassigned to an adjacent school;

(i) by up to two students after September, providing that the teacher could request additional support; or

(j) if the teacher was assigned less than the maximum in another class so that the teacher's total workload was not increased.

[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. For example, if class size or composition limits were exceeded, the teacher might not request that students be removed from the class, but might seek extra support, or a day of paid leave to compensate for the increased workload.

[131] The results of the Korbin commission do not support the suggestion that teachers had made unduly rigid demands with respect to class size or composition. The Korbin Report observed that mediation and facilitation processes available under existing labour laws had been working well to resolve disputes in the first period of collective bargaining: at p. F21. The Korbin Report also noted that it was

relatively early days in the collective bargaining relationships between teachers and their employers. Historically, collective bargaining relationships mature over time and strife diminishes: Korbin Report at p. F26.

[132] The legislative changes in 1994 following the Korbin Report were about providing more accountability between the party responsible for funding education, the government, and the employers who were negotiating at the collective bargaining table with teachers, as well as equalizing bargaining power.

[133] The 1994 legislation, *PELRA*, confirmed the teachers' right to negotiate working conditions, including class size, as part of provincial bargaining: s. 7 (4)(b). This is inconsistent with the notion that class size demands by the teachers had historically been an insurmountable hurdle and the source of dysfunction in collective bargaining.

[134] It is true that once two-tiered province-wide bargaining was introduced in 1994, the two sides of the table, BCPSEA and BCTF, were not quick in coming to agreement. The Korbin Report had anticipated that this might be difficult. This is not surprising given the task at hand, namely creating a single, cohesive agreement negotiated provincially, from what historically had been up to 75 divergent agreements negotiated locally.

[135] As province-wide bargaining agents, each of BCPSEA and BCTF had to deal with diverse views amongst their members. In 2001, BCPSEA put it this way: "drawing a consensus from the diverse School Boards of this province has been a challenge. It has been painful at times...".

[136] While the government stepped in to negotiate directly with BCTF in February 1998, leaving BCPSEA out of the negotiations, one cannot conclude from this that the relationship was dysfunctional due to BCTF demands regarding class size and composition. The inability of the two sides to come to agreement could equally be due to unreasonable positions taken by BCPSEA, or to demands made on other issues. I am not suggesting this was so, but simply pointing out that the mere fact

two parties did not reach agreement on their own does not permit of an inference blaming the impasse on one party's position regarding one set of issues.

[137] Clearly in 1998, when the previous provincial government legislated the AIC that it had negotiated with BCTF, which contained terms addressing class size and composition issues, it did not consider BCTF's position on these issues so rigid nor did it consider that these issues did not belong in a collective agreement. However, it may well be that legislating the collective agreement over BCPSEA's objections contributed to ongoing difficulties in the relationship between BCPSEA and BCTF.

[138] It is clear that BCPSEA was unhappy with the government's imposition of class size and composition limits in the K-3 Memorandum which was part of the 1998 AIC. BCPSEA called upon school administrators to document problems with these limits. An association of school principals and vice-principals (BCVPA) commissioned a survey of school administrators in October 1998. The resultant report by Bognar & Associates cited the AIC as causing, amongst other things: the reorganization of K-3 classrooms in September, after the beginning of the school year; an increase in the number of split classes; and turning away some students from schools closest to their residences.

[139] The Bognar survey was not designed to obtain neutral and objective information and so it cannot be relied upon as a fair representative sample. It was designed to elicit negative feedback, as part of the school administrator's campaign to challenge the AIC. The cover page of the survey began as follows:

> URGENT!
>
> A Request from BCVPA
>
> We know you're busy, but...
>
> BCVPA wants to document the impact of the Agreement-in-Committee (AiC). For many schools, this Agreement raises significant issues. A high return rate on this survey will provide us with the best information possible, and will increase our credibility when raising concerns with the Ministry of Education and others.

[140] The Bognar report's conclusion that a number of students could not attend the school nearest their place of residence did not delve into the question of whether any other efforts had been made to accommodate such students, within existing collective agreement mechanisms for exceptions to class size limits.

[141] A representative of BCPSEA, Mr. Rick Davis, also set about to informally gather information from school administrators, designed to illustrate problems with class size and composition limits. Mr. Davis served on BCPSEA's bargaining teams between 1997 and 2002. The government filed his affidavit evidence in support of its position that there were numerous problems created in the school system due to class size and composition limits. Mr. Davis put together a list of the examples he gathered in 2001. The problems cited by Mr. Davis suggest that class size and composition limits sometimes created hardships for children and families, for example by causing some students to attend schools other than the school closest to their homes.

[142] However, Mr. Davis's knowledge of problems was collected from school administrators. Mr. Davis did not have any first-hand knowledge of the problems cited, all of which were based on hearsay.

[143] I have approached Mr. Davis's evidence cautiously, as his affidavit evidence tended to characterize the facts less than objectively. For example, in his initial affidavit, Mr. Davis suggested that the bad examples he gathered were presented to BCTF at the bargaining table, and that BCTF "did not deny that these circumstances exist". He further suggested that BCTF simply treated these circumstances as "a funding issue" and BCTF was adamant that "[t]he class size limit should not be violated". This evidence was designed to assist the government argument that BCTF was unduly rigid about class size limits and to suggest that this was harming students and families.

[144] However, when Mr. Davis was pressed on this affidavit evidence in cross-examination, it became clear that it was not accurate. The problematic examples gathered by Mr. Davis were not put to the BCTF during collective bargaining in 2001,

and so BCTF had no opportunity to question them or to correct any misinformation. Further, when BCTF negotiators discussed the issues of class size and composition at the bargaining table, they showed a willingness to discuss the substantive issues, and were not simply stating that more funding was required.

[145] Most significantly, BCTF has illustrated that the vast majority of the bad examples listed by Mr. Davis and relied upon by the government to suggest that they illustrate the need for the impugned legislative reform, either could have been resolved under the terms of the existing collective agreement, or were not capable of being resolved by the legislated class size maximums.

[146] The evidence that the government relied on in the hearing before me, to support its assertion that class size limits were causing hardships to students and parents, was anecdotal hearsay. It was so vague and unsubstantiated that it was impossible for BCTF to challenge it meaningfully. It would be unfair to give it any weight for the truth of its contents. However, members of government were told of these stories by BCPSEA in 2001, and may have believed them, and so it has some relevance as potentially informing the government objective of the challenged legislation.

[147] But it is also clear from the government's own evidence that a key reason that school administrators and the government did not like to have class size and composition limits included in collective agreements was the fact that these limits increased costs to school districts.

[148] The government tendered the affidavit evidence of Thomas Fleming, Ph.D., a Professor of Educational History and Policy in the Faculty of Education at the University of Victoria in support of its case. Dr. Fleming stated that: "[c]lass size is much more than a condition of work issue. Rather, it is a condition of spending issue...". Further, Dr. Fleming stated that: "[p]ut simply, control over class size represents, in effect, control over provincial school expenditures insofar as class size determines the number of teachers that the education system requires...".

[149] While Dr. Fleming referred to "control over class size", I pause to note that control is not the issue in this proceeding. BCTF is not seeking control over class sizes, it simply seeks to be able to include it as a subject matter for negotiation in the process of collective bargaining. BCTF is seeking an opportunity for meaningful, enforceable input into class size, rather than control.

[150] Returning to the collective bargaining relationship, the 1998-2001 Collective Agreement was for the term July 1, 1998 to June 30, 2001.

[151] Collective bargaining between BCPSEA and BCTF began in approximately March 2001.

[152] The June 30 expiry date of the 1998-2001 Collective Agreement came and passed without a new agreement.

[153] To support their position in this case, both parties point to the other side's conduct in 2001. The collective agreement had expired in June, and no new agreement had been reached. The government suggests this is evidence of the impasse between BCTF and BCPSEA, which it suggests supports its position that exigent circumstances existed. BCTF says that it continually showed a willingness to settle issues but BCPSEA took a hard-line, delayed its responses or did not respond at all, and thus BCTF's efforts to negotiate were fruitless. BCTF says this is evidence that BCPSEA was engaging in bad faith "surface bargaining" at the direction of the government.

[154] BCTF has discovered documents of the government, and BCPSEA, which indicate that BCPSEA representatives were active in discussing the new government's intentions with respect to education throughout the time that BCPSEA was engaged in collective bargaining with BCTF. From these documents, and cross-examination of BCPSEA witnesses, BCTF urges the court to draw the inference that BCPSEA knew that the government was planning to bring in legislation that would remove class size and composition from the scope of collective bargaining and that would seriously curtail BCTF's collective bargaining rights.

[155] There are notes in evidence of a meeting amongst BCPSEA representatives on April 19, 2001, after the election was called but before a new government was elected. BCTF made much of these notes because they record these sentiments on the part of one member of BCPSEA with respect to the impending new government:

> We need to know policy direction from gov't to shape barg strat i.e. concessions on class size. Note: if barg class size, when gov't intro leg'n, then BCPSEA bad faith bargaining.

[156] The notes also record someone present saying:

> Suggest run silent & run deep.

[157] Mr. Hugh Finlayson, Executive Director of BCPSEA at the time, who was cross-examined about the April 19, 2001 notes, claimed that he did not recall the meeting although the notes record him as present. However, he said that in the early days of the newly elected government, BCPSEA was seeking clarity on whether the new government would cause a "dramatic change" in the bargaining framework.

[158] Once the new government was elected in May 2001, BCPSEA representatives continued their pre-election discussions with representatives of the new government.

[159] As early as the beginning of June 2001, one policy being considered by some members of the government was the removal of class size and composition from the scope of collective bargaining.

[160] BCPSEA minutes of a board meeting on June 15, 2001 record a report by representatives of BCPSEA on their meeting with the Minister of Education, Christy Clark, and the Minister of Finance, Gary Farrell-Collins and ministry staff to discuss "teacher bargaining and essential services as well as a brief synopsis regarding the status of teacher bargaining with the BCTF and the possible outcomes if policies currently under consideration were enacted through legislation". The minutes also record Mr. Finalyson reporting on the fact that BCPSEA had expended considerable time and effort working with the new government "regarding policy considerations

that would impact on the K-12 sector. This work will continue over the coming months".

[161] As early as June or July 2001, government officials had expressed to BCPSEA representatives that they were of the view that class size and composition were inappropriate matters to include in collective bargaining. This position never changed. Removing certain subjects from collective bargaining was typically described by BCPSEA as the "public policy - collective bargaining interface".

[162] On August 16, 2001, the government passed the *Skills Development and Labour Statutes Amendment Act, 2001*, S.B.C. 2001, c. 33 [*Skills Development and Labour Statutes Amendment Act*]. This Act amended the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*Labour Relations Code*] to give the Minister of Labour the authority to direct the B.C. Labour Relations Board to "designate as essential services" those services that "the board considers necessary to prevent immediate and serious disruption to the provision of educational programs." The practical effect of this meant that any job action would need to be approved by the Labour Board before it was taken.

[163] In late August 2001 BCTF decided to take action to pressure BCPSEA to increase the pace of bargaining, and unless the parties achieved substantial progress at the bargaining table, to hold a strike vote.

[164] As early as September, 2001, BCPSEA learned that influential government representatives were of the view that non-enrolling ratios, like class sizes, should not be in a collective agreement. As well, sometime in the fall of 2001, BCPSEA knew removing school calendaring issues from collective bargaining was also being considered by some government representatives. As with the other changes to education that might affect collective bargaining that were being considered by the government, it appears that BCPSEA was consulted on and informed of this by government representatives.

[165] However, BCTF was not informed or consulted about the potential legislative direction of the new government.

