B.C. Teachers Win Landmark Ruling At The Supreme Court

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The British Columbia Teachers' Federation won a landmark ruling on negotiating class size and composition against the B.C. Government in the Supreme Court of Canada.

In a decision released on November 10, 2016, the British Columbia Teachers' Federation ("BCTF") won a landmark ruling on negotiating class size and composition against the B.C. Government in the Supreme Court of Canada.

In a rare move, the Supreme Court ruled from the bench 7-2 in favour of the BCTF about their collective bargaining rights.

The BCTF was asking the high court to reconsider the British Columbia Court of Appeal's decision finding that the province did not violate teachers' constitutional rights when it introduced Bill 22 in April 2012. The Bill had the effect of limiting teacher bargaining rights on class size and composition.

In *British Columbia Teachers' Federation v. British Columbia,* 2016 SCC 49, the majority of the Court allowed the appeal, “substantially for the reasons of Justice Donald”, who provided the dissenting opinion at the B.C. Court of Appeal. No further analysis was provided by the Supreme Court of Canada.

Background

This case relates to the B.C. government's attempts to alter teachers' working conditions through legislation rather than through collective bargaining. In 2002, the B.C. government enacted legislation — Bill 28 — to declare void certain terms of the collective agreement between the British Columbia Teachers' Federation ("BCTF") and the British Columbia Public School Employers' Association (“BCPSEA”). The effect of Bill 28 was to remove the BCTF's ability to negotiate class size and class composition as part of their working conditions.

In 2011, the BCTF successfully challenged Bill 28. It was found unconstitutional because it not only declared void the terms of an existing collective agreement, but it also prohibited collective bargaining on those terms in the future. The declaration of

invalidity was suspended for a year while the government drafted remedial legislation to address these issues.

In the year after the 2011 decision, the B.C. government and BCTF engaged in consultations relating to the overturned legislation and options going forward. Teachers and school boards also engaged in collective bargaining, but, unable to reach an agreement, the BCTF went on strike.

Ultimately, at the expiry of the one-year period following the 2011 decision, the B.C. government passed Bill 22 – the *Education Improvement Act,* S.B.C. 2012, c. 3 — in April 2012. Bill 22 was virtually identical to the earlier Bill 28. The only difference was that the new Bill 22 placed a time limit on its provisions, such that no term concerning class sizes and composition could be included in a collective agreement for approximately the next 14 months.

B.C. Supreme Court Decision

In 2014, the BCTF successfully challenged Bill 22. Justice Susan Griffin of the B.C. Supreme Court found that there was no material distinction between Bill 28 and Bill 22, and the imposition of a time limit did not make an otherwise unconstitutional provision somehow constitutional.

Further, the trial judge found that the failure to enact Bill 22 in a timely manner — along with evidence that the province attempted to provoke the BCTF into commencing an illegal strike action for political purposes — negated the province's argument of good-faith bargaining. Justice Griffin found that Bill 22 was not, in fact, "remedial" legislation. Instead, she found that the province's "strategy was to put such pressure on the union that it would provoke a strike." As such, she concluded that the province breached the teachers' s. 2(d) *Charter* right to freedom of association by failing to negotiate and consult in good faith. The BCTF was awarded $2 million and Bill 22 was declared unconstitutional.

B.C. Court of Appeal Decision

The province appealed the trial ruling, and was successful at the B.C. Court of Appeal.

Four of the presiding justices, constituting a majority of the five-judge panel at the B.C. Court of Appeal, found that although the content of Bill 22 was very similar to that of Bill 28, the process by which it had been drafted was meaningfully different. By consulting with the province and engaging in some collective bargaining before the enactment of Bill 22, teachers had been afforded a meaningful process in which to advance their shared workplace goals. The majority of the Court of Appeal found that the trial judge had erred in finding that the province had not consulted in good faith.

The majority of the B.C. Court of Appeal also found that the trial judge had erred by dismissing pre-legislative consultations as irrelevant and by insufficiently considering the context in which Bill 22 was enacted.

The lone dissenting judge, Justice Ian Donald, agreed with the majority that the pre-legislative consultations were relevant, and that the context of drafting Bill 22 should have been considered.

However, Justice Donald disagreed with the majority's conclusions as to the province's conduct. He found that the trial judge had not erred in finding that the province had failed to consult with the BCTF in good faith. Justice Donald provided a lengthy dissent, relying on the policy rationale, jurisprudence, and legal test that defines the *Charter* right to "freedom of association" and the concept of free collective bargaining. He also relied on recent Supreme Court of Canada cases enshrining labour rights: in particular, *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 on the right to independent collective representation, and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 on the right to strike. Justice Donald's takeaway from these recent cases was that at the centre of section 2(d) of the *Charter* is a balance between employees and employer that will allow for meaningful collective bargaining.

In addition to emphasizing the importance of deferring to the trial judge's findings of fact, Justice Donald focused on the elements of the legal test for negotiating in good faith. Citing prior Supreme Court of Canada precedents, he noted that the *Charter* protection of freedom of association means that the parties must meet and engage in meaningful dialogue, and genuine and constructive negotiations; they must avoid unnecessary and unjustified delays in negotiation; they must make a reasonable effort to reach an agreement; they must mutually respect the commitments entered into; and they must be willing to exchange and explain their positions. Justice Donald held that, in light of these important criteria, the majority at the B.C. Court of Appeal had improperly disregarded the trial judge's findings of fact about the province's conduct and lack of good faith. She had reached her conclusions after a very lengthy hearing, and there were no apparent palpable or overriding errors.

Further, Justice Donald noted that the government had failed to negotiate in good faith because it had come into negotiations with its mind made up. Repeatedly stating "this is as far as we can go" and implementing a strategy to provoke a strike made "a mockery of the concept of collective bargaining."

Finally, with respect to remedy, Justice Donald would have ordered the Minister of Education to direct the public administrator for the BCPSEA to reinstate the provisions on class sizes, composition, and other working conditions into the collective agreement. He would have overturned the trial judge's additional damages award of $2 million, as he opined that award was inappropriate in light of the province's small attempts to bring new legislation into compliance.

Supreme Court of Canada Decision

The hearing of the appeal from the B.C. Court of Appeal decision was held on November 10, 2016. In an unusual move, the Supreme Court of Canada issued its ruling from the bench on the same day. Typically, the Supreme Court of Canada reserves judgment, and provides reasons several months after a hearing. Instead, the Supreme Court of Canada simply stated that a 7-2 majority would allow the appeal, substantially for the reasons of Justice Donald.

The B.C. government will now likely spend an estimated $250 million more per year on education in order to comply with the Supreme Court of Canada ruling, and to return to pre-Bill 28 staffing levels. The government will need to hire more teachers, librarians, counsellors, and other staff to reach the ratios, maximum classroom sizes, and staffing

thresholds that were in place before Bill 28 was enacted in 2002. The president of the BCTF has stated that approximately 3,500 full-time jobs have been eliminated since 2002.

This decision affirms the recent trend at the Supreme Court of Canada, enshrining various elements of the right to freedom of association. *British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49 confirms that the s. 2(d) *Charter* right includes an obligation to negotiate in good faith. This rounds out the Supreme Court of Canada decisions from early 2015, which held that the s. 2(d) *Charter* right includes a right to unionize and a right to strike.

Although this decision arose out of British Columbia and specific legislative amendments in that province, educators across the country should take note of the courts' approaches to collective bargaining. What may once have been construed as simple hard bargaining might now be found to be a failure to negotiate in good faith, and could have costly ramifications for those found in the wrong.

By

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