Supreme Court Agrees to Hear Constitutional Class Size Case

May 27, 2016

The Supreme Court of Canada announced it would hear an appeal of a recent British Columbia Court of Appeal decision relating to the right to collectively bargain issues relating to teachers' working conditions.

On January 14, 2016, the Supreme Court of Canada announced it would hear an appeal of a recent British Columbia Court of Appeal decision relating to the right to collectively bargain issues relating to teachers' working conditions.

The decision being appealed, *British Columbia Teachers' Federation v. British Columbia,* 2015 BCCA 184, relates to the B.C. government's attempts to alter teachers' working conditions through legislation rather than through collective bargaining.

Facts

In 2002, the B.C. government enacted legislation known as Bill 28 that declared 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.

The Bill was successfully challenged by the BCTF, and was ultimately found to be unconstitutional in 2011. Justice Griffin of the B.C. Supreme Court found that the 2002 legislative amendments infringed teachers' freedom of association because, first, the legislation had declared void certain terms of a collective agreement that was in force, and second, it effectively prohibited collective agreement on those terms in the future. The government was given one year to draft remedial legislation that addressed these issues. The 2011 decision was not appealed.

In the ensuing year, 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.

At the expiry of the one-year suspension period following Justice Griffin's declaration, in April 2012, the B.C. government passed the *Education Improvement Act,* S.B.C. 2012, c. 3, also known as Bill 22. The new legislation was very similar to the previous legislation that had been declared unconstitutional. It declared void every term of the expired collective agreement between the BCTF and BCPSEA, which effectively restricted school boards' power to negotiate and establish class size, class composition, student assignment, teacher numbers, teacher staffing loads, and classroom ratios, and instead imposed requirements relating to these issues.

The only difference between Bill 22 and the unconstitutional Bill 28 was that Bill 22 placed a time limit on its provisions. It provided that no term concerning these issues could be included in a collective agreement for approximately the next 14 months, to June 30, 2013 (the date the previous collective agreement was expected to be mediated, the anticipated beginning of the next round of collective bargaining and the end of the school year). Following that date, negotiations could resume.

B.C. Supreme Court Decision

The BCTF again challenged the constitutionality of the government's legislation. The BCTF was again successful at the trial level. Justice Griffin found that there was no material distinction between the language in Bill 28 and Bill 22. Placing time limits on the application of *prima facie* unconstitutional provisions did not somehow validate otherwise-identical unconstitutional legislation; this argument was characterized as incorrect and logically irrational.

The trial judge further found that the failure to enact the legislation in a timely manner, together with evidence that the province attempted to provoke the BCTF into commencing an illegal strike action for political purposes, vitiated the province's claim of good-faith bargaining. She found that the purportedly remedial legislation was not in fact remedial, and instead was enacted in order to harm or insult the BCTF.

The BCTF was awarded $2 million in damages, and Justice Griffin issued a declaration that Bill 22 violated the right to freedom of association found in section 2(d) of the *Charter.* The province appealed.

B.C. Court Of Appeal Decision

The B.C. Court of Appeal allowed the appeal, siding with the province and concluding the legislation was constitutional.

The B.C. Court of Appeal noted that between the consultations and the collective bargaining leading up to the legislation, teachers were afforded a meaningful process in which to advance their collective aspirations. Their freedom of association was respected. The trial judge had erred in finding that the province had not consulted in good faith. Whether or not the trial judge believed the province's position to have substantive merit or reasonableness was not relevant; what mattered was that the consultation process itself gave teachers a meaningful opportunity to make collective representations about their shared workplace goals.

The trial judge was found to have erred by dismissing pre-legislative consultations as irrelevant. In the infringement analysis, she did not sufficiently consider the context in which Bill 22 was enacted, and was incorrect to focus only on its content. Focusing only on the content of the Bill led the trial judge to provide workers with a "constitutional veto" over any significant legislative changes to their working conditions, subject only to the saving provisions of s. 1 of the *Charter.* The B.C. Court of Appeal also noted that the trial judge had not considered recent words of the Supreme Court of Canada, emphasizing that 2(d) of the *Charter* protects a process rather than a particular model of labour relations.

The B.C. Court of Appeal also held that in fact, the meaningfulness of the overall consultation process was enhanced, rather than diminished, by the opportunity for the teachers to make collective representations directly to the province. The province consulted in good faith because it had engaged in subjective honesty that excluded "surface bargaining" but not "hard bargaining". The B.C. Court of Appeal reaffirmed that not reaching an agreement did not amount to bad faith.

Proceedings At The Supreme Court Of Canada

The BCTF applied for leave to appeal the B.C. Court of Appeal decision to the Supreme Court of Canada. This leave was granted on January 4, 2016, and a hearing date has tentatively been set for November 10, 2016.

Additionally, the BCTF was granted its motion to state a constitutional question on March 21, 2016. The approved questions are as follows:

1. Do sections 8, 13 and 24 of the *Education Improvement Act,* S.B.C. 2012, c. 3 [Bill 22], infringe section 2(d) of the *Canadian Charter of Rights and Freedoms*?
2. If so, are the infringements reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Canadian Charter of Rights and Freedoms*?

The BCTF also brought a motion to adduce new evidence on appeal, which was dismissed by the Supreme Court of Canada on May 13, 2016.

The Supreme Court of Canada will likely render its decision sometime in late 2017.

Implications

The result of this decision could have far- reaching impact for educators across the country. While these issues arose out of British Columbia and relates to specific legislation in that province, a decision from the Supreme Court of Canada on the scope of the *Charter* protection of freedom of association will be noteworthy to all.

Coming on the heels of two important Supreme Court of Canada decisions in early 2015 — *Mounted Police Association of Ontario v. Canada (Attorney General),* 2015 SCC 1 on the right to unionize, and *Saskatchewan Federation of Labour v. Saskatchewan,* 2015 SCC 4 on the right to strike — this case could provide a ruling from the Supreme Court of Canada on the right to collectively bargain.

In addition to providing some resolution to the ongoing discord between the B.C. government and its teachers, a statement from the Supreme Court of Canada could help guide all labour relations in the education sector going forward. It could help define the role of the government as employer, and it could affect how school boards' collective bargaining is conducted across the country.

By

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