[166] BCTF has linked internal government and BCPSEA documents with the collective bargaining positions taken by BCPSEA during the summer and fall of 2001, and suggests that these illustrate that the government was directing BCPSEA's positions in the bargaining.

[167] For example, on September 4, 2001, the Ministry of Education updated internal Communications Notes advocating the removal of non-enrolling teacher ratios from the provincial collective agreement. That same day, BCPSEA tabled a bargaining proposal to remove non-enrolling teacher ratios from the provincial collective agreement. This represented a significant departure from BCPSEA's original bargaining proposal of standardizing the ratios and including administrators in the calculation of these ratios.

[168] Rick Davis denied knowing that the government intended to remove non-enrolling ratios from the scope of bargaining, when BCPSEA tabled its bargaining proposal.

[169] Mr. Davis's evidence in this regard makes the point that the BCPSEA representatives may not have known with certainty what specific legislation would be brought in by the government, or when. Furthermore, BCPSEA representatives would not have been privy to all internal government discussions or documents. The views of some members of government may not have ended up being the views of the majority of the Legislature.

[170] But it is abundantly clear, from the whole of the evidence, that throughout the bargaining period in 2001, BCPSEA was seeking to learn government policy to inform its bargaining strategy and to advise the government, and that it was given access to the government's legislative direction accordingly. BCPSEA made this a priority in its internal "Teacher Bargaining Position Paper" as early as January 2001, and its representatives, Rick Davis and Hugh Finlayson, worked to carry out this

priority throughout 2001. These efforts paid off when the new government was elected in May, as BCPSEA was consulted by the government on the government's development of legislative policy that might impact on the teachers' employment relationship. The fact that government representatives were on BCPSEA's board and bargaining team added to BCPSEA's access to government. BCPSEA was thus readily able to learn that influential government representatives favoured bringing in legislation to remove class size, composition and non-enrolling ratios from collective bargaining. I find that this must have informed BCPSEA's bargaining strategy in 2001.

[171] When progress at the bargaining table was not achieved, the BCTF tried to increase pressure by approving a strike vote in October, 2001. The first partial job action occurred in late November 2001, with the teachers withdrawing from a number of non-instructional duties such as participation in meetings, the organization of assemblies, and employer directed professional development and fundraising. This job action was permitted by the Labour Relations Board.

[172] In November, 2001, unbeknownst to BCTF, BCPSEA representatives were involved in discussing drafts of the proposed legislation with representatives of the government.

[173] Also in November 2001, the government appointed a "fact finder" to inquire into the dispute, Richard Longpre. He issued a report at the end of November, recommending the assistance of a facilitator. This resulted in the appointment of Stephen Kelleher, Q.C., now Mr. Justice Kelleher, as mediator/arbitrator in December 2001.

[174] On January 8, 2002, the BCTF proposed that Mr. Kelleher make non-binding recommendations on the issues of lesser magnitude, but this idea was rejected by BCPSEA.

[175] On January 22, 2002, the BCTF presented a "Framework for Settlement". BCPSEA rejected this proposal.

[176] On January 23, 2002, perceiving that BCPSEA was failing to bargain in good faith, BCTF applied to the Labour Relations Board seeking an order requiring BCPSEA to immediately begin bargaining in good faith. The BCTF also sought to escalate its job action to include a withdrawal of instructional services. The Board did not issue a ruling on either of these matters, as, on January 25, 2002, the Government tabled Bill 27 (*ESCAA*) and Bill 28 (*PEFCA*) in the Legislature. The Labour Relations Board, over the strenuous objections of BCTF, held that the legislation rendered the applications moot.

[177] No collective agreement was reached before the government tabled Bill 27 and Bill 28 in the legislature on January 25, 2002. *ESCAA* and *PEFCA* were passed on January 27 and 28, 2002, respectively.

[178] I can understand why the evidence might raise suspicions on the part of BCTF about BCPSEA's intentions during collective bargaining negotiations in the fall of 2001. But the question posed by BCTF in this proceeding is whether or not the government acted in concert with BCPSEA, to cause BCPSEA to negotiate in bad faith in 2001, in the lead-up to the impugned legislation. BCTF has the burden of proving this assertion on a balance of probabilities.

[179] In the context of labour relations, the duty to bargain in good faith is concerned with the parties' intentions during bargaining, not with the outcome of the positions taken. Parties can take "hard" positions, hoping to persuade the other side to agree. But parties bargaining must have a "genuine intention" to try to reach agreement. If they pretend to try to reach agreement but have no real intention of doing so, this is bad faith "surface bargaining": *Health Services* at para 104, citing *Canadian Union of Public Employees v. Nova Scotia Labour Relations Board*, [1983] 2 S.C.R. 311 at 341.

[180] BCTF has provided no evidence that the government directed BCPSEA to take any specific course of action in the collective bargaining negotiations. Indeed, BCTF filed evidence supporting the conclusion that the government went further in

its legislation than what BCPSEA had hoped or tried to achieve at the bargaining table.

[181] The government was not the bargaining agent directly negotiating with BCTF. There is no evidence that the government instructed BCPSEA to render meaningless the collective bargaining process. Here, the circumstantial evidence does not go so far as to persuade me of the inference that the government intention was to not have BCPSEA and BCTF reach agreement, and that it directed BCPSEA in this regard.

[182] The evidence does, however, dispel the suggestion that the legislation was passed in exigent circumstances due to "labour unrest" causing "virtual paralysis of the school system". If that was so, one would expect to link the substance of the legislation to the issues that were the cause of the unrest. Contrary to the position of the government, the labour situation between teachers and their employers in 2001 cannot be attributed to unreasonable demands or inflexibility on the part of BCTF with respect to class size and composition or other related issues later addressed in the legislation.

[183] Rather, the evidence leads to the conclusion that BCPSEA knew, during the 2001 collective bargaining process, that there was a good possibility that the new government would enact legislation that BCPSEA would consider favourable to it, and that could affect the collective bargaining between it and BCTF on class size and composition and non-enrolling ratios. As such, it was likely that BCPSEA had no motivation to compromise in its collective bargaining with BCTF on these issues. Given what BCPSEA knew, it is likely that it was taking very hard positions in the bargaining. This most likely was a key contributing factor for the lack of progress in collective bargaining in 2001.

[184] Furthermore, the government had earlier passed essential services legislation which ensured there would be no "virtual paralysis" of the public school system, namely the *Skills Development and Labour Statutes Amendment Act*. Any job action that either side to the bargaining table could have taken would have to first be

approved by the Labour Relations Board. The job action that had been authorized had consisted of the withdrawal of non-instructional, administrative and voluntary duties, and so was not affecting core educational services.

[185] For the above reasons, I find that the factual context leading-up to the legislation introduced in 2002 was not such that it could be described as "exigent circumstances" or "virtual paralysis of the public school system". I also find that the government's choice of consulting only with BCPSEA during the 2001 collective bargaining period, likely impeded collective bargaining. However, I do not find that this government conduct amounted to "acting in concert with BCPSEA to engage in bad faith bargaining", as alleged.

[186] I will come back to the fact that the government failed to consult with BCTF in connection with its intended legislation, as this is a factor to consider when considering whether or not the legislation was unconstitutional.

[187] Having reviewed the factual context of the challenged legislation, I will now address the question of whether the legislation was unconstitutional, using the analytical framework set out in *Health Services*.

CONSTITUTIONAL ANALYSIS

Does the Legislation Interfere with Collective Bargaining?

[188] The first stage of the analysis established in *Health Services* is to determine whether or not the legislation interfered with collective bargaining.

[189] In *Health Services*, the Supreme Court of Canada found that legislation which repudiated employment terms reached through past collective bargaining efforts, and which prohibited the inclusion of terms on these issues in collective agreements in the future, had the effect of interfering with collective bargaining.

[190] For the same reasons, as I will explain further, sections of the legislation challenged in this case at least equally interfere with collective bargaining as did the legislation in *Health Services*.

Sections 8 and 9 of PEFCA

[191] The consequence of section 8 of *PEFCA* was to amend s. 27 of the *School Act* to prohibit terms in a collective agreement on any of the listed subjects in new s. 27 (3)(d) to (j), including terms restricting or regulating a board's power to establish class size, class composition, staffing ratios, and establishing case loads, staffing loads or teaching loads.

[192] In addition, section 8 of *PEFCA* amended s. 27 by: adding new subsection (5), rendering void any such provision of a collective agreement; and, adding new subsection (6), prohibiting a term in a collective agreement that requires negotiation to replace, amend or modify the voided provisions.

[193] Section 9 of *PEFCA* was the method by which section 8 was to be implemented. It provided for a new s. 27.1 of the *School Act*, by which the Minister of Skills Development and Labour was required to appoint an arbitrator to review the teachers' collective agreement and determine whether a provision conflicted with or was inconsistent with the prohibitions enacted by s. 8 of *PEFCA* (s. 27 (3)(d) to (j) of the *School Act*). The arbitrator was to then delete the identified provisions from the collective agreement. The arbitrator's decision was deemed to be final and binding and not open to appeal or review by the Labour Relations Board.

[194] The importance to collective bargaining of the subject matters covered by the legislation is illustrated by the result of the arbitration mandated by s. 9 of *PEFCA*. The arbitrator deleted vast provisions of the collective agreement. Hundreds of terms were excised from the agreement.

[195] At the same time as sections 8 and 9 were enacted, section 12 of *PEFCA* amended the *School Act* to add s. 76.1, which set class size averages for K-12, and class size limits for K-3.

[196] Section 8 of *PEFCA* voided provisions of the collective agreement which were broader in scope and variety than the statutory class sizes enacted pursuant to the

new section 76.1 of the *School Act*. In other words, s. 76.1 of the *School Act* did not replace that which was removed from the collective agreement.

[197] There are two arguments advanced by the government as an answer to the suggestion that the challenged legislation interfered with collective bargaining. First, the government argues that the collective agreement affected by the legislation was not freely negotiated in the first place, and so the legislation affecting that agreement did not affect collective bargaining. Second, the government argues that the legislation was dealing with matters of educational policy.

The Status of the Existing Collective Agreement

[198] Dealing with the first point, the government argues that the collective agreement in place prior to the 2002 legislation was the 1998-2001 Collective Agreement that had been imposed by the previous government through the *Public Education Collective Agreement Act*. The government says that because the 1998-2001 Collective Agreement had not been freely negotiated by BCPSEA and BCTF, the fact that s. 8 of *PEFCA* voided terms of it cannot amount to interference with collective bargaining.

[199] The government's argument relies on a distinction made in *Health Services*. In *Health Services*, two sections of the challenged legislation, sections 7 and 8 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2 [*Health and Social Services Delivery Improvement Act*], were found not to interfere with collective bargaining, because these sections eliminated programs unilaterally imposed by the government that did not arise out of a process of collective bargaining: at paras. 124-125. These programs provided one year of training, assistance and financial support for employees, administered by a separate society. The Supreme Court of Canada noted that since these programs were outside the power of the employer and did not arise out of collective bargaining, there was no potential for future collective bargaining on them. As such, the Court held that the two sections of legislation modifying these programs did not interfere with collective bargaining.

[200] The circumstances of the impugned sections 8 and 9 of *PEFCA* in this case are very different than sections 7 and 8 of the *Health and Social Services Delivery Improvement Act* discussed in *Health Services*.

[201] Section 8 of *PEFCA* rendered void terms of a collective agreement, specifically the 1998-2001 Collective Agreement. While it is true that the 1998-2001 Collective Agreement was imposed by legislation, the bulk of it contained terms that had been freely negotiated by BCTF and BCPSEA in the past. Other terms of it were freely negotiated by BCTF and BCPSEA after the agreement had been imposed. All of the subject areas were within the power of the employer to negotiate, and were in fact historically bargained between the parties.

