

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia Teachers' Federation v. British Columbia*,  
2014 BCCA 75

Date: 20140226  
Docket: CA041558

Between:

**British Columbia Teachers' Federation on Behalf of all  
Members of the British Columbia Teachers' Federation**

Respondent  
Appellant on Cross Appeal  
(Plaintiff)

And

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

Appellant  
Respondent on Cross Appeal  
(Defendant)

Before: The Honourable Mr. Justice Harris  
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated  
January 27, 2014 (*British Columbia Teachers' Federation v. British Columbia*,  
2014 BCSC 121, Vancouver Docket S124584).

Counsel for the Appellant:

H. Shapray, Q.C.,  
K.A. Horsman & E.L. Ross

Counsel for the Respondents:

J.D. Rogers, Q.C., D. MacDonald,  
S. Rogers, & A.D. Merritt

Place and Date of Hearing:

Vancouver, British Columbia  
February 21, 2014

Place and Date of Judgment:

Vancouver, British Columbia  
February 26, 2014

**Summary:**

*In 2002 the Province of British Columbia enacted legislation that voided hundreds of terms of the teachers' collective agreement. The legislation also prohibited collective bargaining on issues of class size and composition. In a decision indexed at 2011 BCSC 469, the B.C. Supreme Court declared the legislation an unconstitutional interference with the teachers' right of freedom of association, as guaranteed by s. 2(d) of the Charter of Rights and Freedoms. The court suspended the declaration of unconstitutionality for 12 months. The Province did not appeal.*

*After the 12-month suspension expired, the Province enacted the Education Improvement Act, S.B.C. 2012, c. 3. Section 8 continued the cancellation of the collective agreement terms and s. 24 temporarily prohibited collective bargaining on class size and composition. The British Columbia Teachers' Federation ("BCTF") challenged the constitutionality of this legislation and, again, the B.C. Supreme Court found that it unjustifiably infringed teachers' s. 2(d) right (2014 BCSC 121). The court ordered that the clauses be returned to the collective agreement, effective the date the legislation was enacted.*

*The Province appeals and applies for a stay of this order and the variation of confidentiality orders to permit the BCTF to distribute un-redacted written submissions to its members. The confidentiality orders in question governed the use that could be made of Cabinet documents, which are arguably protected by public interest immunity.*

*HELD: Both stays are granted. The onus is on the Province to demonstrate: (1) there is a serious question to be tried on appeal; (2) it would suffer irreparable harm if the stay is not granted; and (3) the balance of convenience favours a stay.*

*In respect of the order declaring the legislation unconstitutional, there is a serious question to be tried concerning both the constitutional protection of collective bargaining and the right of legislatures to enact legislation nullifying concluded terms in collective agreements. The appeal also raises questions about the remedy for a breach of the s. 2(d) right. The issues are not frivolous or vexatious. The evidence demonstrates that the disruption and costs of implementing the decision amounts to irreparable harm and the balance of convenience justifies a stay pending appeal.*

*In respect of the order permitting the distribution of the un-redacted written submissions of the BCTF, the Province's appeal is not frivolous or vexatious. The appeal involves serious issues regarding the tension between public access to the court and protecting Cabinet confidentiality. If the un-redacted submissions are distributed before the appeal is heard, the Province will have suffered irreparable harm if the appeal is allowed. Cabinet confidentiality over the documents will have been lost irretrievably. The balance of convenience favours the stay to prevent irreparable harm and because its effect is principally to postpone access to the un-redacted argument until the appeal is decided. The effect on the "open court principle" is temporary and limited.*

**Reasons for Judgment of the Honourable Mr. Justice Harris:**

[1] This is an application by the appellant, Her Majesty the Queen in right of the Province of British Columbia (the "Province") for a stay, pending resolution of this appeal, of two terms of the order of Madam Justice Griffin pronounced January 27, 2014. Those terms are the following:

1. Sections 8 and 24 of the *Education Improvement Act*, S.B.C. 2012, c. 3, are declared unconstitutional and invalid from the date they came into force; and
2. The orders of this Court dated January 14, 2013 and January 9, 2012 are varied to permit the plaintiff to distribute its un-redacted written submissions to its members.

