NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. Nova Scotia Teachers Union*, 2020 NSCA 17

Date: 20200310
Docket: CA 489232
Registry: Halifax

Between:

Attorney General of Nova Scotia representing
Her Majesty the Queen in Right of the Province of Nova Scotia

Appellant

v.

Nova Scotia Teachers Union

Respondent

Judge: The Honourable Justice Joel E. Fichaud

Appeal Heard: January 27, 2020, in Halifax, Nova Scotia

Subject: Admissibility of Evidence—Privilege

Summary: The Nova Scotia Teachers Union and the Minister of Education were negotiating a new collective agreement. In October 2015, the Deputy Minister of Finance told the Union's chief negotiator that, if the Union did not accept the Minister's offer, the Government would legislate less favourable terms of compensation. In December 2015, the Government introduced Bill 148, which adopted a restricted framework for compensation of public employees. Bill 148 was enacted by the Legislature but not proclaimed. Thereafter, the Minister and Union were unable to reach terms of a collective agreement that were acceptable to the teachers. In February 2017, the Government introduced and the Legislature enacted Bill 75, which was proclaimed and imposed terms of employment on teachers.

The Union sued for rulings that the Minister bargained in bad

faith and offended s. 2(d) of the *Canadian Charter of Rights and Freedoms*. Those issues were for the principal proceeding and not for determination in this appeal.
The Attorney General moved to strike the Union's evidence that the Deputy Minister had threatened legislation if the Union failed to accept the Minister's offer. The Union moved for an order that the Attorney General produce documents relevant to the enactment of Bill 148. The chambers judge of the Supreme Court of Nova Scotia dismissed the Attorney General's motion and granted the Union's motion.
The Attorney General appealed both interlocutory rulings to the Court of Appeal. The Attorney General moved to adduce fresh evidence in the Court of Appeal.

Issues: Is the fresh evidence admissible? Did the Deputy Minister's threat of legislation attract either settlement privilege or case-by-case privilege? Are the documents respecting Bill 148 relevant or subject to public interest privilege?

Result: The Court of Appeal dismissed the Attorney General's motion to adduce fresh evidence. The Attorney General had not exercised due diligence to adduce the evidence to the chambers judge. Further, the evidence could not reasonably be expected to affect the result.
The Deputy Minister's statement did not attract either settlement privilege or case-by-case privilege.
The documents respecting Bill 148 were relevant and did not attract public interest privilege.

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Judges:	Van den Eynden, Oland and Fichaud JJ.A.
Appeal Heard:	January 27, 2020, in Halifax, Nova Scotia
Held:	Motion to admit fresh evidence dismissed, leave to appeal granted, and the appeal dismissed with $2,500 appeal costs, per reasons for judgment of Fichaud J.A, Oland and Van den Eynden JJ.A. concurring
Counsel:	Andrew Taillon and Dorianne Mullin for the Appellant Gail Gatchalian, Q.C. and Jillian Houlihan for the Respondent

Reasons for judgment:

[1] In June 2015, the Nova Scotia Teachers Union gave the Province's Minister of Education notice to re-negotiate the teachers' collective agreement.

[2] In late October 2015, the Deputy Minister of Finance told the Union's chief negotiator that, if the Union did not accept the Minister's tabled offer, the Government would legislate less favourable compensation. In December 2015, the Government introduced and the Legislature enacted Bill 148, which adopted a restricted framework for compensation to public employees, including teachers. Bill 148 was not proclaimed. The Union alleges the threat to legislate terms of employment and the prospect of proclamation of Bill 148 constrained what should have been free collective bargaining.

[3] Thereafter the Union and Minister failed to reach terms of a new collective agreement that were acceptable to the teachers. In February 2017, the Government introduced and the Legislature enacted Bill 75, which imposed terms of employment on the teachers.

[4] The Union sued for rulings that the Minister bargained in bad faith and Bill 75 offended s. 2(d) of the *Canadian Charter of Rights and Freedoms*. The Attorney General denied the claim. That matter is for another day.

[5] This appeal is from interlocutory rulings on admissibility of evidence in the underlying claim. Before the chambers judge in the Supreme Court:

- The Attorney General moved to strike the Union's affidavit evidence that the Deputy Minister threatened legislation if the Union rejected the Minister's offer. The Attorney General says the evidence attracts settlement privilege or case-by-case privilege.
- The Union moved for production of Cabinet documents respecting Bill 148. The Attorney General submits that evidence is irrelevant and is subject to public interest privilege.