[202] As I have noted earlier, the 1998-2001 Collective Agreement continued most of the negotiated terms that formed part of the parties' Transitional Collective Agreement, which itself rolled over terms that had been locally negotiated between teachers and school boards.

[203] Part of the 1998-2001 Collective Agreement that was newly imposed by legislation was the K-3 Memorandum. This was something the employees had collectively bargained, albeit with the provincial government directly and not with BCPSEA.

[204] Regardless, BCPSEA and BCTF negotiated a replacement of this memorandum in February 2001, by way of the agreed 2001 K-3 Memorandum.

[205] However, the government now argues that BCPSEA only agreed to the 2001 K-3 Memorandum in order to not lose funding from the government, and so one cannot consider its terms to have been "freely negotiated". It seems a strange position for the government to take: that it forced BCPSEA to sign an agreement against its will. There are several problems with this argument.

[206] Government funding is always a significant influence in any collective agreement dealing with the public sector. But this does not mean that BCPSEA could not have refused to agree to the 2001 K-3 Memorandum. When BCPSEA

agreed to the 2001 K-3 Memorandum, its representatives made a public statement praising it for its increased flexibility.

[207] Regardless, the *Charter* protects against unconstitutional actions by the state. Both the government and BCPSEA are state actors and so cannot claim to have the protection of the *Charter*. The *Charter*-guaranteed freedom to associate protects the employees from violations by the state, not the state from its own conduct.

[208] The negotiated 2001 K-3 Memorandum clearly formed part of the collective agreement that was altered by s. 8 of *PEFCA*. Its terms dealt with class size, staffing plans, special circumstances, staffing formula including non-enrolling ratios, and funding process. This was also the case with respect to LOU #3 and LOU #5, agreed to in June 1999 and June 2000 respectively, dealing with non-enrolling and ESL ratios. This subject matter of the collective agreement was also stripped by s. 8 of *PEFCA*.

[209] Indeed BCPSEA's position, once *PEFCA* was introduced, was that all of the terms previously agreed to in the 2001 K-3 Memorandum, LOU #5, and the vast majority of terms in LOU #3, were rendered void and were prohibited from being the subject of future negotiation by virtue of s. 8 of *PEFCA* (BCPSEA's position was not limited to this, as it took the position that many more pages of the collective agreement were also rendered void).

[210] I am therefore not persuaded by the government argument that the collective agreement in place at the time of the challenged legislation was not freely negotiated and so by interfering with that agreement, the government did not interfere with collective bargaining. The 1998-2001 Collective Agreement, including the 2001 K-3 Memorandum, was negotiated through the employees' exercise of freedom of association. By rendering void provisions of that collective agreement, the government interfered with collective bargaining.

[211] Furthermore, at the very time that ss. 8 and 9 of *PEFCA* were enacted, the teachers were in the midst of collective bargaining with BCPSEA and both sides had exchanged proposals on these very issues. Clearly these subject matters had been

part of the past and ongoing collective bargaining of the parties, and such bargaining was rendered meaningless by the new legislation.

[212] In addition, s. 8 of *PEFCA* prohibited the subject matters set out in amended s. 27 (3)(d) to (j) of the *School Act* from being the subject of negotiation and from being included in a term of a collective agreement in the future, by virtue of s. 27 (6) of the *School Act*. As noted, these were terms that had long been the subject of collective bargaining. By prohibiting these subject matters from collective bargaining in the future, the process of future collective bargaining over these matters was rendered meaningless.

The "Educational Policy" Argument

[213] The second argument advanced by the government as an answer to the suggestion that the legislation interfered with collective bargaining was its "educational policy" argument. While the government conceded that class size and composition and staffing levels of non-enrolled teachers may affect teachers' working conditions, it argued that these are not "traditional" labour concerns. It asserted that these are more importantly matters of educational policy. The government argued that determination of these matters requires taking into account a variety of interests: teachers, principals and vice principals, school trustees, parents and students. It submitted that the balancing of these interests is not appropriately done in the "polarized environment of collective bargaining".

[214] The government argued that a "refinement" of the judgment in *Health Services* is necessary to provide that such matters of public policy are exempt from being subject to collective bargaining. The government asserted repeatedly in its written submissions that the legislation at issue represented government choices "concerning public education available to the Legislature under s. 93 of the *Constitution Act*, 1867, to enact laws for the good of all".

[215] As a first observation, s. 93 of the *Constitution Act, 1867* simply gives the provinces exclusive jurisdiction to make laws in relation to education. This is not in issue in this case.

[216] There are several additional problems with the government's policy argument. The most obvious point is that matters of government policy are not exempt from the requirements of the *Charter*. The government must pursue matters of public policy on a wide variety of matters. But the government is subject to the law when it pursues public policy, including the most supreme law, the Constitution.

[217] Case law dealing with *Charter* rights emphasizes that the appropriate stage for the court to consider a balancing of interests, including the interests sought to be advanced by the government objective of the legislation, is during the section 1 analysis, when determining whether an infringement of a right is justified. It is not appropriate as a starting point to interpret the scope of a right narrowly, as a form of deference to government policy. That this approach would be inappropriate is made clear by the authorities, including *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, 137 D.L.R. (4th) 142 at paras. 25 and 28-31.

[218] If the pursuit of government policy objectives was a reason to exclude a category of government legislation from compliance with *Charter* rights, then it could be raised in practically every case. As held in *Health Services*, this approach would take an overly broad view of judicial deference to the legislature. Instead, "[p]olicy itself should reflect *Charter* rights and values": *Health Services* at para. 26.

[219] While the government cited a few authorities from the Committee on Freedom of Association of the Governing Body of the International Labour Organization (the "Committee") to support its argument that class sizes are matters of educational policy, these authorities are readily distinguishable.

[220] In Report No. 310 (June 1998), the Committee addressed legislative changes to Manitoba's *The Public Schools Act*, R.S.M. 1987, c. P250. Manitoba employs an interest arbitration system in its public school system. The amendments removed jurisdiction from the arbitrator to consider class size, teacher evaluations, and other matters. While the Committee suggested that class size could be the type of matter that is more appropriately considered as a matter of educational policy than

collective bargaining, it also said it could have a bearing on conditions of employment. The Committee therefore said at para. 175:

> If the Government considers that subjects such as class size should be determined outside the process of collective bargaining, the Committee requests the Government to ensure that the teachers' associations concerned are adequately consulted prior to the development and implementation of policies in this regard.

[221] Further to this, with respect to the removal of the various matters, including class size, from the jurisdiction of the arbitrator, the Committee in Report No. 310 stated at para. 177:

> The Committee accordingly urges the Government to take steps to have the amendments to the Public Schools Act of Manitoba that circumscribe the jurisdiction of the interest arbitrators repealed and to keep it informed in this regard.

[222] In Report No. 330 (March 2003), the Committee was faced with a complaint that included the same legislation that is challenged in the present case. In its conclusions it found at para. 300:

> The Committee recalls that, while the determination of broad lines of educational policy is not a matter for collective bargaining between the competent authorities and teachers' organizations, it may be normal to consult these organizations on such matters (see Digest, op. cit., para. 813). This is particularly important in cases such as the present one, where the issues in question were previously negotiated, with the usual give and take process, which means that the parties probably gave away some demands in return for concessions, which are now being taken away through legislative decision. Such a unilateral action by the authorities cannot but introduce uncertainty in labour relations which, in the long term, can only be prejudicial.
>
> [Emphasis added.]

[223] The Committee cases relied on by the government predated the decision in *Health Services*. Furthermore, these cases clearly considered consultation with employees as an important part of the development of any government policy affecting class size.

[224] While I do not reject the government proposition that class size is a matter of educational policy, it is also a matter that affects the working conditions of teachers. I

conclude that the proper place to analyze the importance of government objectives is under s. 1 of the *Charter*.

[225] The government's arguments do not overcome the clear result of ss. 8 and 9 of *PEFCA*. On the analysis set out in *Health Services*, ss. 8 and 9 of *PEFCA* interfered with collective bargaining. By rendering void provisions that had previously been included in a collective agreement, and prohibiting collective bargaining on the same subjects in the future, these provisions rendered past bargaining and future bargaining on these matters meaningless.

Section 5 of the Amendment Act

[226] The arbitrator appointed pursuant to s. 9 of *PEFCA* issued an award deleting hundreds of provisions from the parties' collective agreement. This included deletion of language incorporated in the many local agreements that fell under the umbrella of the collective agreement, and also deletion of broader province-wide language in the collective agreement. There were at least nine "categories" of deletions proposed by BCPSEA, and the arbitrator accepted most of them on the basis that they were in conflict with or inconsistent with the amended s. 27 (3)(d) to (j) of the *School Act*.

[227] The arbitrator accepted BCPSEA's submission that the 2001 K-3 Memorandum should be deleted, as well as BCPSEA's submissions on deletions from LOU#3 and LOU #5.

[228] In rendering his decision, the arbitrator noted that the language of s. 27 (3)(d) to (j) was strikingly broad: *British Columbia Public Service Employers' Association v. British Columbia Teachers' Federation* (2002), (Arbitrator: Eric Rice, Q.C.) at paras. 29-31. This was a fair characterization.

[229] BCTF brought a court challenge to the arbitrator's award. In *BCTF v. BCPSEA (2004)*, Mr. Justice Shaw allowed the challenge, and quashed the arbitrator's decision. The Court held that the arbitrator had erred in interpreting his mandate. The arbitrator considered that he must delete any provision that conflicted

or was inconsistent with s. 27 (3)(d) to (j) of the *School Act*, and that he did not have authority to parse out those sections which were partially dealing with void matters and partially dealing with valid matters. The Court held that in doing so the arbitrator failed to properly apply s. 27 (5) of the *School Act*, which only voided those provisions "to the extent of" the conflict or inconsistency.

[230] Mr. Justice Shaw in *BCTF v. BCPSEA (2004)* described the arbitrator's proper mandate as follows:

> 36 To carry out this mandate, the arbitrator may strike out whole provisions or parts thereof where they solely relate to forbidden matters. However, where provisions relate to matters that are void as well as matters that are valid, and mere excision of words will not suffice, the arbitrator must fulfill the mandate by modifying or recasting the collective agreement provisions. The arbitrator may adopt any reasonable modification that achieves the end of getting rid of the void aspects of a provision while preserving the valid aspects.
>
> 37 By way of illustration, I pose a hypothetical example. A provision says "All teachers will wear uniforms". A law then requires that secondary school teachers be deleted from this provision. It is clear that simple excision of words will not work; but recasting of the provision will. The provision may be modified to read: "All teachers, except secondary school teachers, will wear uniforms". Another solution would be to add a sentence which reads "However, secondary school teachers will be exempted from this provision".

[231] There was another important aspect to the decision of Shaw J. in *BCTF v. BCPSEA (2004)*. He considered the arbitrator's approach to s. 28 of the *School Act*, which was amended by s. 10 of *PEFCA*. That section provides:

> 28(1) The Provincial union, as defined in the Public Education Labour Relations Act, may, on matters in respect of which a board has been given power or discretion under this Act or the regulations, enter into a collective agreement containing provisions respecting
>
> > (a) the manner in which the power or the discretion may be exercised, and
> >
> > (b) the consequences that flow from the exercise of the power or discretion.
>
> (2) Despite subsection (1), if this Act or the regulations contain * provisions that limit or restrict any matter described in subsection (1)(a) or (b), those * provisions prevail over the collective agreement in the event of a conflict.

[232] The asterisks above denote the relevant substantive change made to the section by *PEFCA*, namely, deletion of the word "express" in front of the word "provisions".