[2] The issue in the trial was whether the *Education Improvement Act* [EIA], also sometimes referred to as Bill 22, is an unconstitutional interference with teachers' right of freedom of association guaranteed by s. 2(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter]. Previously, in reasons indexed at 2011 BCSC 469, the court had declared that earlier legislation, referred to as Bill 28, had infringed teachers' s. 2(d) Charter rights by enacting legislation in 2002 which substantially interfered with teachers' collective bargaining because it:

- 1) voided hundreds of terms of a collective agreement which had previously been negotiated dealing with various Working Conditions, which in short-hand can be understood as class size and class composition conditions, and,
- 2) prohibited collective bargaining over the same subject matters in the future.

[3] Bill 28, the court concluded, was not a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter*. The declaration of unconstitutionality was suspended for 12 months.

[4] Immediately after the expiry of the 12 months, the Province enacted the *EIA* which was described by the trial judge in this way:

[12] A day after the year following the Bill 28 Decision had passed, on April 14, 2012, the Province of British Columbia then enacted new legislation, the *Education Improvement Act*, S.B.C. 2012, c. 3 [*EIA*], also known as "Bill 22". This legislation stated that it repealed the legislation which had been declared unconstitutional in the Bill 28 Decision. But at the same time Bill 22 also then immediately re-enacted the previously declared unconstitutional provisions in essentially identical terms, with one change:

- a) the government again voided the same terms of the parties' collective agreement, again retroactive to July 1, 2002<sup>[3]</sup>; and,
- b) the government again prohibited the parties' from negotiating the subject matter of those terms in collective bargaining. However, the one change was that the prohibition on collective bargaining was time limited, and would expire by June 30.

[5] The trial judge declared unconstitutional those sections of the *EIA* that again nullified the same terms of the parties' collective agreement retroactive to July 1, 2002. The deleted provisions of the collective agreement, material to this stay application, were referred to by the trial judge as the Working Conditions clauses. Those clauses set class size limits, maximums on the number of special needs students in a classroom, and ratios for "non-enrolling" teacher staffing levels. Many of these clauses had been imposed in the collective agreement by legislation in 1998.

[6] The trial judge did not suspend her declaration of unconstitutionality. As the trial judge said:

[571] The result of both the Bill 28 and Bill 22 Actions is that the Working Conditions clauses are returned to the collective agreement between the BCTF and BCPSEA as of July 1, 2002.

[7] It is that result the Province applies to stay pending the appeal of this matter.

[8] I propose to deal first with the application to stay s. 8 and 24 of the *EIA*. I will return later in these reasons to deal with the issue concerning the distribution of the plaintiff's written submissions to its members. Before doing so, it may be helpful to explain the test I am to apply in deciding whether to grant the stay.

[9] The basic elements of the test are uncontroversial. They are established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*]. The court must be persuaded that:

- (i) There is a serious question to be tried;
- (ii) The party seeking to stay would suffer irreparable harm should the stay not be granted; and
- (iii) The balance of convenience and public interest considerations favour a stay.

[10] The Supreme Court of Canada established that the threshold to determine whether there is a serious question to be tried is low: at 337. The burden on the applicant is to satisfy the court that the claim is not frivolous or vexatious: at 335. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits: at 348. A heightened scrutiny of the merits is justified in two circumstances. First, where the result of the stay motion would in effect finally determine the action: at 338. Second, where the question of constitutionality is a simple question of law alone: at 339. These exceptions apply only in rare circumstances or within extremely narrow confines: at 338-339. There is no suggestion that either of these exceptions has any application to the motion before me.

[11] The issue before me on the merits of the appeal is only whether there is a serious question to be heard in the sense that the appeal is not frivolous or vexatious. A consideration of that question does not involve an examination of the ultimate merits of the appeal or its strength beyond being satisfied that the threshold has been met. I make this point because it appeared to me that the submissions on the merits that were advanced on behalf of the British Columbia Teachers' Federation ("BCTF") were directed to its view that the analysis of the trial judge was correct or that the appeal was weak, rather than to the question whether the appeal raised a serious question to be heard as a threshold matter. Nothing I say in this judgment about the merits of the appeal should be taken as expressing any opinion

about the merits of the appeal beyond considering whether it is frivolous or vexatious.

