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Back to School Act Survives Injunction Application

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Case Commented On: *Alberta Teachers Association v Alberta (AG)*, 2026 ABKB 190

On March 13, 2026, Justice Douglas R. Mah denied the application of the Alberta Teachers Association (ATA) for an interlocutory injunction to suspend operation of the *Back to School Act*, SA 2025, c B-05 (*BSA*). Background on this legislation and the Alberta government's use of the *Charter*'s notwithstanding clause to override the teachers' rights to collectively bargain and strike appears in earlier ABlawg posts here and here. This post will discuss Justice Mah's reasons, including his commentary on the role of judges in a constitutional democracy. This commentary is a sign of the times in Alberta, with the government posing threats to the rule of law and judges feeling compelled to speak out and defend their role. And it is not just the Alberta government seeking to exert more control over the judiciary. On March 24, Alberta was joined by the governments of Saskatchewan, Ontario, and Quebec in calling for a greater say for the provinces in the selection of federally appointed judges. The provinces' letter to Prime Minister Mark Carney came during a week when the Supreme Court of Canada is hearing what many consider to be the most important constitutional case since the *Charter* came into effect in 1982, *English Montreal School Board, et al v Attorney General of Quebec, et al*, 2025 CanLII 2818 (SCC) (*EMSB*). *EMSB* involves foundational issues about the powers of judges after a government has invoked the *Charter*'s notwithstanding clause, section 33. As I will discuss, the *EMSB* case played a key role in Justice Mah's decision.

Background

In addition to the background to and scope of the *BSA* laid out in previous ABlawg posts, affidavit evidence heard by Justice Mah helps provide context for the ATA's injunction application. Sean Brown, the ATA's chief negotiator, attested that the "truncated timeline" for the *BSA* – in which legislative debate was limited and the Act came into effect within 12 hours of being introduced – was "alarming to the ATA" (at para 33). He also noted how "the teachers' strike drew broad public support" (at para 33), including student protests in support of teachers in 45 schools across the province following the *BSA*'s enactment. While noting these facts, Justice Mah was careful to indicate that his role was not to abide by public sentiment "or even furor", nor was it to "pass upon the policy or wisdom" of the legislature (at para 34). Rather, his duty was "to ensure the legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power" (at para 34).

The ATA's arguments regarding the constitutional problems with the *BSA* were that:

- Section 14 of the *BSA*, a privative clause that seeks to limit judicial oversight of the Labour Relations Board, is contrary to section 96 of the *Constitution Act 1867*, which recognizes the inherent jurisdiction of superior courts
- The *BSA* violates teachers' freedom of expression and freedom of association in sections 2(b) and (d) of the *Charter*, despite the government having invoked the section 33 notwithstanding clause
- The government's use of section 33 in the *BSA* is invalid
- The *BSA* violates the gender equality guarantee in section 28 of the *Charter*, which applies notwithstanding section 33, and is not justified under section 1 of the *Charter.* (at para 38)

Test for Interlocutory Injunction

In constitutional cases the claimant must satisfy all elements of a three-part test for an interlocutory injunction: (1) either there is a serious issue to be tried or a prima facie case has been established; (2) the applicant would suffer irreparable harm if the injunction was denied; (3) the balance of convenience supports granting the injunction before the case is heard on the merits (at para 36, citing *RJR-MacDonald Inc. v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 at 314-315).

In this case, there was some debate about whether the first step should be based on the lower "serious issue" standard or the higher "prima facie case" standard. The Alberta government argued that because the application involved purely legal issues with no need for findings of fact, the ATA had to raise a "strong prima facie case" (at para 39). Justice Mah generally disagreed that this was the type of "rare or exceptional" case where the issues could be resolved simply by reading the constitutional texts (at para 40). Although he noted that the government's use of the notwithstanding clause was exceptional, this occurred within a factual context of failed negotiations in a specific labour dispute. Legislative facts as to the government's rationale for enacting the *BSA* would also need to be weighed (at para 41). The fact that the ATA's application was for an injunction prohibiting action on the part of the government, rather than mandating government action, supported the "serious issue" standard as well. This was the case for all but the issue raising the privative clause, which Justice Mah found to be a pure question of law subject to the higher "prima facie case" standard (at para 43).