[233] An issue before the arbitrator was whether or not s. 28 of the *School Act*, as amended, permitted the teachers to bargain on "manner and consequences" of the exercise of the Board's power and discretion over the subject matters listed in s. 27 (3)(d) to (j) of the *School Act*. The arbitrator concluded it did not. The Court held that this conclusion was in error.

[234] The Court held that the teachers union could collectively bargain over the "consequences" of the matters established or imposed or determined by boards under s. 27 (3)(d)(f)(g) and (i); and that the teachers union could bargain over the "manner and consequences" of the matters covered by subsections (e), (h) and (j). I will discuss this in more detail next, under the heading "Preservation of 'Manner and Consequences' Bargaining".

[235] The decision of Shaw J. was rendered on January 22, 2004.

[236] The government responded by passing the *Amendment Act* on April 22, 2004.

[237] By s. 1, the *Amendment Act* deleted everything from the collective agreement that the arbitrator had deleted. By s. 5, the *Amendment Act* deemed the deletions to be effective as of July 1, 2002, notwithstanding any court decision to the contrary made before or after the coming into force of this section.

[238] In other words, the *Amendment Act* restored the arbitrator's decision in its entirety.

[239] Furthermore, the *Amendment Act* added a new subsection (3) to s. 28 of the *School Act*, as follows:

> 28 (3) For certainty and despite any decision of a court to the contrary made before or after the coming into force of this subsection, nothing in this section is to be construed as authorizing a board or the Provincial union to enter into

> a collective agreement that includes a provision that is prohibited under section 27 (3) or void under section 27 (2), (5) or (6).

[240] The *Amendment Act* was described as follows in briefing notes prepared for the Minister of Skills Development and Labour, the Hon. Graham Bruce, who introduced the Bill:

> Prior to 2002, class sizes and student-teacher ratios in British Columbia public schools were regulated through collective agreements between the [BCTF] and [BCPSEA]. The class size restrictions were negotiated into collective agreements in various districts between 1987 and 1994. The ratios for non-enrolling teachers and K-3 classes were legislated into collective agreements by the previous government in 1998.
>
> Bill 28 [*PEFCA*] amended the *School Act* to exclude some issues, such as regulations on class size or student/teacher ratios, from the scope of bargaining with the BCTF. Bill 28 also required the appointment of an arbitrator to determine whether collective agreements between the BCTF and the BCPSEA contained provisions regarding the prohibited issues, and to delete any such provisions from the collective agreements.
>
> Bill 27 [*ESCAA*] deemed collective agreements between the BCTF and BCPSEA to be amended by the deletions determined by the arbitrator.
>
> ...
>
> The proposed legislation would implement the intent of Bills 27 and 28, which was to exclude some issues from the scope of bargaining.

[241] I have already concluded that s. 8 of *PEFCA* interfered with collective bargaining.

[242] The *Amendment Ac*t restored the decision of the arbitrator deleting provisions of the collective agreement. The arbitrator's approach to deletions from the collective agreement was broader in scope than was required by s. 8 of PEFCA, according to the decision of Shaw J., which was never appealed. By rendering void hundreds of provisions of the collective agreement, clearly the *Amendment Act* also interfered with collective bargaining.

Preservation of "Manner and Consequences" Bargaining

[243] The *Amendment Act* adopted the deletions of the arbitrator for the term of the collective agreement, effective July 2002. The BCTF and BCPSEA collective agreements were for two year periods.

[244] The government argues that after this two year period, the decision of Shaw J. and s. 28 of the *School Act* applied, and so the BCTF was free to collectively bargain over the "manner and consequences" of the matters enumerated in s. 27 (3)(d) to (j), so long as to do so was not contrary to the *School Act* s. 28 (2) or (3).

[245] This argument took the BCTF by surprise. It says that every time it subsequently attempted to negotiate over "manner and consequences", BCPSEA refused on the basis that it was not negotiable because of the *Amendment Act*. There is no evidence that government representatives advised BCPSEA that this position was incorrect. It has to be kept in mind that senior representatives of government were on BCPSEA's bargaining team.

[246] However, BCPSEA also took the position that it would refuse to bargain "manner and consequences" in any event, even if it was not illegal. Because of this, the Labour Relations Board held that BCPSEA's position was not bad faith bargaining: *B.C.P.S.E.A. and B.C.T.F.*, BCLRB Decision No. B136/2006, 124 C.L.R.B.R. (2d) 167.

[247] Members of the government took the position that bargaining over "manner and consequences" was contrary to the *Amendment Act* at the time of its introduction. The briefing note for the Minister introducing the legislation stated that Mr. Justice Shaw's interpretation of s. 28 "expanded" the scope of bargaining, and that the *Amendment Act* legislatively overruled that decision. The government now insists these positions were wrong.

[248] While no doubt BCTF wishes that the government's present interpretation came much earlier, both sides now agree with the proposition that the interpretation of Shaw J. regarding the "manner and consequences" application of s. 28 of the *School Act*, is correct and continued to apply to future bargaining, regardless of the *Amendment Act*.

[249] Returning to the judgment of Shaw J., he found at paras. 59-60 that the wording of s. 27 (3)(d), (f), (g) and (i), "restricting or regulating a board's power to...", precluded any scope of collective bargaining over the "manner" in which the power could be exercised (through application of s. 28 (2)), although bargaining over "consequences" was preserved by s. 28 (1).

[250] Thus, by virtue of s. 8 of *PEFCA*, enacting s. 27 (3)(d), (f), (g) and (i) of the *School Act*, the government prohibited terms in a teachers collective agreement restricting or regulating a board's power to establish class size and composition; assign a student to a class; determine staffing levels or staff ratios; or determining the number of students assigned to a teacher. As found by Shaw J., the breadth of these prohibitions also meant that there was no preserved ability to bargain concerning the "manner" in which the board's power on these subjects was exercised. Pursuant to this and the *Amendment Act*, in practical terms, all that was left pursuant to the judgment of Shaw J. interpreting s. 28, was a limited ability to bargain over "consequences" of the board's exercise of powers in this regard in the future.

[251] Shaw J. found that s. 28 did preserve the teachers right to bargain over the "manner and consequences" of the matters under s. 27 (3)(e), (h) and (j), based on the wording of these provisions. Shaw J. did not give examples of how this might work, given the breadth of s. 27 (3)(d), (f), (g) and (i). The matters in s. 27 (3)(e), (h) and (j) dealt with the establishment of class size limits, minimum number of teachers or other staff, or maximum or minimum case loads, staffing loads or teaching loads. These matters were just another way of stating the board's wide powers under s. 27 (3)(d), (f), (g) and (i). When considering these subsections together, it can be seen that they did not leave teachers much, if any, room to bargain about "manner".

[252] In other words, since the teachers could not negotiate over the "manner" in which a board restricted or regulated class sizes or staffing ratios or number of students assigned to a teacher (s. 27 (3)(d), (f), (g) and (i)), then it is hard to conceive much scope for the teachers to negotiate the "manner" in which class size

limits, minimum number of teachers or other staff, or teaching loads were established by the Board pursuant to s. 27 (3)(e), (h) or (j).

[253] I conclude that the preserved ability to bargain over "manner and consequences" was, for practical purposes, insignificant with respect to "manner" and limited with respect to "consequences", given the broad scope of s. 27 (3)(d), (f), (g) and (i).

Combination of ss. 8 & 9 of PEFCA and s. 5 of Amendment Act

[254] Thus, the impact of the combined legislation, ss. 8 and 9 of *PEFCA* and s. 5 of the *Amendment Act*, was to:

(a) delete hundreds of provisions of the existing collective agreement; and,

(b) prohibit BCTF from negotiating or including in a future collective agreement terms that offended s. 27(3)(d) to (j) of the *School Act*, restricting or regulating a school board's power to establish or determine class size limits, class composition, staffing ratios, minimum number of teachers or other staff, number of students assigned to a teacher, and teaching loads;

(c) however, BCTF could attempt to negotiate in the future a very limited and undefined scope of some "manner and consequences" of some school board determinations of the above matters, by virtue of s. 28 of the *School Act* and the decision of Shaw J.

[255] The legislation deleted hundreds of terms of the collective agreement. Many of these terms dealt with subject matters that the parties had been actively negotiating for several months, with the BCTF providing several proposals dealing with these terms at the bargaining table. All of this negotiating exercise and effort was for naught.

[256] Further, the ability to bargain in the future was considerably restricted. Boards were given wide discretion. For practical purposes, it is likely that the best the union might be able to do is negotiate over the consequences of the board's

exercise of discretion. This had substantially less scope than the ability to bargain over the establishment of class size and composition limits and workload limits.

[257] By negating terms of a collective agreement, and precluding a significant scope of bargaining in the future, I conclude that ss. 8 and 9 of *PEFCA* and s. 5 of the *Amendment Act* interfered with collective bargaining.

Section 15 of PEFCA

[258] Section 15 of *PEFCA*, by adding 78.1 (1) to the *School Act*, eliminated or voided provisions in the collective agreement that limited or restricted the Board's ability to implement changes to hours of work in a day or days of work up to and including year round schooling. By changing s. 78.1 (2), it voided any collective agreement provisions which restricted the power of a School Board to "establish, vary, extend, or amend" the scheduling of educational or other programs in a day, the hours, days, weeks and months in which educational programs are to be provided, and the days on which teachers and others are scheduled to be available for not only teaching but also non-instructional or administrative activities.

[259] The government says that consultation with teachers was preserved in the legislation by s. 14 of *PEFCA*. It amended s. 78 of the *School Act* by adding subsection (3.1), which provided that a board could not adopt a school calendar different from the standard calendar, unless it had consulted with parents and representatives of employees assigned to that school. This consultation was required as a condition precedent to the prohibition introduced in the new s. 78.1.

[260] In other words, s. 15 of *PEFCA* had the effect of providing that, so long as a board set its school calendar after consulting with parents and representatives of employees of that school (in accordance with new s. 78 (3.1) of the *School Act*), then a collective agreement provision that limited or restricted the board's power to set the school calendar, or purported to do so, was void in respect of that school (new s. 78.1 (1) of the *School Act*). Further, any provisions in the collective agreement attempting to restrict the board's power regarding the scheduling of

delivery of educational programs, hours of work, and days for instructional or non-instructional activities, would also be void (new s. 78.1 (2) of the *School Act*).

[261] The government says that BCTF has not shown any provision of the collective agreement in place that was invalidated by this legislation. This argument fails to recognize how the legislation was to work. What s. 78.1 of the *School Act* did was prospectively render void collective agreement provisions, where the school boards complied with s. 78 (3.1). Since s. 78 (3.1) was new, school boards had not yet complied with it and so no collective agreement provisions had yet been rendered void.

[262] Even if no existing terms of the collective agreement were repudiated by s. 15 of *PEFCA*, before the legislation was introduced the employees had the right to collectively bargain over the terms of a school calendar that a board might set as different from the standard calendar, and over such things as the their hours and days of work. The legislation effectively took away the teachers' right to negotiate over their required hours of work or length of the school year. How many hours of work an employee must work in a day and year is clearly a fundamental working condition.

[263] The legislation did require some prior consultation, by virtue of s. 78 (3.1), but it did not prescribe the nature or degree of consultation required of a school board. However, the consultation was not the equivalent of collective bargaining, as it was consultation with representatives of the employees of the board assigned to the affected school, as opposed to a wider collective group. Furthermore, at the same time as some local employees were to be consulted, parents of students enrolled in the school were also to be consulted. As school boards were typically elected by parents and sensitive to parents' wishes, the inclusion of parents in the consultation process diluted the teachers' voice in the matter. By equating the two forms of consultation, parents and teachers, the requirement of consultation minimized any bargaining strength that local teachers might have on these issues.

