



# British Columbia Teachers' Federation

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*Working draft*

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**SUBJECT: Highlights of the BC Supreme Court Decision Regarding Bills 27 and 28**

## INTRODUCTION

On April 13<sup>th</sup>, the BC Supreme Court issued a landmark decision ruling that the government's actions in 2002 eliminating hundreds of provisions from the provincial collective agreement were unconstitutional and invalid. The court suspended the declaration and gave the government twelve months to address the findings in the decision.

By way of background, in January 2002 the Liberal government of British Columbia introduced legislation ("ESCAA" and "PEFCA") that unilaterally voided existing terms in the teachers' collective agreement, and prohibited future collective bargaining, regarding restrictions on class sizes, class composition, ratios of non-enrolling teachers to students, and workload. The legislation also affected other issues such as the school calendar, including the hours and days of work for teachers. Lastly the legislation eliminated in their entirety ten local agreements.

At paragraph 254 and Justice Griffin summarizes the impact of the combined legislation as follows:

- a. it deleted hundreds of provisions of the existing collective agreement;
- b. it prohibited the BCTF from negotiating or including any future collective agreement terms that offended section 27(3)(d) to (j) of the *School Act*, restricting or regulating a school board's power to establish or determine class size limits, class composition, staffing ratios, minimum number of teachers or other staff, number of students assigned to a teacher, and teaching workloads;
- c. however the BCTF could attempt to negotiate in the future a very limited and undefined scope of some "manner and consequences" of some school board determinations of the above matters.

The decision is well written and very strong. I will address the arguments and court rulings below.

## **BAD FAITH BARGAINING**

BCTF argued that the government acted in concert with BCPSEA to engage in bad faith bargaining while the government was preparing the impugned legislation. The BCTF argued that this conduct offended the *Charter* guarantee of freedom of association. In defence, the government argued that it faced “exigent circumstances of labour unrest” and “virtual paralysis of the public school system” prior to the passage of the legislation.

In terms of bad faith bargaining Rick Davis, then of BCPSEA, filed an affidavit to demonstrate that there were numerous problems for students and families arising from the class size and composition provisions in the collective agreement and to demonstrate that the BCTF was unduly rigid in the application of these provisions<sup>1</sup>. Justice Griffin found that: a) local associations and the BCTF regularly settled grievances or requested remedies at arbitration that ensured that students were not moved from schools or out of classes during the school year; and b) the Korbin Commission did not support the suggestion that teachers made unduly rigid demands with respect to class size or composition.

Hence, the problematic examples gathered by Rick Davis, which were not put to the BCTF during collective bargaining in 2001, were based on anecdotal hearsay and were so vague and unsubstantiated that it was impossible for the BCTF to challenge them meaningfully (para. 146). She found that rather than a concern about inflexibility, it appeared that the key reason that the government did not want to have class size and composition limits included in collective agreements was the fact that these limits increased cost to school districts (para. 147).

Rick Davis denied knowing that the government intended to remove class size and related provisions from the scope of bargaining when BCPSEA tabled its bargaining proposal. Justice Griffin found it was abundantly clear from the whole of the evidence that throughout 2001 BCPSEA was seeking to learn government policy and that such policy informed BCPSEA's bargaining strategy in 2001. Further in November 2001, unbeknownst to the BCTF, BCPSEA representatives were involved in discussing drafts of the proposed legislation with representatives of government.

However, according to Justice Griffin, the question was whether the government acted in concert with BCPSEA, to cause BCPSEA to negotiate in bad faith in 2001. She held that the BCTF provided no evidence that the government directed BCPSEA to take a specific course of action in the collective bargaining negotiations. There was “no evidence the government instructed BCPSEA to render meaningless the collective bargaining process” (para. 181).

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<sup>1</sup> Justice Griffin states: “I have approached Mr. Davis’s evidence cautiously, as his affidavit evidence tended to characterize the facts less than objectively” (para. 143). She further states:

Most significantly, BCTF has illustrated that the vast majority of the bad examples listed by Mr. Davis and relied upon by the government to suggest that they illustrate the need for the impugned legislative reform, either could have been resolved under the terms of the existing collective agreement, or were not capable of being resolved by the legislated class size maximums (para. 145).