[12] Once satisfied that there is a serious question to be tried, a court must then move on to examine the second and third elements of the test for a stay. The Supreme Court of Canada has given guidance on how to address those issues in a constitutional case. In approaching these questions, I respectfully agree with the observation of Justice M. Rosenberg in *Bedford v. Canada (Attorney General)*, 2010 ONCA 814, that I am not sitting on an appeal of the trial judge's refusal to suspend the declaration of unconstitutional validity. As he observed:

[8] ...I am bound by a different body of law and by a different test, the test enunciated in *RJR-MacDonald*, where the context is the *prima facie* right of the government to a full review of the first-level decision and, as I will explain, the presumption of irreparable harm if the judgment is not stayed pending that review.

[13] My exercise of discretion is guided by the following principles. Again, I borrow from the helpful summary provided by Justice M. Rosenberg at para. 13:

[13] Therefore, unlike the application judge, I must determine whether a stay should be granted in a context where (1) there is a *prima facie* right of the government to a full review of the first-level decision; (2) the government has a presumption of irreparable harm if the judgment is not stayed pending that review; and (3) the responding parties must demonstrate that suspension of the legislation would provide a public benefit to tip the public interest component of the balance of convenience in their favour.

[14] The Supreme Court of Canada in *RJR-MacDonald* summarized the task of a motions judge in considering the second and third stages of the test at 348-349:

At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either

party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

[Emphasis added.]

[15] Of particular relevance to the issue before me is the following guidance provided by the Supreme Court of Canada in *RJR-MacDonald* at 346:

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

[Emphasis added]

**Is the government entitled to a stay of the order declaring sections 8 and 24 of the EIA unconstitutional and invalid from the date they came into force?**

[16] The Province submits that its appeal raises a serious question to be heard. It contends that the appeal raises issues concerning the scope and application of *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 [*Health Services*], and the relationship between freedom of association as a right to process and the legislative nullification of concluded collective agreements. The legal questions on appeal, it contends, includes whether and in what circumstances s. 2(d) of the *Charter* gives substantive constitutional protection to concluded collective agreement terms.

[17] Apart from issues connected to the breach of freedom of association, the appeal also raises legal issues concerning the appropriate constitutional remedy in circumstances where, as here, the effect of the remedy is to reintroduce terms of a historic collective agreement into the collective agreement, even though the parties have negotiated new collective agreements in the interim.

[18] In my view, it cannot reasonably be disputed that the appeal is not frivolous or vexatious. More particularly, I am satisfied that the legal issues raised by the appeal do not depend on the assertion of a conflict between the principles discussed in *Health Services* and the subsequent decision of the Supreme Court of Canada in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, which at a minimum upheld the result of *Health Services*. Although counsel for the BCTF did not concede that there was a serious question to be heard, he did not expressly argue that the appeal was frivolous or vexatious. Rather, he defended the correctness of the judgment under appeal and, at most, laid a foundation for an argument that in light of the rigour and soundness of the trial judge's reasoning the appeal is weak. That is not the relevant test.

[19] Having concluded that the appeal raises a serious question to be heard, I turn to the central issues on this motion relating to irreparable harm and the balance of convenience.

[20] The Province asserts that the *EIA* reflects policy objectives conceived in the public interest to provide operational flexibility to school boards to allocate funds in a manner that provides a greater range of choice in student programmes. As such it is entitled, but does not need, to rely on the presumption of irreparable harm if the stay is not granted. It says that its evidence demonstrates that the immediate restoration of the deleted clauses to the collective agreement presents irreparable harm to the public interest of unprecedented magnitude. In addition to very significant financial and irrecoverable costs resulting from the immediate imposition of those terms, the Province alleges that their imposition will result in unquantifiable harm to students, families and educators through the disruption of school programmes and classrooms in the restructuring of the K-12 system required by the judgment before the appeal could be heard and resolved.