[264] By prohibiting the inclusion of terms in a collective agreement dealing with hours and days of work, s. 15 of *PEFCA* rendered meaningless future collective bargaining on these issues. It therefore interfered with collective bargaining.

Section 4 of ESCAA

[265] Section 4 of *ESCAA* is the "merger amendment" by which the government enacted legislation to get rid of duplication of local agreements within a single school district.

[266] In 1996, the government had amalgamated school districts, reducing the total number of school districts to 59 from 75 (since then an additional school district was added, bringing the total to 60). This was done by abolishing 31 school districts and school boards and creating 15 new school districts and boards in their place. The legislation did not, however, address the consolidation of previous local collective agreements.

[267] While BCTF's own bylaws required local unions to amalgamate, this only occurred in six of the 15 new districts. When *ESCAA* was introduced in January 2002, eight of the amalgamated districts had two previous local agreements in place, and one district had three previous local agreements in place. Section 4 of *ESCAA* was meant to accomplish merger of the agreements in these remaining nine districts.

[268] The government unilaterally decided through this legislation which local agreement would apply to the entire school district, and rendered void any terms of any other local agreement. Column A of the legislation listed the collective agreements that would survive; Column C listed the collective agreements that would be void as of July 1, 2002.

[269] Given the then existing two-tier structure of the collective agreement, the various local agreements all had the same provincial terms. There were differences in local matters. Where the agreements in Column C had superior terms to those being imposed in Column A, affected employees were unhappy.

[270] The legislation was assented to on January 27, 2002 but as noted, the merger amendment was not going to be effective until July 1, 2002.

[271] The government argues that although *ESCAA* made no express provision for a negotiated outcome with respect to amalgamation, neither did it prohibit such negotiations. Negotiations did in fact ensue. The government argues that in each of the amalgamated school districts that had had multiple local agreements in place, the parties were able to negotiate a consolidated agreement before July 1, 2002, when s. 4 came into effect.

[272] However, the negotiated consolidated agreement was based on a Letter of Understanding dated June 25, 2002 that expressly stated it was "without prejudice" to BCTF's position in respect of *ESCAA* and *PEFCA*, "including any legal or other challenges".

[273] By the time of the Letter of Understanding, BCTF had commenced this proceeding on May 30, 2002, challenging Bill 27 and Bill 28 as violating teachers' *Charter*-protected freedoms.

[274] I therefore do not consider the Letter of Understanding to be an answer to this court challenge to s. 4. It was without prejudice to this proceeding.

[275] It is clear that s. 4 of *ESCAA* voided some negotiated terms of the collective agreement. As such, it interfered with collective bargaining.

Conclusion on Interference

[276] At the first stage of analysis of the legislation, I have concluded that the impugned legislation, ss. 8, 9 and 15 of *PEFCA*, and s. 4 of *ESCAA*, interfered with the process of collective bargaining, by voiding previously negotiated terms of collective agreements, or prohibiting collective bargaining on matters that had previously been the subject of bargaining, or both.

[277] The second stage of analysis set out in *Health Services* requires consideration of whether or not the interference with the right of employees to engage in collective bargaining was substantial.

Was the Interference Substantial?

[278] There is a two-fold inquiry involved in the analysis of whether or not government interference with collective bargaining is substantial: first is an inquiry into the nature of the affected right, and its importance to the workers; second is an inquiry into the process or method by which the changes were made, including whether or not the changes were made through or preserved a process of good faith negotiation or consultation.

[279] There are two general categories of issues dealt with by the impugned legislation:

(a) class size and composition, non-enrolling ratios, work load, and school calendaring, including hours and days of work; and

(b) the merger of local agreements into one local agreement.

The Working Conditions Provisions: Importance

[280] I will first address the first group of issues, which I will describe as the working conditions provisions, affected by ss. 8, 9 and 15 of *PEFCA*, and s. 5 of the *Amendment Act*.

[281] If an employment term is important to the workers' conditions of employment, and the ability to collectively bargain on it is negated by government action, this seriously undermines the whole point of collective bargaining for the workers and their substantive freedom to associate. This is so even though freedom of association does not guarantee any specific outcome of collective bargaining. The mere fact that workers are prohibited from bringing significant issues to the bargaining table, regardless of outcome, is an interference with their right to freely associate to try to influence these issues.

[282] However, *Health Services* explains that if an employment term is relatively insignificant to working conditions, the inability to bargain on this term does not necessarily undermine the process of collective bargaining generally.

[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.

[284] Teachers have been trying to influence these working conditions since they first began to form associations.

[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. Ms Lanzinger explained this in detail in her affidavit:

> 7. The size and composition of the class to which a teacher is assigned is the single most important determinant of the actual working conditions of a teacher. A teacher's work includes both time spent instructing in class, and time spent beyond direct instruction, which the teacher has determined is necessary to, or flows from, direct instruction to students. ...
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> 8. In the B.C. school system, students with special needs who have been tested and designated as having certain physical or mental disabilities, learning or health challenges or behaviour issues, receive Individual Education Plans ("IEPs").
>
> 9. IEPs are learning plans that teachers are required to follow for students and set out educational goals, strategies and methods which respond to the unique situation of each student. IEPs often have requirements for teachers to adapt or modify materials, lessons, learning objectives and testing for students. IEPs can range from minor accommodations in the classroom to significant additional work for teachers, and the requirement for additional staffing.
>
> ...

[286] Ms. Lanzinger pointed out that teachers are responsible for assessing the educational needs of each individual student in their class, and ensuring those

needs are met. They must take into account the physical and emotional well being of their students, maintain order in the classroom, and ensure that the environment is conducive to learning for all students. Accordingly, the number and composition of students in each class is a critical element of their working conditions.

[287] Ms. Lanzinger's evidence made it clear that teachers are supportive of the integration of special needs students, so long as class sizes are adjusted accordingly, and proper support is provided, such as teaching assistants.

[288] A teacher's work is done both inside and outside of the class room. Teachers must prepare lessons and learning materials, assess individual student progress, arrange special assistance for students in need, perform administrative tasks and marking, and meet outside of classroom hours with students and parents to discuss learning outcomes and disciplinary issues. Increases in class sizes not only impact the management of the classroom, they also result in a greater workload. These effects are compounded the greater the number of special needs students integrated into the classroom, and the fewer the supports from non-enrolling teachers (specialist assistants and other support staff).

[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: *Health Services* at para. 52, citing Bryan D. Palmer, *Working-Class Experience: Rethinking the History of Canadian Labour, 1800-1991*, 2d ed. (Toronto, Ont: McClelland & Stewart, 1992) at 111.

[290] Here, all of the subjects of ss. 8 and 9 of *PEFCA*, and s. 5 of the *Amendment Act* 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.

[291] The length of the school day, and the days of the year that teachers must work at a school, are also clearly fundamental to a teacher's working conditions. School boards were given virtually absolute power to determine these issues by virtue of s. 15 of *PEFCA*.

[292] It must be acknowledged that the teachers retained some limited processes after the challenged legislation. Teachers could negotiate in a very limited and undefined way some "manner and consequences" of school board decisions regarding class size and composition, non-enrolling ratios and work load. Teachers could file a grievance if a school board exceeded the legislated class size limits. Local teachers also had to be consulted on a school calendar that varied from the standard, before a Board could exercise its absolute powers regarding hours and days of work. I will return to the impact of these matters when I analyze the issue of whether or not the legislation minimally impaired the *Charter* right to freedom of association. However, these matters did not preserve any process similar to collective bargaining over the matters removed from the scope of collective bargaining by the challenged legislation.

[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.

[294] Commentators, commissioners of inquiry such as Korbin, labour tribunals nationally and internationally, as well as the courts, recognize that a fundamental precept of collective bargaining is equality of bargaining strength. In *Health Services*, the Court cited an early article by then Professor Bora Laskin as follows, at para. 29:

> Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength.
>
> ("Collective Bargaining in Canada: In Peace and in War" (1941), 2:3 *Food for Thought*, at p. 8.)

[295] It is clear from the history of teachers' labour relations that they have long considered their working conditions a significant priority to be negotiated collectively, and this includes the conditions of class size and composition, non-enrolling ratios, and hours of work. I conclude that the legislation purging the collective agreement of these matters, and prohibiting future collective bargaining over these matters, interfered with the teachers' ability to come together to collectively pursue goals, and significantly undermined the teachers' s. 2 (d) *Charter* guarantee of freedom of association.

The Working Conditions Provisions: The Process

[296] I have found that sections 8, 9 and 15 of *PEFCA*, and s. 5 of the *Amendment Act*, amounted to interference with the teachers' ability to collectively bargain on matters of significant importance to them. I must now consider whether the method of bringing about this legislative change otherwise preserved the essential underpinning of collective bargaining: voluntary good faith negotiation and consultation.

[297] If the government prohibited collective bargaining through legislation, but otherwise in the process of implementing the legislation replaced collective bargaining with an equivalent process of good faith consultation or negotiation, then the legislation might not be an interference with freedom of association. However, if in the process of legislating limits to collective bargaining the government did not otherwise allow employees to influence the legislative process or outcome in association, then the interference with s.2 (d) rights will be considered substantial.

[298] Here, the legislative changes were brought about without any consultation with the teachers' union.

[299] In addition, when considering the changes, the government informed and sought the advice of only one side to the bargaining table about its proposed changes, the employer side, BCPSEA. This occurred in the midst of collective bargaining, distorting the balance of power at the negotiating table and giving BCTF a distinct disadvantage in the bargaining.

[300] It is worth noting that it is likely that in including these working conditions in their past collective agreements, prior to the impugned legislation, the teachers made "trade-offs" of other demands in collective bargaining. The lack of consultation in the legislative process sent the message to teachers that whatever time and effort and sacrifices they might put into the collective bargaining process, it was all subject to the government overriding the process without any consultation. This seriously undercut the utility of collective bargaining.

[301] The historical evolution of collective bargaining as a protected right recognizes that there is a psychological benefit to workers to be able to collectively bargain over their working conditions, a benefit that goes beyond the economic benefits they might obtain. As held in *Health Services* at para. 86, recognition of the right to collectively bargain as part of the freedom to associate "reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*."

[302] Allowing workers a process to have a voice in their working conditions, regardless of the outcome, is thought to have a mediating or therapeutic impact on industrial conflict. It has been regarded as a form of industrial democracy, where the worker gains a sense of worth and freedom by the ability to participate: Karl E. Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978) 62 Minn. L. Rev. 265 at 281-284, cited in *Health Services* at para. 57. It is only common sense that citizens who participate in a lawful collective bargaining process resulting in an agreement that affects the way

they earn their very livelihood, will feel more like partners in the employment relationship, to the benefit of the entire community.

[303] The Korbin commission summarized school boards' views on the strengths of collective bargaining as follows at p. F24:

> The major strength of the present collective bargaining arrangement is that both parties are responsible for living within the contract they negotiate. There is more incentive for both parties to take long term relationships and the feelings of the community into account. There is also the opportunity of both parties to work together on problems during the course of the contract without worrying about stepping outside the bounds of their authority. The parties that are working on the problem are also the parties that will be negotiating when the contract comes up for renewal.

[304] The Korbin Report gave the example of the Prince George teachers and school board who united to make joint submissions to the commission. That joint submission commented on the success of their employee-employer relationship which enabled them to achieve an early settlement in later collective bargaining, despite the fact that in their first round of bargaining there was a prolonged legal strike.

[305] Conversely, the inability to participate in collective bargaining about one's working conditions can exacerbate industrial conflict. Workers who negotiated and relied on the give and take of negotiations and the resultant collective agreement will likely feel betrayed, disrespected and disheartened if their negotiated collective agreement is subsequently torn up by the state.