Application of the Test

Step 1 – Serious Issue or Prima Facie Case

On the first constitutional argument, it is noteworthy that although section 14 of the *BSA* provides that "No cause of action or other legal basis for a proceeding arises against the Crown" in relation to the Act, including claims under the *Charter* (see section 14(4)), the government did not contest the court's authority to hear the injunction application (at para 45). Justice Mah indicated that any such argument would have been unsuccessful given the inherent jurisdiction of superior courts, including in constitutional matters (at para 48). The focus was thus whether section 14 disrupted the courts' supervisory jurisdiction over the Labour Relations Board (LRB) contrary to section 96

of the *Constitution Act 1867*. The government argued that section 14 did not "extinguish judicial review" of LRB decisions; it only immunized LRB members from actions taken against them related to their authority under the *BSA* (at para 46). Justice Mah agreed that the *BSA* and other relevant legislation could be interpreted to avoid immunizing the LRB from judicial review, such that the ATA did not make out a strong *prima facie* case on this issue (at paras 48-51).

In his analysis of the first issue, Justice Mah also noted that any prosecutions under the *BSA* would be governed by the *Provincial Offences Procedure Act*, RSA 2000, c P-34 (*POPA*), such that the presumption of innocence would apply even though the *BSA* purported to override section 11(d) of the *Charter* (at paras 46, 51). This appears to have been in response to the ATA's argument that the government's "shotgun" approach to using the notwithstanding clause lacked the requisite degree of clarity in overriding all applicable *Charter* rights (i.e. applicable under section 33 rather than in this specific dispute). The Crown apparently agreed with the court's interpretation that the presumption of innocence would continue to apply to any prosecutions under the *BSA* / *POPA* (see para 51). Both this point and the one directly above beg the question of why the government worded section 14, and indeed the entire *BSA*, more strongly than was legally enforceable, which I will come back to below.

On the second constitutional issue, the court agreed with the ATA that there was a serious issue to be tried as to whether the *BSA* unjustifiably violates teachers' freedom of expression and freedom of association. Although the government invoked the notwithstanding clause to override these freedoms, the Supreme Court of Canada is currently considering whether courts still have jurisdiction to grant declarations of *Charter* violations in spite of the government's use of section 33 (at paras 54, 56, citing *EMSB* and *Government of Saskatchewan v UR Pride Centre for Sexuality and Gender Diversity*, 2025 CanLII 113893 (SCC) (date for hearing not yet set)).

The third issue was whether the government's use of section 33 in the *BSA* was invalid because it operated retrospectively and was used as a blanket shield against any judicial review (at para 57). On the first sub-issue, the Supreme Court had ruled that the notwithstanding clause can only be applied prospectively in *Ford v Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 SCR 712 at 744-745. Justice Mah indicated that he was "less concerned" about this issue and accepted the government's submission that the *BSA* could be read prospectively even though it imposed a collective agreement that the teachers had already rejected by a vast majority (at para 59). He noted, for example, that the teachers' wage increase only began after the *BSA* took effect. The more significant issue was whether section 33 of the *Charter* is subject to any substantive limits – for example, whether governments can use the notwithstanding clause pre-emptively or only in reaction to a court decision (at para 60). Noting that *Ford* had not resolved this question, but that it is currently before the Supreme Court in the *EMSB* case, Justice Mah again found a serious issue to be tried as to the validity of the invocation of section 33 in the *BSA*. One interesting argument the government made was that because the invocation of section 33 prevents courts from striking down legislation under the *Charter*, they should not be able to suspend the operation of section 33 in an injunction application (at para 58). Justice Mah did not address this argument at this stage, perhaps because he went on to deny the injunction application. The government's position does depend on there being no substantive limits on section 33, which is again before the Supreme Court in *EMSB*. However, Alberta also conceded that some of the issues raised by the ATA were not frivolous or vexatious, including that involving the guarantee of sex equality in section 28 of the

Charter, which would impose a substantive limit on section 33 (see para 63). It was difficult to follow the logic in some of the government's arguments.