[6] The chambers judge dismissed the Attorney General's motion and granted the Union's motion. The Attorney General appeals both rulings. In this Court, the issues are whether (1) the affidavit evidence of the Deputy Minister's threat of

legislation attracts settlement or case-by-case privilege, and (2) the evidence respecting Bill 148 is irrelevant or is subject to public interest privilege.

Background

[7] The Nova Scotia Teachers Union ("Union") is a body corporate under the *Teaching Profession Act*, R.S.N.S. 1989, c. 462 and is the exclusive bargaining agent for 9,300 teachers employed with provincial school boards. The teachers' employer is the provincial Minister of Education and Early Childhood Development ("Minister").

[8] On May 14, 2013, the Union and Minister entered into a collective agreement for a term to expire July 31, 2015.

[9] On June 18, 2015, the Union gave the Minister notice to bargain a new collective agreement. The negotiation was governed by the *Teachers' Collective Bargaining Act*, R.S.N.S. 1989, c. 460, as amended.

[10] On September 29, 2015, the parties exchanged proposals.

[11] The Union alleges that, on October 28, 2015, the Deputy Minister of Finance and the Treasury Board, Mr. George McLellan, told the Union's lead negotiator, Mr. Ronald Pink, Q.C., that, if the teachers did not accept the Minister's offer (which included, among other terms, a two-year wage freeze), the Government would introduce legislation to impose lower compensation. On November 12, 2015, the Union accepted the Minister's offer, subject to ratification by the teachers. The parties term this the "first tentative agreement". On December 1, 2015, a majority of teachers voted to reject that agreement.

[12] On December 14, 2015, the Government introduced Bill 148. The Bill was enacted quickly with Royal Assent on December 18, 2015 as the *Public Services Sustainability (2015) Act*, S.N.S, 2015, c. 34 ("Bill 148"). Section 2 said the Bill's purposes included to "create a framework for compensation plans for public-sector employees … by placing fiscal limits on increases to the compensation rates and compensation ranges payable by public-sector employers that are in conformity with the consolidated fiscal plan of the Province". These limits included a wage freeze and an end to the accrual of the service award (an amount payable when the public servant leaves employment). Bill 148 expressly applied to teachers' collective agreements. Bill 148 was not proclaimed.

[13] The negotiators returned to the bargaining table. On September 6, 2016, the Union and Minister concluded a second tentative agreement. By a vote, this too was rejected by a majority of teachers.

[14] On December 5, 2016, the teachers began a partial withdrawal of services. The Minister followed with a brief lockout.

[15] On January 20, 2017, the Union and the Minister reached a third tentative agreement, also rejected by a majority vote of teachers.

[16] In February 2017, the Government introduced and enacted Bill 75, the *Teachers' Professional Agreement and Classroom Improvements (2017) Act*, S.N.S. 2017, c. 1 ("Bill 75"). Bill 75 ended the teachers' job action, froze wages for two years, limited wage increases for the next two years, froze the accrual of the service award for current teachers and eliminated the service award for future teachers. Bill 75's wage pattern was consistent with the Government's framework that Bill 148 had described fourteen months earlier.

[17] On October 31, 2017, the Union filed, in the Supreme Court of Nova Scotia, a Notice of Application against the Attorney General representing the Province of Nova Scotia ("*Charter* Application"). Based on Mr. McLellan's alleged statement to Mr. Pink on October 28, 2015, the Notice claimed:

> 12. … By threatening to legislate unfavourable collective agreement provisions, the government failed to respect a process of collective bargaining and good faith consultation as required under s. 2(d) of the *Charter* and instead, contrary to s. 2(d), bargained in bad faith and substantially interfered with the collective bargaining process.

Respecting Bill 148, the Notice claimed:

> 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. Bill 148, if it had been proclaimed in respect of teachers, would have limited compensation increases to those in Tentative Agreement 1, and would have ceased the accrual of service awards on retirement based on the teacher's salary as at March 31, 2015.

The Notice (paras. 22 and 40) reiterated the claim that the threat to proclaim Bill 148 for teachers "continued to hang over negotiations" and offended the Minister's obligation to bargain in good faith under s. 2(d) of the *Charter*. The Notice also claimed Bill 75's imposition of terms of employment offended s. 2(d) of the *Charter*.