[21] Quite apart from any presumption of irreparable harm that I would be required to apply, the Province filed a substantial body of evidence outlining the specific concerns arising from a requirement to begin immediately implementing the judgment. I do not propose to recite that evidence in any detail. I will provide some illustration of it. Suffice to say that the evidence amply demonstrates that the burden of showing irreparable harm in the manner required by the *RJR-MacDonald* test has been met.

[22] The evidence supports the view that the impact of implementing the judgment will vary from district to district. In some districts the requirements of implementing the judgment would be more easily accomplished than in others, and it may well be that in some the burden of doing so, both financially and in terms of disruption, would be modest. That is not, however, the typical situation on the evidence before me. The evidence demonstrates that the immediate reinsertion of the deleted terms into the current collective agreement will probably lead to a dislocation of current planning and budgeting for the next school year, immense challenges in hiring sufficient suitably qualified staff, lay-offs of employees, changes to available school programmes, cancelling school programmes, creating more classes, moving students to other schools, disrupting programmes for special needs students, the

provision of additional classroom space (likely through the addition of portables where space permits), and the breaking of contracts with community groups who use school space for their activities as school districts reclaim needed space to accommodate additional classes.

[23] Much of the planning and budgeting process for the next school year is already well underway. To implement the judgment would, I am satisfied, entail very significant disruption to the provision of education services in large parts of the province.

[24] The evidence of Mr. Tinney, the Superintendent of the Surrey School District, the largest in British Columbia, is illustrative of some of the problems he anticipates would be involved in implementing the judgment. He estimates, for example, that Surrey would have to fill nearly 450 new full-time equivalent teaching positions to comply with the language of the 2002 collective agreement. He estimates the cost of doing so at \$40 million in the first full year. (I acknowledge that the BCTF criticizes that cost estimate on the basis that Mr. Tinney does not use the compensation cost of an entry-level teacher. Even if the financial estimate is high, about which I express no view, the financial cost of the hiring implications of implementing the judgment remain very substantial.)

[25] Mr. Tinney goes on to explain that the implementation of the former collective agreement language would not only require hiring more teaching staff, but also adding more classroom space, including adding portable classrooms in schools that have no room to accommodate additional space. Students would have to be moved to other classes or other schools where space could not be made available for them in their existing class or school. It is far from clear how school districts would handle possible termination of teachers hired to comply with the judgment, if the appeal is allowed.

[26] Mr. Tinney also describes the effect on class composition of implementing the 2002 terms dealing with special needs students. This, he deposes, would involve

substantial modifications to the way in which special needs students are currently supported. These changes would lead to restricting the availability of elective courses to those special needs students. He also describes problems he anticipates in being able to hire suitably qualified candidates to fill positions required by the original collective agreement language; the effect on school capacity and additional classrooms, including portables; and a need to re-evaluate any educational programme or service provided outside the school district's core mandate. He deposes that it may be necessary to reclaim space by eliminating services provided in the community such as day care, StrongStart programmes (aimed at pre-kindergarten children), before and after school care, and other community services.

[27] Mr. Tinney also explained the usual planning process to accommodate organizational changes and the time typically involved in planning and implementing significant organizational changes. He deposes that school planning for the next school year is already well underway with enrollment numbers already submitted and the school calendar almost complete. Course selection booklets have been published and students are in the process or have completed course selection to determine next year's timetable. Projections for school enrollments across the district for budget purposes have been submitted to the Ministry of Education and commitments have been made to community partners who have released space for programmes in schools that may need to be canceled if the collective agreement's clauses are restored.

[28] I am satisfied that the evidence discloses more than a speculative concern; to the contrary, there is every reason to anticipate that beginning to implement the restored clauses of the collective agreement may well lead to substantial disruption of several kinds. First, with respect to staffing, non-teaching staff may have to be laid off, it may be impossible to recruit qualified teachers to the required staffing levels, and teachers who are not fully qualified may have to be hired. Second, with respect to school programmes, some may have to be cancelled, student choice may be limited, or access to programmes restricted. These consequences may affect special needs students and affect programmes for vulnerable youth. Third, with

respect to space and classroom availability, new portables will be needed and students may have to be transferred to other schools or boundaries changed because of a lack of space in existing schools. Those space constraints may also lead to the closure of day care centres and StrongStart programmes, and lead to the disruption of existing agreements with third parties for the use of school space. Current expectations of students and parents about which schools students will attend and what programmes will be available to them are cast in doubt.

