NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia Teachers Union v. Nova Scotia (Attorney General)*, 2023 NSCA 82

Date: 20231109
Docket: CA 516998
Registry: Halifax

Between:

Nova Scotia Teachers Union

Appellant

v.

Attorney General of Nova Scotia Representing His Majesty the King in Right of the Province of Nova Scotia

Respondent

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	September 14, 2023, in Halifax, Nova Scotia
Subject:	*Canadian Charter of Rights and Freedoms* – Freedom of Association - Remedies
Summary:	The NSTU brought a proceeding alleging the *Teachers' Professional Agreement and Classroom Improvements (2017) Act* ("Bill 75") breached s. 2(b) and 2(d) of the *Charter*. They sought a declaration of invalidity under s. 52(1) of the *Constitution Act* as well as a remedy under s. 24(1) of the *Charter*. Bill 75 imposed a time limited collective agreement which included limitations on the accrual of service awards by teachers. The hearing judge found Bill 75 violated s. 2(d) of the *Charter* and declared it to be of no force and effect. He did not grant any additional remedy under s. 24(1). Part of the NSTU argument was that the government engaged in bad faith during collective bargaining. They requested the

	"reinstatement" of the service award provisions in a subsequent collective agreement on the basis they had been lost by the breach of s. 2(d).
Issues:	Did the hearing judge err in principle in not issuing an order amending the collective agreement under s. 24(1)?
Result:	Appeal dismissed. The hearing judge found Bill 75 to be unconstitutional for reasons which were more limited than those argued by NSTU. He did not find any bad faith behaviour by the government. He concluded the s. 24(1) remedy was not warranted in light of his findings. The decision was discretionary and there was no error in principle in his refusal to grant the remedy sought.

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Respondent

Judges:	Wood, C.J.N.S.; Farrar and Beaton, JJ.A.
Appeal Heard:	September 14, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Wood, C.J.N.S.; Farrar and Beaton, JJ.A. concurring
Counsel:	Jillian Houlihan and George Franklin, for the appellant Kevin A. Kindred, KC and Samantha Parris, for the respondent

Reasons for judgment:

[1] The period following June 2015 was a tumultuous time for labour relations between the provincial government and the Nova Scotia Teachers Union ("NSTU"). The Collective Bargaining Agreement ("CBA") between the parties expired on July 31, 2015 (the "2015 CBA"). Negotiation of a new CBA began in the summer of 2015 and the bargaining teams reached three tentative agreements, none of which were ratified by the NSTU membership. The vote rejecting the third tentative agreement took place on February 8, 2017.

[2] On February 21, 2017, the government introduced and passed the *Teachers' Professional Agreement and Classroom Improvements (2017) Act*, SNS 2017, c.1 (referred to by the parties as "Bill 75"). This legislation imposed a CBA on the NSTU for the term August 1, 2015 to July 31, 2019.

[3] On October 31, 2017, the NSTU commenced proceedings in the Supreme Court of Nova Scotia challenging the constitutionality of Bill 75 on the basis it infringed sections 2(b) (freedom of expression) and 2(d) (freedom of association) of the *Canadian Charter of Rights and Freedoms*. The NSTU sought a declaration it was of no force and effect. The Notice of Application in Court also requested "such further and other relief under s. 24 of the *Charter*…as counsel may request and that this Honourable Court may permit".

[4] Following a five-day hearing, Justice John A. Keith of the Supreme Court of Nova Scotia found that Bill 75 violated s. 2(d) of the *Charter* and was not saved by s. 1 (2022 NSSC 168). He granted the requested declaration of invalidity but declined to order any further remedy under s. 24(1) of the *Charter*. NSTU brought this appeal alleging that Justice Keith erred in not granting a s. 24(1) remedy. The AGNS has not challenged his finding that Bill 75 was unconstitutional.

[5] The objective of the NSTU is to obtain an order amending the current CBA between the parties to include provisions related to the accrual of Service Awards which they say were lost because of the province's breach of their s. 2(d) rights.

[6] I have concluded that the NSTU has not demonstrated any reviewable error in the hearing judge's discretionary decision not to grant an additional remedy under s. 24(1) of the *Charter*. In order to provide context for my conclusion, I will review the jurisdiction to award a s. 24(1) remedy, outline the factual background and conduct an analysis of the hearing judge's decision.

