Perspectives in Practice

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

The Organization of Schools, Legislation, the BC Supreme Court, and Now What

Perspectives in Practice is a series of briefing notes to promote discussion on select employment matters at issue in the K-12 public education sector. Each ends with a question to get the conversation started. Let us know what you think at contact.us@bcpsea.bc.ca.

Class size, composition, and the organization of schools are conditions of learning, of work, and also of spending; a complicated public policy decision that is shaped by the interplay of government priorities, as well as economic, social, and human resource factors. The struggle to reconcile these priorities and factors is the backdrop against which today's events are set.

Two broad schools of thought surround the question about whether school organizational matters should be legislatively determined, or whether they should constitute items for bargaining. 2001 saw the election of a new government and the formulation of new public policy approaches for K-12 public education focused on program flexibility and choice. The government's position, with general support from the British Columbia Principals' and Vice-Principals' Association (BCPVPA), the British Columbia Confederation of Parent Advisory Councils (BCCPAC), as well as some school trustees and parents, was that school organizational issues are matters of general public importance to many others in the educational and provincial community apart from teachers — including parents, principals, boards of education, and the public at large — and, therefore, they should be addressed as public policy matters, not as bargaining chips in a collective agreement.[1]

The British Columbia Teachers' Federation (BCTF) strongly opposed this view and, in May 2002, filed a petition in British Columbia Supreme Court (BCSC) alleging that passage of Bill 27, the *Education Services Collective Agreement Act* and Bill 28, the *Public Education Flexibility and Choice Act* violated teachers' constitutional rights. The case was held over pending an action by health unions against Bill 29, the *Health and Social Services Delivery Implementation Act.* What became known as the *Health Services* case proceeded through the BCSC, the Court of Appeal and finally, in 2007, to the Supreme Court of Canada.

[1]During the second reading of Bill 28 on January 26, 2002, Minister of Skills Development and Labour, Graham Bruce, used the term "bargaining chip," in reference to the claim that class sizes were too important to students to be left as a bargaining chip between the BCTF and employers.

At the latter level, the country's highest court found that collective bargaining enjoyed a measure of protection under the *Canadian Charter of Rights and Freedoms* (Charter) and that government had erred in failing to consult with the unions before introducing new legislation.[2]

The BCTF case was not heard in the BCSC until November 2010. The BCTF took the position before Madam Justice S. Griffin that the 2002 changes to the *School Act* were unconstitutional because they prohibited collective bargaining on matters related to class size, class composition, non-enrolling staffing ratios, and hours of work (referred to as "working conditions provisions"), and also removed offending collective agreement provisions from the collective agreement. Along with challenging the legislation, the BCTF also alleged that government and the BCPSEA, the employers' bargaining agent, offended the protection for collective bargaining provided by the Charter by engaging in bad faith bargaining in 2001. Finally, the BCTF claimed that the 2002 legislation that merged collective agreements in amalgamated school districts was similarly unconstitutional.[3]

The province's objectives in passing the 2002 legislation, the British Columbia Attorney General argued before the court, were "to provide greater flexibility to school boards to manage class size and composition issues, to respond to choices of parents and students, and to make their own decisions on better use of facilities and human resources," as Justice Griffin would later summarize them.[4] The Court's decision was released in April 2011 and adopted the precedent set by the Supreme Court of Canada in the *Health Services* case by ruling that the Freedom of Association protected by the Charter included the right to the "process" of collective bargaining. The decision that certain provisions were unconstitutional is based on the court's finding that the BCTF was not consulted properly — the "how" — prior to the legislation being enacted, as opposed to the "what" — the details of the policy approach enshrined in legislation. Justice Griffin decided that the government's 2002 legislation interfered with this process and that the interference was substantial. The Court observed:

> If the government prohibited collective bargaining through legislation, but otherwise in the process of implementing the legislation replaced collective bargaining with an equivalent process of good faith consultation or negotiation, then the legislation might not be an interference with freedom of association. However, if in the process of legislating limits to collective bargaining the government did not otherwise allow employees to influence the legislative process or outcome in association, then the interference with s.2 (d) rights will be considered substantial.[5]

---

[2] *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469, [348] and [375], 88 and 95.

[3] *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469. In addition to challenging the legislation, the BCTF charged that government and, by extension, the BCPSEA engaged in additional unconstitutional conduct by engaging in bad faith bargaining in 2001, leading-up to the passage of Bills 27 and 28. The British Columbia Supreme Court rejected this argument in April 2011, noting that while BCPSEA sought policy direction from government in order to inform its approach to bargaining, there was simply no evidence that the government acted in concert with BCPSEA to negotiate or otherwise act in bad faith in the months leading up to the legislation.