Nevertheless, Justice Griffin found that the evidence did dispel the government argument that the legislation was passed in exigent circumstances due to “labour unrest” causing “virtual paralysis of the school system”. Contrary to the position of government, the labour situation between teachers and their employers could not be attributed to unreasonable demands or inflexibility on the part of the BCTF with respect to class size and composition or other related issues addressed in the legislation. Rather the evidence suggested that BCPSEA had no motivation to compromise in collective bargaining with BCTF. Further the government’s essential services legislation ensured there would be no paralysis of the public school system (paras 181-185).

## CONSTITUTIONAL ANALYSIS

The BCTF argued that by legislatively voiding existing terms in the provincial collective agreement, and prohibiting future collective bargaining on these subjects, the government violated section 2(d) of the *Charter*, freedom of association, as set out in the *Health Services* decision.

The test in *Health Services* can be summarized as follows:

- A. Did the legislation interfere with collective bargaining?
- B. If so, how substantial was the interference? This question involves two inquiries:
  - i. How important is the matter affected to the capacity of union members to come together and pursue collective goals in concert?
  - ii. How does the measure impact on the collective rights to good faith negotiation and consultation?

The Government primarily relied on three defences to argue that the legislation was constitutional: 1. the provincial collective agreement was not freely negotiated; 2. the provisions eliminated matters of education policy, not subjects of collective bargaining; and 3. the legislation replaced the provisions removed from the collective agreement and the legislation preserved the ability to negotiate “manner and consequences” of the school board determinations regarding class size and related issues.

### 1. **Collective agreement was not freely negotiated**

Justice Griffin rejected the government's argument that the provincial collective agreement was not freely negotiated. She found that while the 1998 collective agreement was imposed by legislation, the bulk of it contained terms that had been freely negotiated by the parties in the past. In addition, BCPSEA and BCTF negotiated a memorandum in February 2001, the 2001 K-3 Memorandum, as well as other letters of understanding. She concluded that the provincial collective agreement in place in 2002 was freely negotiated.

### 2. **The provisions eliminated matters of “education policy”**

The government argued that class size, composition and staffing levels for non-enrolling teachers may affect working conditions but they are not traditional labour concerns. It argued that these

matters should be excluded from collective bargaining. Justice Griffin said a serious problem with this position was that:

[M]atters of government policy are not exempt from the requirements of the *Charter*. The government must pursue matters of public policy on a wide variety of matters. But the government is subject to the law when it pursues public policy, including the most supreme law, the Constitution (para. 216).

Justice Griffin did not reject the government's proposition that class size is a matter of educational policy. However she also found that it affects the working conditions of teachers and therefore is a matter of collective bargaining. Moreover, the public policy argument was more properly placed under section 1 of the *Charter* rather than in the section 2(d) analysis.

### **3. The legislation replaced the provisions removed from the collective agreement and preserved the ability to negotiate manner and consequences**

Justice Griffin did not accept the government's argument that section 76.1 of the *School Act* (now referred to as Bill 33) replaced the provisions removed from the collective agreement. She held that the legislated class size limits were no replacement for the collective agreement provisions.

Justice Griffin agreed with Justice Shaw's interpretation regarding section 28 of the *School Act* (the manner and consequences provision) that section 28 applied. This remained true after the passage of the *Amendment Act*. However she concluded that the preserved ability to bargain over manner and consequence was, for practical purposes, insignificant with respect to manner and limited with respect to consequences given the broad scope of section 27(3). It was no replacement for the eliminated collective agreement provisions.

## **WORKLOAD PROVISIONS: CLASS SIZE, COMPOSITION, NON-ENROLLING RATIOS, WORK LOAD, AND SCHOOL CALENDAR, INCLUDING HOURS AND DAYS OF WORK**

### **School calendar and hours of work**

Section 15 of *PEFCA* amended the *School Act* to render void provisions of the collective agreement limiting or restricting a school board's powers with respect to school calendar issues, and hours and days of work.