Jurisdiction to Grant a Section 24(1) Remedy

[7] In considering the remedial scheme established by the *Charter*, it is important to distinguish between legislation which is found to be unconstitutional and government conduct that infringes *Charter* rights. For the former, the remedy is typically a declaration of invalidity under s. 52(1) of the *Constitution Act*. For government actions that infringe *Charter* rights, s. 24(1) will provide the remedy. In *R. v. Ferguson*, 2008 SCC 6, the Supreme Court of Canada discusses the distinction between remedies for unconstitutional legislation and those for unconstitutional government conduct:

> [49] **When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter***. A law may be inconsistent with the *Charter* either because of its purpose or its effect: *R. v. Big M Drug Mart Ltd*., [1985]1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties: *Big M*; see also Peter Sankoff, "Constitutional Exemptions: Myth or Reality?" (1999-2000), 11 *N.J.C.L.* 411, at pp. 432-34; Morris Rosenberg and Stéphane Perrault, "Ifs and Buts in *Charter* Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada" (2002), 16 *S.C.L.R.* (2d) 375, at pp. 380-82. The jurisprudence affirming s. 52(1) as the appropriate remedy for laws that produce unconstitutional effects is based on the language chosen by the framers of the *Charter*: see Sankoff, at p. 438.
>
> [50] **Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional**: see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6. The acts of government agents acting under such regimes are not the necessary result or "effect" of the law, but of the government agent's applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1).
>
> …
>
> [53] The jurisprudence of this Court allows a s. 24(1) remedy in connection with a s. 52(1) declaration of invalidity in unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy: *R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46. However, the argument that s. 24(1) can provide a stand-alone remedy for laws with unconstitutional effects depends on reading s. 24(1) in isolation, rather than in conjunction with the scheme of

> the *Charter* as a whole, as required by principles of statutory and constitutional interpretation. **When s. 24(1) is read in context, it becomes apparent that the intent of the framers of the Constitution was that it function primarily as a remedy for unconstitutional government acts**.
>
> [emphasis added]

[8] While the Supreme Court leaves open the possibility of a s. 24(1) remedy in addition to a s. 52(1) declaration of invalidity, it notes this would be "unusual" and only given where "necessary to provide the claimant with an effective remedy". A party who seeks this additional relief will need to show a connection between the breach of their *Charter* right and the harm being rectified by the proposed order. The Supreme Court of Canada in *Vancouver (City) v. Ward*, 2010 SCC 27 pointed out the need for a connection between the breach and the s. 24(1) remedy in relation to an award of *Charter* damages:

> [23] Section 24(1) is remedial. The first step, therefore, is to establish a *Charter* breach. This is the wrong on which the claim for damages is based.

[9] The discretionary nature of the remedial jurisdiction found in s. 24(1) is apparent from the language used in that provision:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers **appropriate and just in the circumstances**.
>
> [emphasis added]

[10] The Supreme Court of Canada discussed the meaning of "appropriate and just in the circumstances" in *Doucet-Boudreau v. Nova Scotia*, 2003 SCC 62:

> 54 While it would be unwise at this point to attempt to define, in detail, the words "appropriate and just" or to draw a rigid distinction between the two terms, there are some broad considerations that judges should bear in mind when evaluating the appropriateness and justice of a potential remedy. These general principles may be informed by jurisprudence relating to remedies outside the *Charter* context, such as cases discussing the doctrine of functus and overly vague remedies, although, as we have said, that jurisprudence does not apply strictly to orders made under s. 24(1).
>
> 55 **First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the**

> **circumstances in which the right was infringed or denied.** An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just (see *Dunedin, supra*, at para. 20, McLachlin C.J. citing *Mills, supra*, at p. 882, *per* Lamer J. (as he then was)).
>
> 56 **Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary.** This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.
>
> 57 **Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited.** The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.
>
> 58 **Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right**.
>
> 59 **Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*.** As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.
>
> [emphasis added]

[11] Given the broad discretionary nature of the *Charter* remedial jurisdiction, appellate courts reviewing decisions made pursuant to s. 24(1) owe deference to the hearing judge.

Background

[12] The foundation for the dispute which ultimately led to this litigation was outlined by the hearing judge:

> [54] In 2015, a series of collective agreements between the Province and various public service unions were set to expire. The Province expressed alarm that the escalating costs of maintaining the public sector were simply unaffordable. It declared an urgent need for fiscal restraint and girded itself for difficult labour negotiations. It also began contemplating wage restraint legislation applicable to all public service unions if necessary to achieve its financial goals.
>
> [55] The Province's strategy for upcoming negotiations with public service unions generally (and including the possible [*sic*] of wage restraint legislation) was laid bare in Cabinet documents disclosed by decision of Campbell, J. released May 4, 2019. The Province's appeal of Campbell, J.'s decision was dismissed on March 10, 2020 (2020 NSCA 17)
>
> [56] These Cabinet documents reveal:
>
> 1. By as early as January 15, 2015, the Province was contemplating legislation applicable to all public service unions that would freeze wages. It would also phase out public service awards and related benefits. A presentation to Cabinet on January 15, 2015, began by confirming that "Almost all public sector agreements expire between October 2014 and July 2015." It also confirmed that the Province's key priorities around wage restraint would be difficult to achieve and "Decisions will need to be made in the [*sic*] whether to attempt to achieve through job action or to legislate". Finally, Cabinet was warned as to the risk of a court challenge to wage restraint legislation. To mitigate this risk, the Cabinet was advised "legislating same wage pattern as offered";
>
> 2. A subsequent Cabinet meeting on June 18, 2015, identified three potential approaches to upcoming negotiations, all of which mentioned the likely difficulties with unions and the possibility of legislation. It also recommended a consistent, uniform approach with all public service unions because "The more changes made to individual agreements, the greater the risk of a *Charter* loss…" Finally, if legislation became necessary, the statute should "impose a pattern slightly more generous than the tabled patterns."
>
> [57] The stage was set for what became a contentious and confrontational period of time for the provincial government and labour unions. The first major engagement occurred between the Province and NSTU.
>
> [58] On June 18, 2015 (the same day as the Cabinet presentation discussed above), NSTU gave the Province notice to bargain a new collective agreement