[29] The restoration of the deleted clauses to the collective agreement would, the evidence suggests, require very substantial changes in the provision of educational services at the K-12 level in the province. Those changes, as noted, affect staffing levels, course availability, electives, programmes for special needs students, physical plant and relations with third parties in the community. This is quite apart from the cost. The relevant question becomes whether the consequences of the implementation of the judgment will have caused irreparable harm in the event that the appeal is allowed and the judgment is set aside. On that assumption, none of changes to implement the judgment would have needed to have been made. It is clear, in my view, that the harm suffered in implementing the judgment is irreparable.

[30] In reaching this conclusion, I have not overlooked the argument advanced on behalf of the BCTF that the reinserted terms of the collective agreement themselves provide for a process to discuss and deal with issues to do with class size and composition and related matters. Nor have I overlooked the submission that the impugned legislation may have provided less flexibility to deal with those issues than the collective agreement. This submission finds support in the judgment where the trial judge said this:

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

The individual local agreements that had been negotiated across the school districts in the province in the 1987-1993 timeframe showed a variety of terms and conditions regarding class size and composition. Of 75 school districts, some 58 negotiated provisions related to class

size and composition. Sometimes the process of collective bargaining had involved job action.

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

- (a) if a student joined the school late in the year;
- (b) with the consent or request of a teacher;
- (c) with the consent of the teacher for educationally sound reasons;
- (d) if external financial constraints were imposed on the Board;
- (e) for band, choir, or physical education classes, at the request of the teacher;
- (f) where it was not "possible" to stay within limits;
- (g) if the student could not be reassigned to a different class at the same school with fewer students;
- (h) if the student could not be reassigned to an adjacent school;
- (i) by up to two students after September, providing that the teacher could request additional support; or
- (j) if the teacher was assigned less than the maximum in another class so that the teacher's total workload was not increased.

Even where provisions in the local agreements or the later provincial collective agreements led to disagreements with respect to class size or class composition limits, local associations and the BCTF regularly settled grievances or requested remedies at arbitration that ensured that students were not moved from schools or out of classes during the school year. For example, if class size or composition limits were exceeded, the teacher might not request that students be removed from the class, but might seek extra support, or a day of paid leave to compensate for the increased workload.

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

...

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

[31] I am aware that the BCTF takes the position that the claims advanced by the Province are suspect, exaggerated and speculative, but Mr. Rogers did concede that the implementation of the judgment would lead to disruption.

[32] It may be that not all of the concerns articulated in the Province's evidence would come to pass and it may be that if the term of the order is not stayed the parties would find some way to reach agreements that would ameliorate the disruption, but this possibility is itself speculative and does not, in my view, undermine the conclusion that the test of irreparable harm has been met. Irreparable harm has to do with the nature of the harm, not its magnitude. The BCTF submission goes, in my view, to the magnitude not the nature of the harm. The harm lies in the consequences of implementing changes when there turned out to be no legal obligation to do so. Those include not just the changes to the administration of the school system in relation to class size and composition that were in fact implemented (whether ameliorated or facilitated by compromise or not), but also the need to engage in a process dictated or influenced by the presence of the Working Conditions clauses in the collective agreement that led to changes in the provision of educational services that would not otherwise have occurred.

[33] Having concluded that the Province would suffer irreparable harm if a stay is not granted, I turn to the balance of convenience. Much of the BCTF position just discussed bears on this question. The BCTF argues that the balance of convenience does not favour a stay. It has offered to defer the "immediate implementation" of the deleted Working Conditions so that they would take effect only at the beginning of the new school year in September 2014. This would give the parties time to plan for their implementation and, if the appeal is expedited and decided before September, allow the changes required by the reinsertion of the terms to take effect as the new school year begins. Moreover, the balance of convenience favours allowing the parties to rely on the language in the collective agreement that facilitate compromise and flexibility and to work out problems of implementation at the local level.