[18] On December 8, 2017, the Attorney General filed a Notice of Contest. That Notice denied the Union's assertions respecting the McLellan-Pink conversation of October 28, 2015 and the effects of Bills 148 and 75.

[19] The Union's affidavits for the *Charter* Application included evidence of Mr. McLellan's statement on October 28, 2015. One was an Affidavit of Jack MacLeod, an Executive Officer with the Union.

[20] On December 20, 2018, the Attorney General moved to strike the paragraphs of the affidavits that cited the McLellan-Pink conversation of October 28, 2015. The Attorney General submitted that what Mr. McLellan told Mr. Pink was subject to settlement privilege and case-by-case privilege. ("Attorney General's Motion")

[21] The Union moved for production of Cabinet documents respecting Bill 148 ("Union's Motion"). The Attorney General objected, saying the evidence was irrelevant and attracted public interest privilege.

[22] On May 15 and 16, 2019, Supreme Court Justice Jamie Campbell heard both motions in chambers. On June 4, 2019, the chambers judge issued separate decisions on the two motions.

[23] Justice Campbell dismissed the Attorney General's Motion. He held that what Mr. McLellan said to Mr. Pink did not attract settlement privilege or case-by-case privilege. [2019 NSSC 175]

[24] The judge allowed the Union's Motion. He ruled the documents were relevant and did not attract public interest immunity. With some exceptions for irrelevance and solicitor-client privilege, he ordered production by the Attorney General. [2019 NSSC 176]

[25] On June 18, 2019, the Attorney General filed a Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) to the Court of Appeal from each Decision. On June 25, 2019, the Union filed a Notice of Contention respecting the judge's ruling on the Attorney General's Motion.

[26] The appeals were consolidated. On January 27, 2020, this Court heard the appeals together.

Issues

[27] The Attorney General moved to enter fresh evidence in this Court. A preliminary issue is whether that evidence should be admitted.

[28] On the appeal from the dismissal of the Attorney General's Motion to strike, the issues are whether the chambers judge erred by ruling the McLellan-Pink conversation did not attract settlement privilege or case-by-case privilege.

[29] On the appeal from the Union's successful Motion for production, the issues are whether the judge erred by ruling the documents were relevant or by ruling they did not attract public interest privilege.

Should Fresh Evidence be Admitted?

[30] The Attorney General moved to add fresh evidence in the Court of Appeal. The tendered evidence is the cross-examination of Jack MacLeod, conducted on June 28, 2019.

[31] Mr. MacLeod's Affidavit, sworn May 30, 2018, addressed the conversation between Messrs. McLellan and Pink on October 28, 2015. The Attorney General's Motion sought to strike those passages from Mr. Macleod's Affidavit.

[32] The Attorney General's brief in support of the fresh evidence motion quotes two extracts from Mr. MacLeod's cross-examination as relevant to whether settlement privilege applies. In those passages, Mr. MacLeod agreed that: (1) before negotiations began, the Union "was concerned" that the Government might impose terms of employment by legislation; and (2) the negotiations between the Union and Minister involved "a bargaining dispute". The Attorney General says those passages show that the dispute, from which Mr. McLellan's statement of October 28, 2015 arose, was litigious. According to the Attorney General, Mr. McLellan's statement attempted to settle litigation — *i.e.* a possible future *Charter* challenge by the Union to legislation that would impose terms of employment — and, consequently, was subject to settlement privilege.

[33] Rule 90.47(1) says the Court of Appeal "may on special grounds" admit fresh evidence. In *Armoyan v. Armoyan*, 2013 NSCA 99, leave to appeal refused [2013] S.C.C.A. No. 446, this Court explained "special grounds":

> [131] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for "special grounds" stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Under *Palmer*, the admission is governed by: (1) whether there was due diligence in the effort to adduce the evidence at trial, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence, and (4) whether the fresh evidence could reasonably have affected the result. Further, the fresh evidence must be in admissible form. [citations omitted]

[34] In my view, the Attorney General's Motion fails to satisfy the first and fourth criteria.

[35] **Due diligence:** Mr. MacLeod's Affidavit was filed on June 1, 2018 and served on the Attorney General at that time. On December 20, 2018, the Attorney General filed its Motion to strike portions of Mr. MacLeod's Affidavit.

[36] On May 15, 2019, the chambers judge heard the Attorney General's Motion.