> pursuant to section 18 of the *Teachers Collective Bargaining Act*, RSNS 1989, c. 460, as amended. The existing collective agreement dated May 14, 2013, between Nova Scotia's Minister of Education and Early Childhood Development and NSTU expired about 6 weeks later, on July 31, 2015.
>
> [59] During the course of ensuing labour negotiations, the Province made two key monetary demands:
>
> 1. A temporary wage freeze; and
>
> 2. Terminating the ongoing accrual of a Service Award/Death Benefit. Some form of service award was a long-standing fixture in the teachers' collective agreements dating back to the early 1970s. The Service Award/Death Benefit contained in the 2012 collective agreement which expired July 31, 2015, can be traced back through each preceding agreement from January 1, 2002, to July 31, 2005.

[13] The cap on the accrual of Service Awards was a significant issue for the NSTU and its members. With some minor variation, this restriction is found in the three tentative agreements rejected by NSTU members between 2015 and 2017. It is also in the CBA imposed by Bill 75 and the CBA negotiated and signed by the parties on October 23, 2020 ("the New CBA"). According to counsel for the NSTU, the "reinstatement" of the Service Award to the language used in the 2015 CBA is the primary objective of this appeal.

[14] The s. 24(1) remedy sought by the NSTU is an order amending the New CBA to delete the existing clause dealing with the Service Award and replace it with the provisions found in the 2015 CBA.

[15] In addition to Bill 75, another statute figured prominently in the NSTU submissions and the hearing judge's decision. It is the *Public Services Sustainability (2015) Act*, SNS 2015, c.34 (referred to by the parties as "Bill 148"). It was passed by the legislature and received royal assent on December 4, 2015 but was not proclaimed in force until August 22, 2017. At the same time, regulations were passed exempting a wide range of public sector employees from its application, including teachers.

[16] Also on August 22, 2017, the AGNS referred the constitutionality of Bill 148 to this Court pursuant to the *Constitutional Questions Act*. The Court declined to answer the questions posed for the reasons set out in a decision dated May 11, 2022 (2022 NSCA 39).

[17] All parties agreed the constitutionality of Bill 148 was not in issue in this proceeding and should not be addressed by the hearing judge. They advised him

the question whether this legislation violated s. 2(d) of the *Charter* was raised in two other proceedings. One was the reference to this Court under the *Constitutional Questions Act* and the other was a *Charter* challenge brought in the Nova Scotia Supreme Court by several public sector unions, including the NSTU.

[18] Despite the consensus that the constitutionality of Bill 148 should not be addressed, it was discussed extensively in the submissions of NSTU. In its Notice of Application in Court, filed October 31, 2017, the NSTU said:

> 18. The threat of Bill 148 hung over the rest of the collective bargaining process between the Union and the Minister, a further instance of the failure of the government and the Employer to respect a process of meaningful collective bargaining and good faith consultation as required under s. 2(d) of the *Charter* and instead, contrary to s. 2(d), bargaining in bad faith and substantially interfering with the collective bargaining process.

[19] Similar comments were made in the NSTU pre-hearing brief filed on December 18, 2020:

> 6. Bill 75 does not reflect or respect a meaningful process of good faith consultation and negotiation as required by s. 2(d) of the *Charter*. In fact, the Employer acted in bad faith throughout negotiations, including but not limited to approaching bargaining with a closed mind on wages and the Service Award, having a plan in place well before the commencement of negotiations to enact legislation to impose its position on wages and the Service Award if it could not be achieved in bargaining, and then by passing the *Public Services Sustainability (2015) Act* ("Bill 148"), which took wages and the Service Award off the bargaining table.

[20] The NSTU position that the government engaged in bad faith negotiation in the period leading up to the enactment of Bill 75 runs throughout their oral and written submissions to the hearing judge. Bill 148 was said to be important evidence of the alleged misconduct. The hearing judge made no findings concerning the constitutionality of Bill 148 nor the process leading to its enactment. Those issues must be decided in other proceedings.