[306] Here, the legislation voided existing terms of the collective agreement, and prohibited terms on the same subject matter from being included in a future collective agreement. It also prohibited any term that would require BCPSEA to negotiate with BCTF over replacement terms with respect to these matters. As such, it negated any process for voluntary good faith bargaining and consultation on these matters.

[307] By passing this legislation without so much as consulting with BCTF, the government did not preserve the essential underpinning of collective bargaining, namely, good faith negotiation and consultation.

The Working Conditions: s. 2 (d) Conclusion

[308] Legislation that is enacted without consultation with the employees, which invalidates collective agreement terms and prohibits future collective bargaining on subjects that were previously the subject of collective bargaining, clearly infringes s. 2 (d) of the *Charter*, as held in *Health Services*: see paras. 119-122, 128,182. I am persuaded that in enacting ss. 8, 9 and 15 of *PEFCA*, and s. 5 of the *Amendment Act*, the government did all these things, and this constituted a violation of the teachers' freedom of association guaranteed by s. 2 (d) of the *Charter*.

The Merger Amendment: Importance and Process

[309] I will now embark on the same analysis with respect to s. 4 of *ESCAA*: the importance of the provision and the extent to which the process of collective bargaining was interfered with or preserved.

[310] The merger amendment did interfere with matters that had been collectively bargained. However, while those groups of teachers who lost the benefit of certain local agreements might not have had influence in the negotiation of local terms that were now deemed to apply to them, those local terms had been negotiated by their union for another group of teachers. The arbitrary selection by the legislature of one local agreement over another was of temporary effect, until a newly negotiated local agreement could be reached.

[311] As such, I find that this interference was not as significant as the other legislation removing subject matters from collective bargaining and prohibiting such negotiations moving forward.

[312] Even if I am incorrect on the significance of s. 4 of *ESCAA*, it left open a process for future good faith negotiation. Prior to the legislation, both sides to the negotiating table had recognized the need to have only one local agreement in each

school district. While the legislation preferred one local agreement over another and failed to consult with BCTF before doing so, the legislation did not prevent the parties from negotiating their own middle ground both prior to and after the legislation was to take effect. Teachers who lost the benefit of one set of local provisions could still negotiate about the same subject matters within the same school district.

[313] Furthermore, all teachers were already subject to one overall bargaining unit, and provincial bargaining agent, the BCTF. The province-wide terms of the collective agreement applying to them were not affected by the merging of local agreements.

[314] In *Alberta Union of Provincial Employees v. Alberta Health Services*, 2010 ABQB 344 [*AUPE*], the Alberta Labour Relations Board established province wide bargaining units for four employment areas in Alberta Health Services, merging previous bargaining units. In dismissing the application for judicial review brought by the unions representing the previous bargaining units, based on their claim that s. 2 (d) of the *Charter* had been violated, Belzil J. wrote at para. 58:

> Without exception, every subject of collective bargaining which could have been pursued by the applicant unions when there were multiple RHAs can be pursued in the context of a single province-wide bargaining unit.

[315] The decision in *AUPE* is analogous to the impact of s. 4 of *ESCAA*. The merger of the collective agreements, much as the merger of the bargaining units in Alberta, preserved the ability for future collective bargaining. It did not undermine the role of the union, or the utility of bargaining collectively.

The Merger Amendment: s. 2 (d) Conclusion

[316] In summary, the teachers' scope of collective bargaining was not limited by s. 4 of *ESCAA*. I have concluded that s. 4 of *ESCAA* did not amount to a substantial interference with the union's ability to engage in collective bargaining and thus did not violate s. 2 (d) of the *Charter*.

Are the s. 2 (d) Violations Justified Under s. 1 of the *Charter*?

[317] The *Charter* guarantees rights and freedoms which are part of Canada's Constitution and supreme law, and embodies the values our laws consider essential to a free and democratic society. The Canadian Constitution thus limits government powers. Where government conduct seeks to infringe upon those fundamental rights and freedoms, it must meet the requirements of s. 1 of the *Charter*: it must be a reasonable limit that can be demonstrably justified in a free and democratic society. Section 1 of the *Charter* provides:

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

[318] This brings me to the last question that arises in the analysis: whether the violations of s. 2 (d) of the *Charter*, caused by the enactment of ss. 8, 9 and 15 of *PEFCA*, and s. 5 of the *Amendment Act*, are reasonable limits that can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Charter*.

[319] The majority judgment of the Supreme Court of Canada in *Health Services* gave examples of where section 1 of the *Charter* may justify a violation of s. 2 (d), at para. 108:

> [Section 1 of the *Charter*] may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis.

[320] Any s. 1 analysis must always be mindful of the particular context of the legislation at issue. As summarized in *Health Services* at para. 139, this requires considering the nature of the harm sought to be addressed by the challenged legislation, the vulnerability of the group protected by the legislation, ameliorative measures considered to address the harm, and the nature and importance of the infringed activity. I have kept these factors in mind when setting out the contextual background, above, and in approaching the s. 1 analysis.

[321] I am further guided by the remarks of McLachlin J, as she then was, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, where she wrote at para. 133:

> That the s. 1 analysis takes into account the context in which the particular law is situate should hardly surprise us. The s. 1 inquiry is by its very nature a fact-specific inquiry. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.

[322] The onus rests on the government to satisfy the s. 1 test on a balance of probabilities. In other words, it is the government which must establish that the government imposed limit on a *Charter* guaranteed freedom is "demonstrably justified".

[323] As explained earlier in this judgment under the heading "Analytical Framework", the s. 1 analysis involves four steps, each of which I will address in turn.

Pressing and Substantial Objective

[324] While the government must establish that the challenged legislation had a pressing and substantial objective as part of the s. 1 analysis, there is no requirement that this be verified by evidence of the type needed to adjudicate facts.

[325] The Supreme Court of Canada noted this point in *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527 at para. 32:

> The law is clear that the first stage of the s. 1 analysis is not an evidentiary contest. As my colleagues recognized in *Harper*, "the proper question at this stage of the analysis is whether the Attorney General *has asserted* a pressing and substantial objective": *Harper*, at para. 25, *per* McLachlin C.J. and Major J. (emphasis in original). McLachlin C.J. and Major J. went on to note that "[a] theoretical objective asserted as pressing and substantial is sufficient for purposes of the s. 1 justification analysis": see para. 26.

[326] I will now consider the government submissions as to the stated objectives of the challenged legislation.

Sections 8, 9 and 15 of PEFCA

[327] The government stated in its written submission that the objective of *PEFCA* as a whole was to give school boards more flexibility and at the same time give all stakeholders, including teachers and parents, a voice in the decision-making process, as follows:

> The objective of Bill 28 for the public school system was to give the local, elected school boards more flexibility to manage class sizes and composition of those classes, flexibility to make their own decisions on how best to meet students needs and to respond to choices of parents and students and flexibility to make their own decisions on better use of facilities and human resources in order to ensure that public education was available to everyone. Included in this objective was an intent to give all stakeholders including teachers, principals, vice-principals, trustees and parents a voice in this decision-making process.

[328] The above submission left out any reference to non-enrolling ratios, hours and days of work or school calendaring, but I will assume the stated objective was intended to apply to all of these issues.

[329] It can be seen then, that when it came to the objective of the legislation, the government did not argue that *PEFCA* must be considered in context of an education system crisis or that there was a need to allow for more-timely decision-making by management in the best interests of students, and that this necessitated the legislation. This distinguishes the case from *Health Services*: see paras. 144-147.

[330] Furthermore, the objective of the challenged legislation, as argued by the government and on the face of the legislation, was not aimed at improving the collective bargaining relationship or responding to a crisis in collective bargaining.

[331] The government's submission as to the objective of the legislation did not distinguish between the legislation as a whole, and the provisions at issue. It would have been more helpful had it done so. Contrary to the government's written

submission, there was nothing in the impugned provisions of the legislation which gave teachers a voice in the decision-making process about class size and composition. This was conceded by the government in oral argument. Rather, the legislation expressly took away the teachers' voice in these decisions. Therefore this could not have been an objective of the provisions of the legislation which are the subject of this challenge.

[332] Arguably, the legislation gave teachers a limited voice where a school board might wish to vary the standard school calendar, pursuant to s. 78 (3.1) of the *School Act* requiring consultation. However, they had a larger voice before as they could raise these matters in collective bargaining, and so this is not a section of the legislation that is challenged by the teachers.

[333] The majority decision in *Health Services* expressed scepticism as to whether the objective of cutting costs, or increasing management rights, would be considered a pressing and substantial objective justifying interference with s. 2 (d) rights: at para. 147. This scepticism is logical, otherwise the protection of collective bargaining rights would be largely meaningless since the whole process of public sector collective bargaining involves the government-funded side of the table, the employer, having to negotiate over employee rights and costs.

[334] BCTF argued strongly that the objectives of increasing management rights and cost-savings were the true government objectives of the challenged legislation. It argued that this is what greater "flexibility" for school boards meant: greater management rights and the ability to cut costs by increasing class sizes without interference from the teachers' union.

[335] There was some strength to BCTF's argument, and indeed some evidence to support it. When the Treasury Board of the government analyzed the cost implications of the proposed impugned legislation in November 2001, it estimated that the legislation would provide for annualized savings of $275 million. These savings were below the government's desired budget targets for education. At that time, the class size limit thresholds being considered in draft legislation were lower

than what was ultimately implemented by the legislation. Further, the estimate noted that it did not include any savings in capital expenditures, but it was thought that the larger class sizes might result in fewer classrooms and cancellation of new schools, providing even more savings.

[336] There is no evidence as to how the higher average class sizes were ultimately arrived at in the impugned legislation.

[337] While the government also asserted that class size and composition are matters of educational policy, logically this argument can only apply to the legislated class size maximums, which the teachers do not challenge. The unchallenged legislation set the upper limit of class sizes, but the legislation did not set the lower limit. The teachers challenge the fact that the legislation removed their right to collectively bargain for lower class sizes and other class composition issues. The challenged legislative provisions did not make these matters the exclusive subject of a cohesive government educational policy, but rather, gave exclusive decision-making on these matters to school boards, ensuring that they would be unfettered by collective bargaining and collective agreements.

[338] There was some evidence to support the government position that its objectives with the legislation were broader than simply cost savings and included providing flexibility to school boards. BCPSEA and school administrators had presented stories that suggested to the government that class size limits imposed by the 1998-2001 Collective Agreement were causing hardships to families. The legislation did serve the government objective of providing more flexibility to school boards to manage school resources and to accommodate student and parent choices, as the legislation gave school boards complete discretion with respect to these matters so long as it was exercised within the new legislated class size maximums.

[339] I will therefore accept that the objectives of ss. 8, 9 and 15 of *PEFCA*, as stated by the government, 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, was a pressing and substantial objective.

Section 5 of the Amendment Act

[340] The government argued in its written submission that the objectives of the *Amendment Act* were to:

> ...bring about labour peace in the schools by imposing a collective agreement at a particularly turbulent time, to support the objectives of [*PEFCA*]...

[341] The evidence suggests that one of the reasons that April 2004 might have been a "turbulent time" for labour, was that the government had imposed *PEFCA* in January 2002 without consultation with the BCTF, the consequential arbitration had resulted in deletion of hundreds of provisions of the collective agreement, and Shaw J. of this Court had overturned the decision of the arbitrator. Regardless, I have found that the government's objectives with *PEFCA* were pressing and substantial, and so s. 5 of the *Amendment Act*, which was pursuing the same objectives, was equally so.

Was there a Rational Connection Between the Means Adopted by the Act and the Pressing and Substantial Objective?

[342] Just as judicial deference is shown to a government's stated objective of legislation, so too is deference shown to the government's explanation of how the legislation hopes to achieve that objective. The rational connection test has been described by the Supreme Court of Canada as "not particularly onerous": *Health Services* at para. 148, citing *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* 2000 SCC 69, [2000] 2 S.C.R. 1120 at para. 228. This recognizes the political nature of the legislative process.