[37] The chronology on the scheduling of Mr. MacLeod's cross-examination is in evidence. The choice of date to cross-examine Mr. MacLeod did not result from procrastination by the Union. Rather, the Attorney General agreed to June 28, 2019.

[38] After the Attorney General received Mr. MacLeod's Affidavit (June 1, 2018), the Attorney General had almost a year to cross-examine Mr. MacLeod in time for the chambers motion. Instead of seeking a timely cross-examination, the Attorney General opted to schedule Mr. MacLeod's cross-examination for a date after the chambers hearing. Now the Attorney General seeks to bolster the appeal record with evidence the chambers judge did not see. Retrospective bolstering is not a "special ground" under Rule 90.47(1).

[39] The Attorney General did not exercise due diligence to cross-examine Mr. MacLeod within time to submit that transcript for the chambers hearing.

[40] **Reasonably affect the result:** The record already contains a letter from Mr. Pink, to the membership, saying "legislation was always an option for the government". The admission of Mr. MacLeod's passage to similar effect would add nothing new. Later I will discuss whether Mr. McLellan's statement of

October 28, 2015 attracted settlement privilege (paras. 48-57). The analysis does not turn on whether the Union was concerned that legislation was an option. Mr. MacLeod's cross-examination could not reasonably affect the result.

[41] **Summary:** I would dismiss the Attorney General's motion to add fresh evidence.

Leave to Appeal

[42] Leave to appeal is required from an interlocutory order: *Civil Procedure Rules* 90.05(1)(c) and 90.09. Leave is granted for an arguable issue, meaning a ground that, if successful, could result in the appeal being allowed: *Sydney Steel Corporation v. MacQueen*, 2013 NSCA 5, paras. 18–37; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38, para. 18; *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83 (leave to appeal granted by Supreme Court of Canada on March 28, 2019), para. 16.

[43] The grounds here are arguable. I would grant leave.

Standard of Review

[44] On an appeal from a judge, this Court assesses pure or extractable legal issues for correctness. Issues of either fact or mixed fact and law with no extractable legal issue are reviewed for palpable and overriding error. This means a clear error that affected the result.

[45] The judge's exercise of a legal discretion is reviewed for error in legal principle or whether the ruling would cause a patent injustice. As it is presumed that a judge should not use a legal discretion to create an avoidable patent injustice, "causing a patent injustice" is an implied error of law.

[46] Those principles are explained in: *Gwynne-Timothy v. McPhee*, 2005 NSCA 80, paras. 31–33; *Sable Mary Seismic Inc. v. Geophysical Service Inc.*, 2012 NSCA 33, paras. 59–60; *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras. 16–29. *Tapics v. Dalhousie University*, 2015 NSCA 72, para. 38; *Nova Scotia v. Judges of the Provincial Court*, *supra*, para. 18.

Should the Evidence of Mr. McLellan's Statement be Struck?

[47] The Attorney General cites settlement privilege and case-by-case privilege.

[48] **Settlement privilege:** The key fact is Mr. McLellan's alleged statement to Mr. Pink on October 28, 2015 that, if the Union did not accept the Minister's offer, the Government would legislate less favourable compensation. The judge held the statement did not attract settlement privilege.

[49] The judge (para. 39) cited the elements of the test for settlement privilege. The proponent of the privilege has the onus to show: (1) litigation was commenced or in the parties' contemplation; (2) the communication was made with the intent it not be disclosed if settlement negotiations failed; and (3) the purpose of the communication was to achieve settlement. Justice Campbell correctly identified the elements of the test: *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, para. 30.

[50] The judge held that none of the elements existed (paras. 40–50). He found: (1) in October 2015, the only actual or contemplated dispute was the negotiation of a new collective agreement, not litigation; (2) nor was there intent that the communication remain undisclosed if the negotiations failed; and (3) the purpose of the communication was to reach a new collective agreement, not to settle a lawsuit.

[51] In this Court, the Attorney General submits that, in every negotiation of a public sector collective agreement, a legislated outcome clearly is foreseeable, as is a responding challenge to that legislation under s. 2(d) of the *Charter*. Consequently, the Attorney General submits that the attempt to settle the terms of a public sector collective agreement must be presumed to encompass an attempt to settle the contemplated litigation.

[52] The judge's factual findings on the three elements of settlement privilege are well-supported by evidence and disclose no palpable and overriding error.

[53] Insofar as the Attorney General proposes a legal presumption as to what must be contemplated during a public sector negotiation, I respectfully disagree.