[21] The hearing judge described the salient provisions of Bill 148 in his decision:

> [82] Although conceived in the midst of negotiations with NSTU, Bill 148 was broader in scope and applied to a variety of public service unions. Nevertheless, the timing was specific to NSTU negotiations, and it formed a very significant part of the context within which negotiations between NSTU and the Province

would continue. At a minimum, it reflected the government's determination to achieve certain wage restraint goals it considered critical.

[83] I note the following provisions of Bill 148:

> 1. Wages would be frozen for the first two years immediately following the expiry of the prior collective agreement. Wages would increase by 1% for Year 3, another 1% for Year 4 and 0.5% on the last day of Year 4. These increases were identical to the terms which were contained in Tentative Agreement 1 and already rejected by the NSTU members (sections 13 and 14);
>
> 2. Accrual of the Service Award/Death benefit would terminate or be frozen as of March 31, 2015 – worse than the July 31, 2015, deadline contained in Tentative Agreement 1. Furthermore, the Service Award/Death Benefit would be calculated based on the teacher's salary as of March 31, 2015 – again, worse than Tentative Agreement 1 which calculated the benefit based on the last day of employment (sections 20 – 22); and
>
> 3. The Legislative Assembly delegated the authority to make regulations to the Executive Council. Section 29 stated, *inter alia*:
>
> > (1) The Governor in Council may make regulations:
> >
> > (a) designating a person as a public-sector employe
> >
> > (b) prescribing a person as not being a public-sector employee;
> >
> > …
> >
> > (o) defining any word or expression used but not defined in this Act;
> >
> > (p) further defining any word or expression defined in this Act;
> >
> > (q) respecting any matter or thing the Governor in Council considers necessary or advisable to effectively carry out the intent and purpose of this Act.
> >
> > (2) A regulation made under subsection (1) may, if it so provides, be made retroactive in its operation to the date specified in the regulation.

[22] The New CBA was not part of the evidence filed prior to the hearing. The hearing judge raised with counsel the question as to whether he should be given a copy, since the NSTU was seeking to amend it. Ultimately, the parties agreed to provide the New CBA to him. No additional evidence was filed with respect to the negotiations which led to it.

[23] During oral submissions, the hearing judge had discussions with counsel concerning the appropriateness of amending the New CBA. The following exchange illustrates his concerns:

> **THE COURT:** Sure. And, and that's, that's the second question, whether or not, if I am being asked to render a decision that effectively changes the bargain that was negotiated ... subsequently negotiated between the parties is that something that's within my ... that's properly before me or ... because I don't know, I don't know how the parties approached this lawsuit when they were negotiating or if they saw this as saying, well, we will ... anyway. I mean, I don't want to get too far down until you, until you folks talk. But if, if, for instance, if the negotiations between the parties that led to the current collective bargain ... or collective agreement was done on the basis that whatever the Court decides, we'll live with that, or maybe they negotiated the new service award term and said that whatever the Court decides, we'll apply for the intervening period and then we have our new ... a new bargain in place. But I'll leave it with you, you folks to talk about it.
>
> **MS. GATCHALIAN:** Okay. I mean, certainly from the perspective of the Teachers' Union what ... the service award provision that the Union was left with after Bill 75 was not the product of free and fair collective bargaining.
>
> **THE COURT:** Right.
>
> **MS. GATCHALIAN:** And so, what the Teachers' Union wants back is what the product of free and fair collective bargaining had been that, you know, culminated in what was in the 2013 ... 2012/2015 collective agreement.
>
> **THE COURT:** But what they have right now, was that the product of free and fair collective bargaining?
>
> **MS. GATCHALIAN:** I don't want to answer that question ...
>
> **THE COURT:** Okay. No.
>
> **MS. GATCHALIAN:** ... without talking to my friend ...
>
> **THE COURT:** All right. All right.
>
> **MS. GATCHALIAN:** ... but certainly the position of the Teachers' Union is that Bill 75 destroyed any chance of, of free and fair collective bargaining on service award in, in ... along the lines of what Justice Donald said in **BCTF** is that, you know, once, once those working conditions were removed from the collective agreement, there was no way that Unions could ... was going to be able to renegotiate those, those provisions back in ...
>
> **THE COURT:** Those same terms.
>
> **MS. GATCHALIAN:** ... because they were going to be starting from scratch.
>
> **THE COURT:** Right.

MS. GATCHALIAN: And starting from scratch is exactly the position that that Union was in and this Union is in as a result of unconstitutional behaviour and, and significant interference in collective bargaining. So, to assume ... to ... so, one cannot reasonably assume that any amendments to that article, if there were any, could be the result of free and fair collective bargaining when there was such significant interference with that article by virtue of Bill 75.