[34] I am, with respect, unable to accede to this argument. The balance of convenience favours granting the stay. The suggestion that the potential to dissipate irreparable harm by bargaining in accordance with the terms of the process clauses in the collective agreement strikes me as speculative, unrealistic, and the time available to do so is, in any event, too short. Furthermore, there is no genuine prospect that this appeal could be heard and decided leaving time before the start of the 2014 school year, either to implement the judgment for the 2014 school year if the appeal is dismissed, or make whatever adjustments would follow from the appeal being allowed.

[35] It is also relevant to the balance of convenience that there is no current impediment to collective bargaining over Working Conditions clauses dealing with class size and composition. The parties are currently engaged in collective bargaining, the existing collective agreement having expired on June 30, 2013. The BCTF suggests that the retroactive effect of the legislation, if it is allowed to stand, will fetter current bargaining over a new collective agreement. In making that submission, it relies on a comment made by the trial judge at para. 451 of the judgment. The Province disputes the BCTF position on the effect of the retroactive provision and provided me with a transcript of its argument demonstrating that the trial judge attributed a position to the government that it did not take.

[36] I am not persuaded that an interim stay pending appeal will, as argued, materially fetter the current bargaining process. The parties are sophisticated. They fully understand that a stay indicates nothing about which party's legal position will prove to be correct on appeal (or possibly on appeal to the Supreme Court of Canada). It is the ultimate determination of the merits that will affect the bargaining process not the imposition of a stay.

[37] The interests of the BCTF in the implementation of the judgment, although significant in the balance are outweighed by the magnitude of the irreparable harm arising from not granting the stay.

[38] A stay is granted in the terms sought in item 1 of the notice of motion.

**Should there be a stay of the variation of the confidentiality orders that permit the distribution of the un-redacted final submission to the membership of the BCTF?**

[39] The issue here involves the variation of confidentiality orders governing the conditions of disclosure and use of Cabinet documents over which the Province had claimed public interest immunity privilege so that they could be produced in the litigation.

[40] The BCTF quoted from parts of 18 of those documents in its written final submissions. The trial judge varied the confidentiality orders to permit the distribution of those submissions, in an un-redacted form, to the membership of the BCTF. In reaching her conclusion, the trial judge balanced competing principles. She said:

[656] What is at issue is the tension between two public interests:

- a) the public interest in fostering free and open debate between members of Cabinet, which might be harmed if Cabinet documents were not confidential, a public interest expressed in such authorities as *Carey v. Ontario*, [1986] 2 S.C.R. 637 and *Babcock v. Canada (Attorney General)*, 2002 SCC 57; and,
- b) the public interest in an open court process, expressed in such authorities as *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76; and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*].

...

[659] In considering the interests at play, I consider that the following factors are relevant:

- a) with perhaps one exception, the majority of the documents over which Cabinet privilege has been asserted have not been proven by the government to have been created with an expectation that they would be confidential if litigation ensued. The one exception is a minute recording a decision by Cabinet, but it is quite innocuous and does not record any discussion or debate amongst members of Cabinet;
- b) the majority of the documents at issue were authored or known by or reflected advice or recommendations or strategy

of Mr. Straszak in his approach to the BCTF. The government has relied in this litigation on the assertion that Mr. Straszak engaged in good faith negotiations with the BCTF following the Bill 28 Decision and that this remediated any otherwise unconstitutional legislation. It is therefore the government's position in this litigation which makes Mr. Straszak's knowledge and involvement in broader government strategy relevant.

...

[666] I have reviewed the references in the BCTF written submission. I have concluded that counsel for the BCTF has not attempted to cause mischief by reference to alleged Cabinet documents that have little importance on the central issues. Rather, the BCTF written submission is referring to documents the BCTF counsel consider highly relevant to defeat the government argument that on behalf of the government Mr. Straszak consulted in good faith with the BCTF.