[54] The Attorney General's factum says (para. 52) "the ability to claim settlement privilege allows the parties to settle their disputes without concerns of allegations of bad faith". That proposition is the backbone of the Attorney

General's theory. It contradicts the Supreme Court of Canada's approved approach to the topic.

[55] In *British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49, para. 1, the majority of the Supreme Court summarily allowed the appeal "substantially for the reasons of Justice Donald" who dissented in the Court of Appeal. In the Court of Appeal (2015 BCCA 184), Justice Donald (paras. 291–92) held: (1) pre-legislative consultations between the government and union must be "meaningful"; (2) "the *Charter* prohibits an abuse of any power imbalance by the government during the consultation process"; and (3) "this prohibition requires a sufficiently probing analysis of the government's actions and positions by a court".

[56] The Attorney General's proposition would allow a government to abuse a power imbalance and avoid any probing analysis simply by draping litigation privilege over the evidence of bad faith.

[57] Settlement privilege concerns the settlement of an actual or contemplated lawsuit. On October 28, 2015, the negotiators were focused on collective bargaining. They were not girding for litigation. The point of Mr. McLellan's statement was to achieve a new collective agreement. It was not to settle a non-existent *Charter* challenge to un-begotten legislation. Settlement privilege has no application. I would dismiss the Attorney General's ground of appeal on the point.

[58] **Case-by-case privilege:** The chambers judge (para. 52) cited the elements of case-by-case privilege, *i.e.* that the proponent of the privilege show: (1) the communication originated in confidence; (2) confidentiality was essential to the parties' relationship; (3) the relationship was one that, in the opinion of the community, should be fostered; and (4) the injury to the relationship from disclosure would exceed the benefit from the correct disposal of the litigation. See *Slavutych v. Baker*, [1976] 1 S.C.R. 254, at pp. 260–61, citing *Wigmore on Evidence*, 3rd ed. This privilege aims to foster a societally valuable relationship that depends on a bond of trust.

[59] The Attorney General accepts the judge correctly defined the elements of the test.

[60] The chambers judge held the first, second and fourth tests were not satisfied (paras. 53–61). He found: (1) the communication did not originate in an expectation of confidence; (2) the adversarial relationship between the Minister and Union belied any notion of a mutual allegiance based on confidence; and (3)

the benefit from correct disposal of the litigation outweighed any injury to the relationship from disclosure.

[61] In this Court, the Attorney General says a bond of confidentiality existed between the Minister and the Union.

[62] Whether there was an expectation of mutual confidentiality is an issue of fact.

[63] Neither Mr. Pink nor Mr. McLellan gave evidence as to their expectations. The judge was left to draw an inference from the record. In my view the key factors are the following:

- The parties were heatedly adversarial. The negotiators were allegiant to their principals, not to each other. The principals – Union and Minister – were allegiant to the membership and electorate.
- Mr. Pink relayed the threat of legislation in a letter to the Union's membership, 9,300 teachers. Consequently, the judge found (para.56):

"Mr. Pink did not believe that the content of the conversation was intended to be kept in confidence".

- Mr. McLellan would expect Mr. Pink to relay the threat of legislation to the Union executive for dissemination among the membership. Otherwise, the threat would not sway a ratification vote.
- In the months before the McLellan-Pink exchange, the Government's representatives met with labour leaders across Nova Scotia to explain the Government's "Public Services Sustainability Mandate" to restrict public service compensation (Chambers Judge's Decision, para. 13). The Government's warning of austerity was not confidential.
- Several weeks after Mr. McLellan's statement, Bill 148 publicly embodied the Public Services Sustainability Mandate.
- In argument, counsel for the Attorney General sought to justify settlement (or litigation) privilege by urging that a legislated resolution was notoriously predictable in the renegotiation of any public service collective agreement (above, para. 51). Notoriety is inconsistent with an expectation of confidence.

[64] The judge's finding there was no expectation of confidentiality is amply supported. I would dismiss the ground of appeal on case-by-case privilege.

Should the Documents Respecting Bill 148 be Admitted?

[65] The Attorney General submits that the documents relating to the background of Bill 148 are (1) irrelevant and (2) protected by public interest privilege.

[66] **Relevance:** The Attorney General's factum submits (para. 78) Bill 148 is irrelevant because:

> Bill 148 was legislation imposing wage restraint on public sector employees generally; it was not specific to teachers as Bill 75 was.