THE COURT: So, if you ... is ... so, is the Union's argument that if I find that Bill 75 was unconstitutional, even though Bill 75 just relates to the previous collective agreement, that it would have a cascading effect ...

MS. GATCHALIAN: Absolutely.

THE COURT: ... and that the service award suddenly ... the old service award suddenly becomes dropped ...

MS. GATCHALIAN: The ...

THE COURT: ... back into ...

MS. GATCHALIAN: ... the floor.

THE COURT: ... a new collective agreement?

MS. GATCHALIAN: Yes. It's the floor from which the Union would negotiate as Justice Donald said in relation to the working conditions that were deleted from that collective agreement.

THE COURT: And that would be jurisdiction that I would have under ...

MS. GATCHALIAN: Section 24.

THE COURT: ... to, to grant a remedy that would alter a, a bargain that was subsequently reached?

MS. GATCHALIAN: Absolutely. Because the jurisdiction of the Court in this case derives from section 24(1) of the **Charter**.

[24] In his submissions to the hearing judge, counsel for the AGNS outlined a number of problems with the remedy sought by the NSTU:

MR. KINDRED: But we will say, when it gets to our remedial argument, this is not all of the information that the Court needs in order to answer that remedial question. Our remedy question ... our remedy argument very much challenges the notion that as a remedy to this case you can read a new term into a collective agreement that was separately freely negotiated between the parties. Our remedy arguments will be in the alternative in any event. We will say that the fact that the parties met and negotiated a new collective agreement is relevant to the considerations under section 2(d) as well ...

THE COURT: So ...

> **MR. KINDRED:** ... but right now I'm honing in on the remedy question. The reason, really, that we're talking about this agreement is because the ... my ... the Union has sought as a remedy an amendment to this agreement. And we will say that the fact that you don't have any evidence as to the circumstances of negotiating this agreement ... what gives and takes there were, what stances the parties took as to the service award, if any, and what relationship, if any, you know, the remedy alleged in this case might have had, did have, or might have had on the bargaining dynamic. The Court doesn't have any information about any of that, and we will say that obstacle is a ... it's a massive obstacle to the Union's effort to have the Court issue as a remedy an amendment to this agreement. So just ... your question was, Do the parties agree this is all the information that I need to know? I think the parties agree that this is all the information that will be submitted in this case as to that, but the Attorney General's point will be, [in order] to issue the remedy that ... the specific remedy that the Union is seeking on this point. You would need to know much, much, much more than that. So ...

Hearing Judge's Decision

[25] The hearing judge's decision was responsive to the evidence filed and submissions made by the parties. He was asked to decide whether Bill 75 was unconstitutional because it breached s. 2(b) or s. 2(d) of the *Charter*. If it was unconstitutional, he had to determine what remedy should be granted.

[26] The hearing judge started his analysis by evaluating Bill 75 in light of the principles arising from s. 2(d) of the *Charter*. The parties agree he identified and applied the proper test which comes from the Supreme Court of Canada decision in *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27. He found Bill 75 violated this section of the *Charter* and was not saved under s. 1. These findings have not been appealed.

[27] Having found Bill 75 unconstitutional because of its violation of freedom of association, the hearing judge found it unnecessary to deal with NSTU's submissions concerning a potential violation of s. 2(b) (freedom of expression). Although NSTU argued the government did not act in good faith during the process leading to Bill 75, the hearing judge did not come to that conclusion. He based his finding of a breach of s. 2(d) on a more limited ground - the relationship between Bill 75 and the tentative agreement rejected 13 days earlier.

[28] The CBA imposed by Bill 75 was less beneficial to NSTU members than the terms agreed to by the government in the third tentative agreement. The hearing judge relied on this "step back" in position as the basis for his conclusion there was a breach of s. 2(d) by the government. He described his reasoning as follows:

[8] **The terms of the collective agreement imposed by Bill 75 were significantly inconsistent with and worse than the third and final tentative agreement that the Province says was the by-product of good faith bargaining**. At best, Bill 75 was an over-zealous but misguided attempt at fiscal responsibility. At worst, Bill 75 was punitive or a vengeful attempt to gain some unrelated, collateral benefit related to ongoing negotiations with other public service unions at the expense of NSTU. Whatever the motivation, **by selectively dismantling Tentative Agreement 3, Bill 75 failed to fully respect the process of good faith collective bargaining and was terribly wrong**.