This takes us to the fourth serious issue put forward by the ATA, that section 28 supersedes section 33 of the *Charter* and would allow a court to strike down the *BSA* if it can be shown that it adversely impacts freedom of expression and association on the basis of sex (at para 62). The gist of the ATA's argument is that because 75% of teachers are women, the *BSA* has a disproportionately gendered impact on these freedoms. Justice Mah noted that the interplay of sections 28 and 33 of the *Charter* is before the Supreme Court in the *EMSB* case and that it was thus a serious issue to be tried (at para 64). He also stated that if this argument is ultimately to be successful, "the ATA's case for the unequal treatment by gender under the BSA will require proof beyond a bare statistic" (at para 64). Although he did not cite any authorities for this comment, it is consistent with the approach to adverse effects discrimination under section 15 of the *Charter.* For example, in *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) and *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7 (CanLII), the Supreme Court connected the statistically disproportionate impact on women of laws related to childcare to gendered barriers to workforce participation and caregiving norms. The ATA will likely need to draw a link between the statistics and the gendered nature of the teaching profession, which can be supported by cases such as *Fraser* and *Kanyinda* as well as by expert evidence when the case is fully heard.

In conclusion on the first step of the test for an interlocutory injunction, Justice Mah found that there were three serious issues to be tried (at para 66).

Step 2 - Irreparable Harm

The ATA's arguments on step 2 were threefold. First, the *BSA* resulted in damage to the relationships between the ATA, the Teachers Employers Bargaining Association (TEBA) and the Alberta government, between the ATA and its union members (i.e. teachers), and between teachers and parents due to lower trust and morale (at para 69). Second, the *BSA* deprived the ATA of the usual resolution mechanisms available in labour disputes, such as continued collective bargaining, mediation, and arbitration (at para 72). Third, if the interlocutory injunction was denied, the ATA's right to strike might expire before the case could be heard on the merits pursuant to the *Labour Relations Code*, RSA 2000, c L-1 (*Code*).

Evidence of these harms was provided through the affidavit of Sean Brown as well as Professor Robert Hebdon, an expert in public sector labour relations. Hebdon attested that "BSA-type legislation strips a union of its core function, makes the collective bargaining process seem futile in the minds of union members, engenders conflict, lower morale, decreased productivity in the workplace, and undermines trust at all levels" (at para 70). Brown provided evidence that these harms had in fact occurred after the *BSA*: "teachers experienced loss of trust in the collective bargaining regime, increased frustration and morale damage, concerns that meaningful collective bargaining is no longer possible, and negative effects on teacher mental health and workplace productivity" (at para 70). Hebdon also noted that although back-to-work laws have been used in Canada before, the typical approach is to impose binding arbitration to allow collective bargaining to continue.

Justice Mah disagreed with the government's argument that these harms were "hypothetical and speculative" (at para 75), finding that the *BSA* had negatively impacted "labour relations, the educational workplace in Alberta, and the mental and emotional well-being of teachers" (at para 76). He noted that teachers' "only bargaining chip" in the labour dispute, their right to strike, was revoked and a previously rejected collective agreement was "rammed down their throats" (at para 77). But in his view, these harms would not be reversed by an interim injunction – they were "already irretrievable" (at para 77). He acknowledged that the harms may worsen over time, and that the timeframe for resolution of the matter was at least 6 months given that the merits hearing is not until September 2026, decision will likely be reserved, and the *EMSB* decision might further delay the final resolution of the issues between the ATA and the government. However, if the ATA is ultimately successful, the pre-*BSA* status quo will be restored, and on a permanent rather than temporary basis, ameliorating the harms apart from the delay (at paras 78-80). The ATA's undertaking not to go on strike for 3 weeks if the injunction was granted was not accepted as a viable solution, even though it was made in good faith and considered the public interest. The difficulty was that there would be no collective agreement in place if the injunction was granted, such that there would be no terms and conditions of work for the teachers, and also no way of knowing what steps the government might take to resolve the dispute, creating uncertainty for students and teachers (at paras 81-83). Lastly, there were no concerns about expiry of the ATA's right to strike under a proper interpretation of the *Code* (at paras 85-86).