[343] The means chosen to give school boards greater flexibility, the broadly stated objective of ss. 8, 9 and 15 of *PEFCA*, was to give school boards greater independence and power to decide the issues of class size, composition and the like, without needing to deal with union demands on these issues in collective

bargaining. There is a rational connection between those objectives and the legislation.

[344] If the objective of s. 5 of *the Amendment Act* was to bring about "labour peace" in the schools, it is more difficult to see how the legislation was crafted to achieve that. It gave no voice to teachers, one side of the labour issue, and had the effect of overturning a court decision in the teachers' favour. It is difficult to see how this could do anything but bring about labour unrest, not labour peace.

[345] Legislated collective agreements can impair dialogue and the collective bargaining process, as noted by the BC Labour Relations Board in *Health Employers' Ass'n of British Columbia and H.E.U.*, BCLRB Decision No. B395/ 2004, 109 C.L.R.B.R. (2d) 1 at para. 84:

> However, having established this public policy and statutory framework, governments have reacted to public pressure and imposed collective agreement terms by legislation to end several disputes. While the legislation may end a dispute it cannot force cooperation, it cannot force creative and innovative thinking to find long term solutions to problems and it cannot force the necessary dialogue to create productive, flexible and adaptable workplaces. Imposing terms of a collective agreement by legislative intervention has a chilling effect on the long term collective bargaining relationship. Parties may not be motivated to find collaborative solutions and will let government make the tough choices; or parties may reach a short term strategic solution in order to avoid the legislative "hammer", but the long term relationship may not be improved.

[346] However, given that an objective of s. 5 of the *Amendment Act* was to support the objectives of ss. 8, 9 and 15 of *PEFCA*, I conclude that the means chosen was rationally connected to this goal.

Does the Legislation Minimally Impair the Charter Right?

[347] The court must give the government a "margin of appreciation" when considering whether legislation "minimally impairs" a *Charter* right. The test is not whether the court could conceive of a measure that would be less intrusive of a *Charter* right. Where the measure adopted falls outside a range of "reasonable alternatives", and does not impair the *Charter* right "as little as reasonably possible",

the court will find it does not satisfy the minimal impairment test: *Trociuk v. British Columbia (Attorney General),* 2003 SCC 34, [2003] 1 S.C.R. 835 at para. 36.

[348] In finding that the legislation in *Health Services* did not meet the minimal impairment test, the Supreme Court of Canada gave considerable weight to two factors: the fact that the government had "virtually no consultation" with the unions; and the fact that the government presented "no evidence as to why this particular solution was chosen": at paras. 156 and 158. These factors are also present in this case.

[349] The government advanced two arguments under the "minimal impairment" analysis.

[350] First, the government said that the challenged legislation preserved collective bargaining as much as it could. This was done by continuing to permit collective bargaining over the "manner and consequences" of the exercise of powers by a school board over matters of class size, composition and related matters. As well, workers could continue to file a grievance. Teachers would also be consulted before a school board could change the hours and days of work.

[351] Second, the government says that it should be allowed a greater "margin of appreciation" for the means it chose, because the government faced exigent and urgent circumstances.

[352] There are several problems with the government's position.

[353] The government's argument with respect to "manner and consequences" disregards the fact that at the time the legislation was enacted, the government did not appear to appreciate that bargaining the "manner and consequences" was permitted by existing provision s. 28 of the *School Act*. In other words, the government objective at the time it introduced *PEFCA*, followed by s. 5 of the *Amendment Act*, appeared to be to broadly exclude the subject matter of new s. 27 (3)(d) through (j) of the *School Act* from collective bargaining, hence the overlapping and duplicative nature of subsections (d) through (j).

[354] Further, the challenged legislation, including s. 5 of the *Amendment Act*, voided vast numbers of provisions of an existing collective agreement. This was not preserved by any "manner and consequences" language.

[355] Most importantly, the ability to bargain "manner and consequences" preserved in s. 28 (1) of the *School Act* was very narrow given s. 28 (2) and (3) and the broad powers given to school boards under s. 27 (3)(d) through (j), as I have already reviewed above.

[356] The government has not pointed to one practical example of how the ability to negotiate over "manner and consequences" might be effectively used by BCTF to advance teachers' collective interest in their working conditions. The fact that BCPSEA refused to negotiate over "manner and consequences" illustrates how little bargaining power was left to BCTF by the legislation over these matters: it was left with virtually none.

[357] In addition, teachers maintained the right to file a grievance if a school board violated the legislated class limits in the *School Act*, as recognized by the British Columbia Court of Appeal in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2005 BCCA 92 [*BCTF v. BCPSEA (2005) CA*]. That case dealt with the issue of whether or not BCTF had a remedy if school boards violated the class size limits set out in the amendments to the *School Act* enacted by *PEFCA* in 2002. The Court noted that although the legislation had purged class size from collective agreements, the legislation was silent about whether a dispute about an alleged violation of class size requirements of the *School Act* could be resolved by arbitration pursuant to the *Labour Relations Code*, or could only be resolved by judicial review.

[358] In deciding that the matter could be resolved by arbitration pursuant to the *Labour Relations Code*, the Court of Appeal in *BCTF v. BCPSEA (2005) CA* found that class size was a significant condition of employment:

> 37 It seems to me that it is significant that the subject of class sizes was negotiated in collective bargaining between teachers and school boards

> before the 2002 legislation and was clearly, in the past, regarded by the parties as a term or condition of employment. The fact that the subject of class sizes can no longer be negotiated nor have any place in the collective agreement of the parties does not make that subject any less a term or condition that affects the employment relationship. The legislation simply transfers those terms or conditions from negotiated determination to statutory determination. So I regard class sizes and aggregate class sizes as a significant part of the employment relationship. If the statutory determination of class sizes is violated that would surely constitute an improper application of the management rights clauses in the collective agreement, in breach of s. 76.1 of the *School Act* and the *Class Size Regulation*. But it would also affect other terms of the collective agreement such as a decrease in the number of teaching staff leading to dismissals or lay offs, and such as health issues arising from stress. These are only examples. The point is that such a violation is closely connected in a contextual way to the interpretation, operation, and application of the collective agreement and directly affects it.
>
> [Emphasis added.]

[359] The fact that workers could still attempt to influence the consequences of school board decisions on their working conditions, and could still file a grievance if the school board violated the legislated class size provisions, does not detract from the broad scope of the removal of the right to bargain over these matters, and the fact that the government reached its decision to legislate without any consultation with the BCTF.

[360] As for the consultation that was required before a school board could change the hours and days of work, pursuant to new s. 78 (3.1) and s. 78.1 of the *School Act* (the latter brought in by s. 15 of *PEFCA*), this appears to be a minimal protection not a minimal impairment. On a spectrum of importance of working conditions, the hours and days of work are some of the most fundamental conditions affecting a worker. The legislation gave the employer full power to change these fundamental conditions, and prohibited any collective agreement term that might limit or restrict this power, after nothing more than "consultation" with representatives of employees of a particular school and with parents. The form of consultation also did not need to follow any particular method or process. By lumping in consultation with parents, the consultation with employees was further minimized.

[361] The question-and-answer styled internal briefing note prepared for the Minister of Education when the legislation was introduced was consistent with my reading of the legislation, which did not provide for meaningful consultation with teachers regarding the school calendar and hours and days of work:

> Q: Changing the school calendar – by extending the days or adjusting for year-round schooling – has been tried before and thwarted by parents or contract provisions. How will this be different?
>
> - School boards now have the ability to adopt a different calendar than the traditional September to June school calendar – as long as it has the approval of parents and has consulted with staff. Further, boards are no longer limited in scheduling student programs during the day (no prescribed start, stop and lunch times).
> - By setting the minimum hours of instruction per school year (rather than per week), boards may alter the school schedule by day, week or month.
>
> Q: Does this mean a school day may begin at 7:00am and extend into the evening hours, or into the weekend?
>
> - Yes, if agreed to by parents.
>
> ...
>
> Q: Will teachers have a say in whether their school adopts a different schedule or calendar?
>
> - No. But school boards will have the option to consult with teachers before they implement a different schedule.

[362] The legislation regarding school calendaring replaced a meaningful process of collective bargaining with a diluted process of consultation. There was no access to any kind of dispute resolution mechanism. There was no statutory requirement that the employer act in good faith. This does not support the conclusion that the impairment of collective bargaining resulting from s. 15 of *PEFCA*, was minimal.

[363] I have also considered the fact that some aspects of the impugned legislation were temporary. For example, s. 9 of *PEFCA* was repealed by the *Amendment Act,* and s. 5 of the *Amendment Act*, deleting terms of the collective agreement, was only until the next negotiating round and next collective agreement. However, this does not detract from the broad interference with collective bargaining caused by legislation which deleted a large number of previously bargained terms, and which negated future bargaining on the same broad list of subjects, the latter of which was

not time limited by the legislation. In *Health Services*, some of the legislation found to be unconstitutional was likewise limited in duration and had expired by the time of the Supreme Court of Canada's decision.

[364] It is under the "minimal impairment" stage of the s. 1 analysis that the government submits that it faced exigent circumstances in passing the challenged legislation without consultation with the BCTF, namely: "labour unrest and virtual paralysis of the public school system". It says that this context should inform the court's consideration of the government's failure to consult with BCTF prior to passing all of the challenged legislation.

[365] The government consulted fully with BCPSEA prior to passing the legislation, over at least a seven or eight month period during the ongoing collective bargaining between BCPSEA and BCTF. Internal government documents indicate that at least some government officials expected that the teachers' union would be very opposed to the legislation. The government has not offered any explanation as to why, if it could consult with BCPSEA, it could not also have consulted with BCTF about the intended legislation.

[366] As I have reviewed in detail in considering the contextual background, the evidence does not support an inference that the labour relationship between BCTF and BCPSEA was such that there was virtual paralysis of the school system. Even if this inference was supported on the evidence, there is no evidence to support the conclusion that there was a causal link between the labour difficulties and teachers' demands in the collective bargaining process relating to class size and composition and related issues.

[367] The government has also not explained how legislation removing the right of employees to collectively bargain class size, composition, non-enrolling ratios, workload and hours and days of work was logically linked to any ongoing labour dispute. Why was the legislation so broad? Why not provide for a traditional solution to solve a labour dispute? If the legislation was due to urgency, why was the legislation not structured as temporary?

[368] It appears that BCPSEA considered that other options were available. As of August 30, 2001, BCPSEA's internal documents were considering the options available if they reached a bargaining impasse with BCTF. BCPSEA recognized that there were a number of traditional labour solutions available under the *Labour Relations Code*, including mediation, the appointment of an industrial inquiry commission that could impose resolution processes such as final offer selection, or arbitration, or a third party could be appointed with authority to conclude a collective agreement. All of these traditional labour solutions would involve a process that would allow BCTF to negotiate and argue its positions before a decision or recommendation was made by a party independent of the employer. BCPSEA recognized that at this early stage of the negotiations, an appointed third party would likely find that the parties had not yet bargained sufficiently.

[369] But by the summer of 2001, the government was already considering legislation that would remove a broad list of subjects from the scope of collective bargaining, and it was sharing its intentions in this regard with BCPSEA representatives.

[370] The labour issues between BCTF and BCPSEA were based on a broad number of issues that were not new or urgent. Most importantly, the difficulties in the two sides reaching agreement during collective bargaining from the election of the new government in May 2001 and throughout the rest of 2001 was likely contributed to by the government's decision to consult with only one side of the bargaining table, BCPSEA. As I have reviewed above in discussing the contextual background, the government's decision to consult only with BCPSEA and not with BCTF, including sharing with BCPSEA the fact that influential representatives of the government wished to remove certain subject matters from the collective bargaining process, must have negatively affected the bargaining process.