…

[116] **At a minimum, Bill 75 failed to respect the fundamental precept of collective bargaining by failing to adopt and codify the terms contained in Tentative Agreement 3**. Even accepting for present purposes, the Province's argument that the parties finally reached a legitimate impasse following good faith collective bargaining, the Province was wrong to then assume that it could do whatever it deemed appropriate. Recall the words of Donald, J.A. in *BCTF:*

> …if the government negotiates or consults with an association in good faith and nevertheless comes to an impasse, it will likely have satisfied its constitutional duty and may unilaterally pass necessary legislation consistent with that consultation process.
>
> (at paragraph 293, emphasis added)

…

[120] **Had the Province legislated Tentative Agreement 3, its arguments around the constitutionality of Bill 75 would resonate with greater force**. At least the Province could argue that its legislative powers were used to duplicate (not undercut) the by-product of a collective process that the Province insists unfolded in good faith. On this, recall that on January 15, 2020 (months before collective bargaining), the risk of a court challenge to wage restraint legislation was identified. To mitigate that risk, the recommendation received was "…legislating same wage pattern as offered" (see paragraph 53 above). Yet, the Province did not even do that.

[121] Instead, the Province legislated a collective agreement which was much less favourable to teachers that Tentative Agreement 2. As a result, in my view, Bill 75 was inconsistent with the process of good faith bargaining and did not demonstrate that the Province "listened to and incorporated the priorities and interests" of teachers. Bill 75 was disrespected (and was not consistent with) the process which preceded it. In my view, Bill 75 did not respect any of the values that inspire section 2(d) of the *Charter*.

…

[128] **The exceedingly obvious fact is that Bill 75 did not "largely replicate" Tentative Agreement 3. On the contrary, it selectively dismantled Tentative Agreement 3 and debased the process that preceded it**.

> [129] Based on these reasons alone, Bill 75 violates section 2(d) of the *Charter*.
>
> [emphasis added]

[29] NSTU had also argued Bill 75 was unconstitutional because the government had engaged in bad faith conduct during the bargaining which preceded it. Part of this alleged bad faith was the enactment of Bill 148. The hearing judge rejected this argument as an additional basis for finding Bill 75 breached teachers' s. 2(d) rights:

> [130] That said, NSTU neither focusses on Tentative Agreement 3 nor seeks to have it recognized and enforced as a reflection of good faith collective bargaining. NSTU complaint is broader. It argues that the legislative measure in question (Bill 75) reflected a bad faith process of collective bargaining that was contaminated from the very beginning. NSTU asks that Bill 75 be condemned as unconstitutional but goes further and insists that a simple declaration invalidating Bill 75 results only in a pyrrhic victory, leaving teachers without an effective remedy. NSTU's arguments around remedy reveal its primary goal: restoration of the Service Award/Death Benefit that was eliminated through Bill 75. Indeed, in terms of a substantive damages award under section 24(1) of the *Charter*, NSTU requests only that the Service Award/Death Benefit be immediately reinstated into the existing collective agreement together with other related relief for teachers who resigned or retired after Bill 75 and whose entitlement to the Service Award/Death Benefit was reduced. (NSTU Written Submissions filed December 18, 2020, at paragraph 520)
>
> [131] NSTU supports this request by referring back to the process of collective bargaining that preceded Bill 75 and argues that the Province acted in bad faith by:
>
> > …approaching collective bargaining with a closed mind on wages and the Service Award, having a plan in place well before the commencement of negotiations to enact legislation to impose its position on wages and the Service Award if it could not be achieved in bargaining, and then by passing [Bill 148], which took wages and the Service Award off the bargaining table.
> >
> > (NSTU Written Submission filed December 18, 2020 at paragraph 6)
>
> [132] Respectfully, in the circumstances of this case**, I am unable to agree that the entire process of collective bargaining that yielded three successive tentative agreements violated the rights guaranteed in section 2(d) of the *Charter***.
>
> [emphasis added]

[30] Having found Bill 75 to be unconstitutional, the hearing judge issued a declaration it was of no force and effect. He was not prepared to grant any additional remedy under s. 24(1) of the *Charter*. On that point, he simply said:

> [175] NSTU asked that I also reinstate the Service Award/Death Benefit and related damages as a remedy under section 24(1) of the *Charter*. I am not prepared to grant that remedy given my findings regarding the nature of the *Charter* breach in this proceeding and the presumption of constitutionality regarding Bill 148.

Issues on Appeal

[31] The NSTU Notice of Appeal sets out the following grounds:

> (1) The Honourable Justice erred when he failed to grant a s. 24 *Charter* remedy, including the reinstatement of service awards and death benefits;
>
> (2) The Honourable Justice erred when he determined that the presumption of constitutionality applied to the *Public Services Sustainability (2015) Act*, SNS 2015, c. 34 despite the fact that this legislation had not been proclaimed into force during the time period relevant to the Decision, and declined to grant a s. 24(1) *Charter* remedy as a result;
>
> (3) The Honourable Justice erred when he determined that the presumption of constitutionality applied such that the actions taken by the Respondent adjacent to *the Public Services Sustainability (2015) Act* were immunized from scrutiny, and that government actions conducted pursuant to a piece of legislation that was not yet in force must be considered to be constitutional despite the fact that the legislation at issue had not been proclaimed into force, and declined to grant a s. 24(1) remedy as a result;

[32] The order requested was as follows:

> The appellant submits that the Court should allow the appeal and that the Order should be varied to include the granting of a s. 24 *Charter* remedy including the reinstatement of service awards and death benefits.