[667] The fact that some of the documents in evidence relating to this issue constituted submissions to Cabinet or permit inferences to be drawn as to government decisions in my view do not justify preventing the BCTF from disclosing them in its written submission and providing its written submission to its members.

...

[669] I continue to be persuaded that allowing for the circulation of the plaintiff's written submission will not create a chilling effect on Cabinet discussions. This is a unique case where the government relied on assertions of fact regarding its conduct, alleging that it had consulted in good faith. It was the testing of that assertion that made the documents highly relevant. These circumstances will rarely arise in most litigation.

[670] One of the reasons for the open court principle is to allow the public access to the same evidence that the court relied on, so as to allow the public the opportunity to critique the court's judgment.

[671] The principle of open courts is one of the hallmarks of democracy, at the "very soul of justice", and "...permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (Re R. v. Carson)*, [1996] 3 S.C.R. 480 at 495-497.

[672] In my view, where the Courts are tasked with the role of determining the constitutionality of government conduct, it is even more important for there to be transparency so that the public can have confidence that the result was reached in fulfilment of the Court's duty to be independent and impartial.

...

[674] Here, the members of the BCTF have a direct interest in the litigation. In order for the members of the BCTF to be informed critics of my

conclusions reached in this case, especially in relation to the government's central argument that it consulted in good faith with the BCTF, it is necessary for the BCTF members to have access to the un-redacted written submissions of their counsel.

[675] The minimal salutary effects in protecting the Cabinet confidences alleged to exist here, which are far from proven, in my view are outweighed by the deleterious effects of not varying the confidentiality order to allow BCTF members to be informed of the written positions advanced by their counsel in this litigation.

[676] I therefore order that the previous production orders be varied to allow the BCTF to provide its un-redacted written submission to the BCTF members; such order to be stayed for a period of 31 days or such other time as the parties may agree to allow the time for any appeal from this judgment to be taken.

[41] The BCTF opposes granting the stay on a number of grounds. It argues that the order is discretionary based on the findings of fact to which this Court will accord deference. The documents extracted do not record Cabinet discussions and therefore, it submits, the principles outlined in the case law underwriting the importance of protecting Cabinet privilege have no application. It describes the notion that these documents should be accorded any protection based on the need to foster candid discussion within Cabinet as a "grotesque" and "old fallacy". And it observes that the trial judge found that there was no evidence that Cabinet had any expectation of privacy regarding these documents.

[42] The BCTF goes on to argue that there has been no demonstration by the Province of any irreparable harm if the un-redacted written submission is provided to the membership of the BCTF. The only argument advanced, it says, is that the distribution of the written submission would render the appeal moot. That concern, the BCTF argues, is met by its commitment that it would not argue before a division of this Court that the appeal was moot.

[43] Finally, the BCTF contends that the balance of convenience favours distribution. I, like the trial judge, should prioritize the open court principle, particularly in the absence of any demonstrated prejudice. I should also take into account the fact that senior members of the government have chosen publicly to contest the findings of bad faith made by the trial judge. The written submission is,

accordingly, an important tool for the members of the BCTF to use in assessing the validity of that criticism of the trial judge. The documents referred to in the argument are critical documents going to that particular question.

[44] For the reasons that follow I have concluded that the stay sought by the Province should be ordered.

[45] In my view, the appeal raises a serious issue to be heard. It is not frivolous or vexatious. The question is whether the trial judge exercised her discretion on correct principles. The Province contends that the trial judge erred in finding as a fact that Cabinet had no expectation of confidentiality in the disputed documents. Cabinet confidentiality, moreover, extends beyond those documents received by Cabinet and includes documents and communications related to the Cabinet deliberative process. The Province cites *Babcock v. Canada (Attorney General)*, 2002 SCC 57, at para. 18, as authority expressly for that point. The expectation of confidentiality in respect of Cabinet proceedings is, the Province submitted, presumed by the oath of confidentiality taken by each member of Cabinet and is a constitutional principle reflected in such decisions as *Babcock*. Competing interests do not trump that principle, it is suggested. The constitutional principle of Cabinet confidentiality is not, contends the Province, a dead letter in Canada but remains a vital constitutional principle.