[67] I disagree. Bill 148, s. 3(c), specifically defines "collective agreement" as including an agreement under the *Teachers' Collective Bargaining Act.* Bill 148 then supersedes terms of collective agreements with its legislated terms. Section 3(q)(ii) specifically defines "service award" to include an award to teachers. Bill 148 then restricts the accrual of service awards.

[68] The Union pleads that the enactment, failure to proclaim, and ongoing threat to proclaim Bill 148 allowed the Government to constrain free collective bargaining thereafter. It is the Union's theory that (1) the Government's "Mandate" to reform collective bargaining in the public service, which predated the McLellan-Pink exchange, (2) Mr. McLellan's statement to Mr. Pink on October 28, 2015, (3) the enactment (but non-proclamation) of Bill 148 six weeks later, (4) the ongoing threat to proclaim Bill 148, and (5) the enactment of Bill 75 in February 2017, show a pattern of conduct by the Government spanning the period of bargaining for the teachers' collective agreement. The Union alleges the pattern is one of bad faith, as the Government (1) had pre-determined the terms of teachers' compensation, regardless of collective bargaining, and (2) leveraged its power imbalance (its legislative authority) to debilitate negotiations.

[69] The Attorney General's Notice of Contest denies these allegations, placing the Union's allegations and claims in issue.

[70] Whether the Union's allegations are factual is for the judge who hears the *Charter* motion. Whether those facts, if proven, constitute bad faith and violate s. 2(d) also is for the principal hearing. Nothing in my reasons should be taken as expressing a view on those matters.

[71] The issue here is relevance. The evidence respecting Bill 148 is probative of disputed material facts and claims that are basic to the Union's claim. That makes the evidence relevant: *R. v. White*, [2011] 1 S.C.R. 433, para. 36, per Rothstein J.

[72] The judge did not err by ruling the documents were relevant. I would dismiss this ground of appeal.

[73] **Public interest privilege:** The chambers judge cited the established test for public interest privilege from Justice La Forest's reasons in *Carey v. Ontario*, [1986] 2 S.C.R. 637. Justice La Forest listed the factors to be weighed to determine whether public interest privilege exists: (1) the nature of the policy concerned; (2) the contents of the documents; (3) the level of the decision-making process; (4) timing of the disclosure; (5) the importance of production to the administration of justice; and (6) whether there is an allegation of improper conduct by the executive branch against a citizen.

[74] Justice Campbell dealt specifically with each *Carey* factor. He had the Cabinet documents sought by the Union's Motion. He applied the factors to those documents and explained his reasoning for each. He then balanced the factors and concluded:

> [70] Generally, the documents sought are not privileged. They are relevant to the determination of the NSTU's *Charter* litigation and there is a strong public interest in having that resolved without having relevant information kept secret. The case is one that does not involve one commercial litigant but it is of broad public interest and importance. The information that would be disclosed would not disclose deliberations or debates within cabinet. It would not compromise ongoing negotiations by revealing strategies or positions in those negotiations. It would not act as a disincentive to civil servants to provide frank advice to cabinet, when that advice is to comply with the government's *Charter* obligations.

[75] On the appeal, the Attorney General submits the judge gave insufficient weight to "the ability of Cabinet and those presenting to it to be candid". Consequently, according to the Attorney General, the judge "failed to strike the appropriate balance" between the administration of justice and the administration of government (factum, paras. 86–87).

[76] I respectfully disagree. The chambers judge noted the importance of candour within cabinet and between civil servants and members of cabinet (Decision, para. 39). For the documents to be disclosed, he found the disclosure would not impair candid exchange of views within government (paras. 53, 65, 67, 70). The judge

directed redaction of passages that were irrelevant, or contained legal advice. He found that disclosure of the unredacted passages would not impair legitimate governmental interests in deliberative secrecy or future negotiations with public sector unions (paras. 48–69).

[77] The ruling was proportionate and tailored to disclose no more than necessary for the effective resolution of the constitutional issue. The judge's weighing and balancing of the criteria reflected no error.

[78] I would dismiss the Attorney General's ground of appeal on public interest privilege.

Conclusion

[79] I would dismiss the motion for fresh evidence, grant leave to appeal but dismiss the appeal with costs of $2,500 for the appeal, payable forthwith by the Attorney General to the Union.

Fichaud J.A.

Concurred:

Oland J.A.

Van den Eynden J.A.