[33] In its factum, NSTU modified its position and did not request this Court to grant a remedy under s. 24(1) of the *Charter* and amend the New CBA. The factum says:

> 103. The Application Judge erred in concluding that the presumption of constitutionality prevented him from finding that Government failed to engage in meaningful and good faith bargaining before introducing Bill 75. On the findings of the Application Judge, it was open to him to determine that Government had

> engaged in conduct that was contrary to a constitutional process of collective bargaining. Further, it was open to the Application Judge to grant the requested s. 24(1) remedies, including reinstatement of the Service Award, the granting of *Charter* damages, and the reinstatement of terms of Tentative Agreement 3 that had been selectively dismantled by Bill 75.
>
> 104. The Application Judge's error regarding the effect of Bill 148's presumed constitutionality was foundational to his decision to not grant s. 24(1) remedies. In these circumstances**, the NSTU respectfully requests that the related issues of the Government's conduct during bargaining and the granting of s. 24(1) remedies be remitted to the Application Judge.**
>
> [emphasis added]

[34] NSTU says the sole issue for determination on this appeal is whether the judge was correct to say Bill 148 should be presumed to be constitutional. This is a question of law which is reviewed on a standard of correctness.

[35] The AGNS submits the appeal is from a remedial decision made pursuant to the *Charter*. It says such a decision is to be afforded significant deference as described in para. 87 of *Doucet-Bourdreau*:

> 87 Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities. Reviewing courts, for their part, must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle.

[36] I agree with the AGNS that this is an appeal from a discretionary remedial decision, entitled to significant deference.

Analysis

[37] NSTU says there is no presumption of constitutionality for legislation which has been passed but not yet proclaimed. They provide no authority directly on

point. The AGNS cited several cases to support their submission that un-proclaimed legislation can be subject to constitutional analysis including *Manitoba Federation of Labour v. The Government of Manitoba*, 2021 MBCA 85 where the bill in question had not yet come into force.

[38] The hearing judge answered the constitutional question before him on narrower grounds than argued by NSTU. He focused on a comparison of Bill 75 and the third tentative agreement. He found the "step back" in position by the government demonstrated that Bill 75 was not the product of good faith collective bargaining. For this reason, it violated s. 2(d) of the *Charter*. In the circumstances, it was unnecessary for him to go further and consider the additional submission by NSTU that the government had engaged in bad faith during the bargaining process.

[39] The NSTU argument concerning alleged bad faith conduct by the government posed a difficulty for the hearing judge. On the one hand he was not to assess the constitutionality of Bill 148 and yet, he was urged to find its enactment was part of a government plan to substantially interfere with the *Charter* rights of the NSTU and its members. A finding that Bill 148 was enacted for such an improper purpose could call into question its constitutionality, whether or not a declaration to that effect was issued. It is understandable why the hearing judge might choose to avoid this conundrum, particularly where the validity of Bill 148 was being addressed in other proceedings.

[40] Whether the hearing judge was correct in his comments on the constitutional presumption did not affect his reasons for concluding Bill 75 was unconstitutional which were based on the government's failure to respect the third tentative agreement with the NSTU. This is illustrated in various passages from his decision, including paragraph 10:

> [10] Having said that, for clarity, **I do not find that Bill 75 is unconstitutional based on certain additional criticisms advanced by NSTU regarding the collective bargaining process which preceded Bill 75.** The collective bargaining process which ultimately led to Bill 75 was dominated by another, different legislative measure: Bill 148. The issue of Bill 148's constitutionality was not placed in issue in this proceeding…
>
> [emphasis added]

[41] The hearing judge had the discretion to decide the constitutional issue on the grounds he chose without engaging in a broader analysis of government conduct and the underlying question of the *bona fides* of Bill 148. In these circumstances, I

express no opinion on the NSTU arguments concerning Bill 148's potential violation of s. 2(d) rights because this issue is not before us.

[42] Counsel for NSTU says the purpose of this appeal is to obtain an amendment of the New CBA in relation to the Service Award. In order to do so they request the matter be returned to the hearing judge to determine whether the government acted in bad faith during collective bargaining. If successful, they will ask the hearing judge to exercise his discretion and grant an order under s. 24(1) amending the New CBA.

[43] Before the hearing judge, the NSTU based their remedial request on the minority decision of Donald, J.A. in *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184 ("*BCTF*"). The Supreme Court of Canada subsequently adopted his opinion when it allowed an appeal "substantially for the reasons of Justice Donald" (2016 SCC 49).