[46] The Province, as I understood the argument, goes on to contend that the trial judge erred in principle, in any event, in the balance that she struck between the requirements of Cabinet confidentiality and the open court principle. It says that the open court principle is at best only peripherally engaged by the facts of this case.

[47] In my opinion, these arguments are not frivolous or vexatious. There is a serious question to be heard. The first part of the test is satisfied.

[48] If the stay is not granted, the Province will suffer irreparable harm. If the appeal should succeed and the Province is constitutionally entitled to maintain confidentiality over the Cabinet documents referred to in the argument, that

confidentiality will be irretrievably lost if the written submission is disseminated to the membership of the BCTF. Not only will the appeal be rendered moot, but there will have been a public dissemination of constitutionally protected confidential information. That harm cannot be undone.

[49] The more difficult question relates to the balance of convenience. The interests considered by the trial judge in reaching her conclusion are relevant also to the balance of convenience, but the test of that I must apply is different to the one applied by the trial judge. That is to say, even though I might agree with the balance the trial judge struck between competing interests for the purpose of deciding whether to allow the argument to be disseminated, I might nevertheless be of the view that the balance of convenience favours granting an interim stay to provide an opportunity for a division of this Court to examine the merits of her decision. An interim stay merely postpones the delivery of the submission, assuming the appeal is dismissed.

[50] As I observed earlier in this judgment, the government has a *prima facie* right to a full review of the merits of the decision at first instance and the benefit of a presumption of irreparable harm if a stay is not granted. Not granting a stay here would work irreparable harm.

[51] I accept that the membership of the BCTF have an interest in the opportunity to review the submissions made on their behalf in final argument. I accept that they and the public have an interest in being able to understand and scrutinize the basis of the trial judge's findings of fact. That interest may be more deeply engaged in circumstances where a trial judge concludes as a fact that the government has acted in bad faith, especially in discharging its constitutional obligations. Moreover, criticism of the trial judge's findings of fact in public and in letters written to the individual members of the BCTF by senior members of the government may indeed enhance the legitimacy of that interest.

[52] I am nevertheless of the view that the balance of convenience favours a stay. Disclosure will vitiate what may be constitutionally protected information. The commitment not to argue that the appeal is moot if the argument is distributed does not dissipate the problem. Whether this Court will consider a moot argument is for it to decide, not the parties. Nor can a justice in chambers bind the Court on that question.

[53] I recognize and have weighed the importance of the open court principle. Whether that principle justifies distribution of an un-redacted version of the final written submission is for the division hearing the appeal on the merits. An interim stay is by its nature temporary. For the limited purpose of a temporary stay, the impact on the open court principle is, I think, minimal in part because it is time limited. Even without the benefit of the full argument, a considerable amount of well-informed debate about the merits of the decision can still take place.

[54] In the result, the effect of an interim stay on the open court principle is outweighed by the irreparable harm if a stay is not granted. If the appeal is dismissed, any prejudice caused by the stay results from delay and can be mitigated by the appeal proceeding expeditiously.

[55] The BCTF submits that if a stay is granted, I provide directions on what should be redacted from the argument. I do not think I should undertake that task. The effect of the stay is that the existing orders continue to govern the disclosure of information and documents. I do not think I should engage in an exercise of interpreting the meaning of orders made in the Supreme Court. Counsel for both parties knows the contents of the written submission. I would hope that they would be able to cooperate in reaching an agreement on what needs to be redacted to conform to those orders. If not, any dispute should be resolved by the court that made the order.

**Disposition**

[56] The following terms of the order of Madam Justice Griffin pronounced January 27, 2014 are stayed, pending the resolution of this appeal:

1. Sections 8 and 24 of the *Education Improvement Act*, S.B.C. 2012, c. 3, are declared unconstitutional and invalid from the date they came into force; and
2. The orders of this Court dated January 14, 2013 and January 9, 2012 are varied to permit the plaintiff to distribute its un-redacted written submissions to its members.

[57] I would encourage the parties to proceed as expeditiously as possible to have this appeal heard as soon as reasonably possible.

“The Honourable Mr. Justice Harris”