Overall, the ATA did not establish irreparable harm "in the legal sense" that an interim injunction would remediate it, and the second step of the test favoured the government (at para 87).

Balance of Convenience

In constitutional cases, the third step of the test for an injunction includes a rebuttable presumption that an injunction would negatively affect the public interest. The ATA argued that the government's anti-democratic imposition of the *BSA* was "contrary to the public interest in a free, open and democratic society" (at para 90), but this was not seen to satisfy the requirement that "public interest benefits will flow from the injunction if granted" (at para 95). Justice Mah found that the balance of convenience favoured the government in two respects. First, the *BSA*'s stated purpose of ending the labour dispute did transpire, promoting the "societal value of having a functioning education system" (at para 100). This value had to be weighed with the "fundamental freedoms" of the teachers to association and expression, and Justice Mah recognized that this conflict between values could be seen as flowing from the government's "refusal to negotiate one of the ATA's major issues of class complexity" (at para 101). At the same time, he did not want to be taken as pronouncing on the effectiveness of the government's strategy, reiterating that his role was not to judge the wisdom of the government's past actions but to decide the public interest as of the time of the application (at paras 102, 111). This favoured having students in school (at para 104).

The ATA's inability to satisfy the second and third part of the test led to the injunction being denied. Justice Mah did confirm that the ATA and its membership were "profoundly affected" by the *BSA* (at para 107) and acknowledged that his decision would likely be "deeply disappointing" to them and to members of the public who believe that the notwithstanding clause was "invoked

in a high-handed way" (at para 110). But this is not the end of the matter and the ATA's challenge will be fully heard on its merits in a few months.

Commentary on Role of the Courts

In recognition of the strong public interest in this case, Justice Mah endeavoured to make his decision transparent and accessible, including through simplified language and explanatory sections, and by distributing unofficial written copies of the decision in court on March 13 (see para 2; note however that at the time of writing, nearly two weeks later, the official version is still unavailable on CanLII). While implicit, it appears that the public interest went beyond the context of the teachers' strike/lockout and extended to the importance of educating the public on the role of the courts in a constitutional democracy. In addition to the excerpts of the decision already noted in this regard, Justice Mah reminded his audience that he is "sentient, conscious, and aware of the world around me. I am not confined to an ivory tower, nor do I live under a rock" (at para 104). Although he may hold his own opinions, he reiterated several times that the role of courts is as guardians of the constitution rather than as adjudicators of the soundness of government decisions (see paras 5, 34, 104). These types of statements should not be necessary, but that is the position in which judges find themselves in the Alberta of today.

While Justice Mah and the courts have their separate functions, it is the role of members of the public to question why the government framed the *BSA* as it did, making concessions at the injunction hearing about the scope of the privative clause in section 14 and the serious *Charter* issues to be tried. A couple more quotes from the court are of interest in this regard:

> "One should not make profound, far-reaching decisions in haste" (at para 4)
> "It is also my obligation to do my best to present my reasons as to how and why I reached this decision in an accessible and transparent manner. To me, those are the obligations of every decision-maker, regardless the branch the government [sic], when the decision affects the lives, families, work, well-being, and identity of a particular group in society…" (at para 5)

Although these quotes were describing the judicial role, they apply equally to the executive and legislative branches of government. Members of the public may rightly have questions about whether the UCP government's approach to the *BSA* satisfies these criteria for decision-making. The challenge with invoking the notwithstanding clause is that the government may never have to justify its actions, but the *EMSB* case will soon provide clarity in that regard.

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