[44] The NSTU cites Justice Donald's decision as authority for their argument on remedy because he granted an order under s. 24(1) of the *Charter* amending an existing CBA. NSTU says this is analogous to what is being sought here.

[45] The circumstances in *BCTF* were unique and significantly different than those in this matter. Justice Donald accepted the trial judge's finding of bad faith on the part of government which was manifested through 13 years of systemic and institutionalized negation of teachers' s. 2(d) rights.

[46] The basis for Justice Donald's s. 24(1) order can be found in the legislation and government conduct being challenged. The legislation replaced an existing CBA with one where certain provisions related to working conditions were removed. It also prohibited collective bargaining on those matters for several years. Justice Donald described the necessity for the s. 24(1) remedy as follows:

> [397] However, in my opinion, more is required to constitute an appropriate remedy. As stated previously, the effect of delaying invalidity to the present is that the Working Conditions will continue to be absent from the current collective agreement. **This places the teachers at an unfair disadvantage due to egregious and unconstitutional government conduct. Such a result would be unfair and, in my opinion, cannot stand**.
>
> …
>
> [399] In my opinion, allowing the Working Conditions to remain deleted would **force teachers to continue to suffer from unconstitutional government action and legislation**. Therefore, I would order, pursuant to s. 24(1), that the Minister

> of Education direct the public administrator for the BCPSEA appointed under s. 9.1 of the *Public Sector Employers Act* to reinstate the Working Conditions into the collective agreement immediately. Any future deletion or alteration of these terms must occur as the result of the collective bargaining process or after a constitutionally compliant process of good faith consultation.
>
> [emphasis added]

[47] In this case, the restrictions on Service Awards found in the New CBA arose through negotiation. Bill 75 did not apply to the New CBA, and there was no evidence before the hearing judge with respect to the conduct of the parties during the bargaining process which led to it. During oral submissions, the hearing judge raised concerns about inserting new terms in a CBA which had been freely negotiated by the parties.

[48] NSTU argued that even though Bill 75 did not apply to the New CBA the restriction on Service Award accrual had upset the negotiation dynamic and made it practically impossible to negotiate for the reestablishment of the earlier CBA terms. Their pre-hearing brief set out their position:

> 447. Bill 75 also pre-emptively undermines future processes of collective bargaining by curtailing and nullifying the Service Award, rendering it effectively impossible for the NSTU to renegotiate the Service Award back into the collective agreement. As was the case with the removal of Working Conditions and the temporary bar on their renegotiation in *BCTF*, the effect of the ending of the Service Award in Bill 75 is not temporary, and has made future negotiations on the Service Award futile. The NSTU negotiated the Service Awards into collective agreements at least by the 1970s. It negotiated improvements to the Service Award, providing for a standard and significant benefit for service after July 31, 2002, almost 20 years ago. If the Service Award had remained a part of the Teachers' Provincial Agreement, any future negotiation would take place with Article 61 as a floor. If the NSTU were to give up some of the Service Award in negotiations, it would receive some benefit in return. Unilaterally deleting the Service Award from the Teachers' Provincial Agreement set the NSTU back substantially in its efforts to represent teachers' interests. Bill 75 sends the NSTU back to the beginning, and in order to renegotiate the Service Award back into the collective agreement, the NSTU would be starting from scratch and would likely have to give up some other benefit in order to reinstate it. Given the fact that the Service Award had been a feature of teachers' collective agreements for decades, it would be reasonable for teachers to question whether they would ever get it reinstated. This is why Bill 75 was so damaging and why it rendered teachers' attempts to associate and collectively bargain futile in regard to the Service Award.

[49] Without a finding of government conduct in breach of s. 2(d) which impacted the negotiations leading to the Service Award provisions found in the New CBA, there would be no basis for the hearing judge to consider rewriting that agreement to incorporate the provisions requested by NSTU.

[50] There was no evidence before the hearing judge about the negotiations leading to the New CBA nor what impact, if any, Bill 75 had. Were the matter to be remitted, as requested by the NSTU, I agree with the assertions of the AGNS that additional evidence about those issues would likely be required.

[51] The hearing judge was asked to decide whether Bill 75 infringed the s. 2(d) rights of the NSTU and its members. He concluded it did. He exercised his discretion not to go further and consider the other issues raised by NSTU including the s. 2(b) argument and whether the government had engaged in bad faith bargaining. He committed no error in principle in doing so.

[52] The hearing judge's refusal to grant the s. 24(1) remedy was appropriate, given the evidentiary record and the findings he made. NSTU has not demonstrated this is one of those unusual cases where a s. 24(1) remedy should be granted in addition to a declaration of invalidity under s. 52(1).

Conclusion

[53] For the above reasons, I would dismiss the appeal by NSTU with costs payable to the AGNS in the amount of $6,000.00.

Wood, C.J.N.S.

Concurred in:

Farrar, J.A.

Beaton, J.A.