[371] The whole point of the *Charter* protection of collective bargaining is to allow employees the freedom to associate so as to collectively influence their working conditions, through strength of numbers which equalizes an employee's bargaining

power with the employer. In *Health Services*, at para. 84, the majority cited the dissent of Dickson C.J.C. in the *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 [*Alberta Reference*] at 334:

> Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploitative working conditions.

[372] While not a perfect tool, collective bargaining has long been seen as the best vehicle there is for resolving differences between management and labour. In 1966 the government of Canada established a task force chaired by Dean H.D. Woods to examine Canada's industrial relations system. After extensive research, including meetings with management and labour representatives across the country, *The Report of the Task Force on Labour Relations* (1968) observed that:

> Collective bargaining is the mechanism through which labour and management seek to accommodate their differences, frequently without strife, sometimes through it, and occasionally without success. As imperfect an instrument as it may be, there is no viable substitute in a free society.
>
> (Task Force on Labour Relations, *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (1968) at para. 431.)

[373] Giving workers a voice in the process of determining their working conditions, even where they are not ultimately successful in advancing their position, is regarded as a means of increasing stability in the workplace. As the Korbin Report found at C13:

> The commission feels strongly that in the long term it is in the public interest that government and management work with representatives of labour both on a sectoral organizational basis and at the PSEC level <u>to enable all parties to have appropriate influence over and accept responsibility and accountability for human resource matters in the delivery of public services.</u>
>
> [Emphasis added.]

[374] The government has not provided sufficient evidence to support its position that the passage of the impugned legislation occurred in the context of "exigent" or "urgent" circumstances, justifying its failure to consult with BCTF.

[375] The government also did not produce evidence supporting the conclusion that it sought a solution to the problem the legislation was intended to address that would minimally impair the right to engage in collective bargaining. This is understandable as it is unlikely that the government considered the minimal impairment of collective bargaining as important. At the time this legislation was introduced, which was at the same time as the *Health Services* legislation was introduced, the state of the law in Canada was such that the government likely did not anticipate that collective bargaining was protected by s. 2 (d) of the *Charter*. The government's goal was to take the subject matters identified in the legislation out of the collective bargaining process, not to minimally impair the collective bargaining process.

[376] I conclude that the challenged legislation did not minimally impair the teachers' s. 2 (d) *Charter* guarantee of freedom of association.

Proportionality of the Measure -- Its Effects

[377] Because of the conclusions I have reached that the legislation did not minimally impair the employees' s. 2 (d) right to engage in collective bargaining, it is not necessary to consider the salutary and deleterious effects of the legislation.

[378] While the government provided some evidence to suggest that *PEFCA* had the intended positive effect of giving school boards greater flexibility in the organization of schools, it was unclear that this flexibility could not have been achieved through collective bargaining. Furthermore, this was at a cost to teachers: they lost the ability to be involved in decisions which could greatly affect their working conditions.

[379] In the dissent of Dickson C.J.C. in the *Alberta Reference*, at 368, which was cited favourably by the Court in *Health Services*, the Court recognized the fundamental importance of a person's work, as directly impacting one's livelihood and human dignity:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the

> conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect. In exploring the personal meaning of employment, Professor David M. Beatty, in his article "Labour is Not a Commodity", in *Studies in Contract Law* (1980), has described it as follows, at p. 324:
>
> > As a vehicle which admits a person to the status of a contributing, productive, member of society, employment is seen as providing recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of significance. By realizing our capabilities and contributing in ways society determines to be useful, employment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem.

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

CONCLUSION

[381] I conclude:

a) In enacting ss. 8, 9 and 15 of *PEFCA*, and s. 5 of the *Amendment Act,* the government infringed teachers' freedom of association guaranteed by s. 2 (d) of the *Charter.*

b) This infringement was not a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

[382] I declare ss. 8 and 15 of *PEFCA* and s. 5 of the *Amendment Act* to be unconstitutional and invalid. I suspend the declaration of invalidity for a period of twelve months to allow the government time to address the repercussions of this decision.

[383] Section 9 of *PEFCA* is no longer in force. The teachers' have reserved their right to argue any additional remedies and they may seek a further hearing in this regard.

[384] I have also found that s. 4 of *ESCAA* does not infringe teachers' freedom of association and so is not unconstitutional. I have not found the government to have engaged in other unconstitutional conduct.

[385] If the parties cannot agree on costs, they may also seek a further hearing to address costs.

"S. Griffin, J."
The Honourable Madam Justice S. Griffin

Appendix A - Legislation

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

...

8 ***Section 27*** **[of the** ***School Act*****]** ***is amended***

(a) in subsection (1) by repealing paragraph (b) and substituting the following:

(b) the terms and conditions, not inconsistent with this Act and the regulations, of a teachers' collective agreement, and***,***

(b) in subsections (3) and (4) by striking out "a collective agreement***" and substituting "***a teachers' collective agreement***"***,

(c) in subsection (3) by striking out "or***" at the end of paragraph (b) and by adding the following paragraphs:***

(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. ***, and***

(d) by adding the following subsections:

(5) A provision of a teachers' collective agreement that conflicts or is inconsistent with subsection (3) is void to the extent of the conflict or inconsistency.

(6) A provision of a teachers' collective agreement that

(a) requires the employers' association to negotiate with the Provincial union, as defined in the *Public Education Labour Relations Act*, to replace provisions of the agreement that are void as a result of subsection (5), or

(b) authorizes or requires the Labour Relations Board, an arbitrator or any person to replace, amend or modify provisions of the agreement that are void as a result of subsection (5),

is void to the extent that the provision relates to a matter described in subsection (3)(a) to (j).

9 The following section is added* [to the *School Act*]*:

Transitional – appointment of arbitrator

27.1(1) The Minister of Skills Development and Labour must appoint an arbitrator to determine whether a provision in the teachers' collective agreement constituted under the *Education Services Collective Agreement Act* conflicts or is inconsistent with section 27(3)(d) to (j), as enacted by the *Public Education Flexibility and Choice Act*.

(2) The arbitrator appointed under subsection (1) must resolve all issues and make a final and conclusive determination before May 11, 2002.

(3) Despite subsection (2), the Minister of Skills Development and Labour may

(a) order that the arbitrator conclude resolution of issues and make a final and conclusive determination on an earlier or later date than May 11, 2002, as specified in the order, and

(b) make an order under paragraph (a) applicable in relation to one or more boards, as specified in the order.

(4) Sections 89 to 92 of the *Labour Relations Code* apply to an arbitration under this section.

(5) If the arbitrator under this section determines that a provision in the teachers' collective agreement constituted under the *Education Services Collective Agreement Act* conflicts or is inconsistent with section 27 (3) (d) to (j), as enacted by the *Public Education Flexibility and Choice Act*,

(a) the arbitrator's decision takes effect on the date section 27(3) (d) to (j) comes into force,

(b) section 27 (5) and (6) applies in respect of that decision on that date, and

(c) the arbitrator must delete the provision from the collective agreement on that date.

(6) An arbitrator's decision under this section is final and binding and not open to appeal or review by the Labour Relations Board.

(7) This section may be repealed by regulation of the Lieutenant Governor in Council.

15 The following section is added **[to the *School Act*]:**

Extended day and year-round schooling

78.1(1) If a board satisfies the conditions under section 78 (3.1), a provision of a teachers' collective agreement that limits or restricts, or purports to limit or restrict, the board's power to adopt and implement the school calendar approved under section 78 (3.1) for the school or the group of students concerned is void, but only to the extent that the provision limits or restricts the power in respect of that school or group of students.

(2) Without limiting subsection (1), a provision of a teachers' collective agreement is void to the extent that it limits or restricts, or purports to limit or restrict, the power of the board to establish, vary, extend or amend, in respect of the school or group of students referred to in subsection (1),

(a) the schedule of delivery of educational programs in a day of instruction,

(b) the schedule of delivery of health services, social services and other support services under section 88, in a day of instruction,

(c) the hours of the day, days of the week or months of the year on or within which educational programs are to be provided, or

(d) the days on which teachers, or persons providing services referred to in paragraph (b), are scheduled to be available for instructional, non-instructional or administrative activities.

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

...

4 Effective July 1, 2002, the provisions of an agreement referred to in Column A of the following table, which provisions form part of the collective agreement constituted under section 2 (1) of this Act, are deemed to apply for the purposes of all teachers employed by the school board in the school district referred to in the same row in Column B, and the agreements referred to in Column C are void and cease to have any effect:

Column A	Column B	Column C
02 Cranbrook Agreement	School District No. 5 (Southeast Kootenay)	01 Fernie Agreement
04 Windermere Agreement	School District No. 6 (Rocky Mountain)	03 Kimberley Agreement 18 Golden Agreement
07 Nelson Agreement	School District No. 8 (Kootenay Lake)	86 Creston-Kaslo Agreement
14 Southern Okanagan Agreement	School District No. 53 (Okanagan-Similkameen)	16 Keremeos Agreement
31 Merritt Agreement	School District No. 58 (Nicola-Similkameen)	17 Princeton Agreement
65 Cowichan Agreement	School District No. 79 (Cowichan Valley)	66 Lake Cowichan Agreement
88 Terrace Agreement	School District No. 82 (Coast Mountain)	80 Kitimat Agreement
89 Shuswap Agreement	School District No. 83 (North Okanagan-Shuswap)	21 Armstrong-Spallumcheen Agreement
56 Nechako Agreement	School District No. 91 (Nechako Lakes)	55 Burns Lake Agreement

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

1 Section 2(1)(a)(v) of the Education Services Collective Agreement Act, S.B.C. 2002, c. 1, is repealed and the following substituted:

(v) effective July 1, 2002,

(A) deleting Article D.1 entitled "Staffing Formula -- Non-Enrolling/English as a Second Language Teachers",

(B) deleting Article D.2 entitled "K-3 Primary Class Size",

(C) deleting sections D.1, D.2 and D.3 of Appendix 1 of Letter of Understanding No. 1, dated May 31, 1995,

(D) in Addendum C to Letter of Understanding No. 1, which addendum is dated April 23, 1997, deleting the heading "Professional Development and Teacher Assistants" and substituting "Professional Development" and deleting the heading "Teacher Assistants:" and the paragraph immediately under that heading,

(E) deleting paragraphs 1 to 5 and everything after paragraph 8 of Letter of Understanding No. 3, dated June 4, 1999,

(F) deleting Letter of Understanding No. 4, dated June 22, 1999,

(G) deleting Letter of Understanding No. 5, dated June 19, 2000, and

(H) in respect of an agreement referred to in Column A of the document entitled "Teachers' Collective Agreement Deletions" tabled in the Legislative Assembly on the date of First Reading of the *Education Services Collective Agreement Amendment Act, 2004*, deleting those words, phrases and provisions, or parts of provisions, as set out in the same row in Column B of that document; .

...

Retroactive effect

5(1) Despite any decision of a court to the contrary made before or after the coming into force of this section,

(a) the deletion under section 1 of words, phrases, provisions and parts of provisions from a collective agreement between the British Columbia Teachers' Federation and the British Columbia Public School Employers' Association is deemed to have taken effect on July 1, 2002, and

(b) those deleted words, phrases, provisions and parts of provisions must not for any purpose, including any suit or arbitration commenced or continued before or after the coming into force of this section, be considered part of that collective agreement on or after July 1, 2002.

(2) This section is retroactive to the extent necessary to give full force and effect to its provisions and must not be construed as lacking retroactive effect in relation to any matter merely because it makes no specific reference to that matter.