[4] *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469, [339], 85-86. The government also argued that in bringing in the legislation, it was exercising its power and authority to enact education legislation for the public good, its constitutional responsibility. It claimed, also, that the impugned legislation did not have the substantial impact on collective bargaining that the teachers alleged and that, even if the legislation did offend the *Charter* protection for collective bargaining, it is saved by application of s. 1 of the *Charter*.

[5] *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469, [339], 297.

However, the Court also noted that when the legislation was introduced in 2002, "the state of the law in Canada was such that the government likely did not anticipate that collective bargaining was protected by s. 2 (d) of the Charter."[6] On the matter of "working conditions provisions," the Court found that the process used by government negated any process for voluntary good faith bargaining and consultation, whereas the process used in relation to the *Education Services Collective Agreement Amendment Act* left open a process for future good faith negotiation. The Court rejected the argument that the BCPSEA failed to bargain in good faith in 2001 and 2002. Although the BCPSEA sought policy direction from government to inform its bargaining approach, no evidence could be found to suggest government acted in league with the BCPSEA to negotiate, or otherwise act in bad faith, prior to the passage of legislation.[7]

Altogether, the Court found that only the "working conditions provisions" breached the Charter guarantee of Freedom of Association. And, although the Court declared those provisions to be invalid, the declaration of invalidity was suspended for a year to afford government time to address the decision's implications.

It is interesting to note that the recent Supreme Court of Canada decision in *Fraser v. Ontario*, issued April 29, 2011, confirmed that the *Charter* does not prevent governments from enacting legislation inconsistent with existing collective agreement provisions. Rather, the focus is on ensuring there is an opportunity for good faith negotiation and consultation with respect to important workplace issues.

In early May 2011, the provincial government decided not to appeal the BC Supreme Court ruling. The government appointed Paul Straszak, president and CEO, Public Sector Employers' Council, to lead the initial phase of consultation with the BCTF.

Since deciding not to appeal the decision, government has noted that the court accepted the policy objectives underlying Bills 27 and 28 and that the ruling of unconstitutionality was based on the process it used to achieve those objectives.

Government has now indicated that it intends to continue to pursue these policy objectives through a process consistent with the current case law requiring good faith consultation with the BCTF.

The policy objectives accepted by the court were described as follows: to provide greater flexibility to school boards to manage class size and composition issues, to respond to choices of parents and students and to make their own decisions on better use of facilities and human resources." (see para 339)

Government has initiated contact with the BCTF for the purpose of discussing a consultation and negotiation process in relation to these policy objectives. The interplay between the government's consultation and negotiation process with the BCTF and the ongoing collective bargaining between the BCTF and BCPSEA in relation to working conditions is not yet fully known.

[6] *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469, [375], 95.

[7] In the April 19, 2011 BCTF E-news Vol. 10, No. 8 the BCTF would charge "Court Case Uncovers Duplicity of BCPSEA and Government," putting a construction on the court proceedings at odds with the court's findings.

The end result of the government's consultation and negotiation process could be that issues such as class size, class composition, non-enrolling staffing ratios, and hours of work in relation to school calendars are not matters that may be restricted by collective agreement provisions. Alternatively, if government determines a different approach is warranted, it could, after consultation with the BCTF and other stakeholders, enact legislation dealing with these matters which allows collective bargaining on some or all issues. Finally, although it seems extremely unlikely given the government's present actions, if the government decides to take no further action in the wake of this decision, in 12 months time the collective agreement provisions removed from the collective agreement by Bill 19, the *Education Services Collective Agreement Amendment Act* in 2004 would be applicable and binding on the parties to the collective agreement.[8]

For Reflection and Consideration

If you accept the proposition that *class size, composition, and the organization of schools are conditions of learning, of work, and also of spending, a complicated public policy decision that is shaped by the interplay of government priorities, economic, social and human resource factors*, what are the elements of a working model? How should those elements be organized?

[8] Media outlets, including CHNL Radio, reported on April 27, 2011 that, "The BC Teachers' Federation today demanded that Victoria restore about $275 million in funding for the education system.

Reporter: President Susan Lambert says that's how much money was taken from the system each year since the province enacted legislation removing the right to bargain class size and composition.

Susan Lambert quote: 'We want that money put back in the system at a minimum because the court has found that our constitutional rights, the very basic charter rights that all Canadians are guaranteed were violated by those bills.'"