Section 15 of *PEFCA* had the effect of providing that, so long as a board set its school calendar after consulting with parents and representatives of employees of that school, then a collective agreement provision that limited or restricted the board's power to set the school calendar, or purported to do so, was void in respect of that school (s.78.1(1) of the *School Act*). This legislation effectively took away right of teachers to negotiate over the required hours of work or length of the school year. She found that how many hours of work an employee must work in a day or year is clearly a fundamental working condition.

Justice Griffin found that the consultation that was provided in the legislation was not the equivalent of collective bargaining. She further found that because school boards were typically

elected by trustees, who were sensitive to parents wishes, the inclusion of parents in the consultation process diluted the teachers' voice in the matter. This minimized any bargaining strength that local teachers might have on these issues.

Section 15 of *PEFCA* rendered meaningless future collective bargaining on these workload issues. It therefore interfered with collective bargaining and it was a substantial interference. This was a violation of section 2(d) of the *Charter*.

### **Class size, composition, non-enrolling ratios and work load**

With respect to the importance of class size and related provisions to teachers, Justice Griffin accepted the long history of teachers considering class size and related provisions to be teachers' working conditions and a significant priority to be negotiated collectively. She stated there could be little doubt that issues of class size and composition, non-enrolling ratios and workload are important issues to teachers. Moreover these subjects of the legislation, including the *Amendment Act*, directly affect the teachers' hours of work. The more children in the classroom, the greater the number of special needs children in the classroom, or reduced support from other specialist teaching staff, "correspondingly increases the amount of time the classroom teacher must spend outside of the classroom in preparing for the class, marking, and preparing individualized learning plans" (para. 290).

In terms of the process, how does the legislation impact on the collective right to good faith negotiation and consultation, Justice Griffin found that the legislative changes were passed without any consultation with teachers. The government informed and sought the advice of only one side to the bargaining table, BCPSEA. Since this occurred in the midst of the collective bargaining process, this distorted the balance of power at the table and placed the BCTF in a disadvantaged position (para. 299). As Justice Griffin stated:

the lack of consultation in the legislative process sent the message to teachers that whatever time and effort and sacrifices they might put into the collective bargaining process, it was all subject to the government overriding the process without any consultation. This seriously undercut the utility of collective bargaining.... As held in *Health Services* at para. 86, recognition of the right to collectively bargain as part of the freedom to associate "reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*" (para. 301).

Purging these provisions from the collective agreement, and prohibiting future collective bargaining over these matters, interfered with the teachers' ability to collectively pursue their goals and significantly undermined their *Charter* guarantee of freedom of association (para. 295). There was a substantial interference with collective bargaining and a violation of section 2(d) of the *Charter*.

### **The Amendment Act**

The BCTF judicially reviewed the decision of Arbitrator Rice who had ordered the removal of hundreds of provisions from the collective agreement. Justice Shaw held that the arbitrator erred in not permitting the manner and consequence language to remain in the agreement and by interpreting his mandate too broadly. The *Amendment Act*, passed by the government following

the Shaw decision (rather than appealing the decision), restored the Arbitrator's decision in its entirety.

Justice Griffin ruled that the *Amendment Act*, by eliminating hundreds of provisions from the collective agreement, interfered with collective bargaining, and that it was a significant interference amounting to a violation of section 2(d) of the *Charter*.

### **The merger of local agreements into one local agreement**

Section 4 of ESCAA addressed the “duplication” of local agreements within a single school district.

Justice Griffin found that because section 4 of ESCAA voided some negotiated terms of the collective agreement, it interfered with collective bargaining. However, while the teachers lost the benefit of certain local agreements, and were unable to influence the negotiation of local terms that were now deemed to apply to them, those local terms had been negotiated by their union for another group of teachers. Justice Griffin found that this interference was not as significant as the other legislation (removing the entire subject matter from collective bargaining and prohibiting such negotiations moving forward). She also found that section 4 left open a process for future good faith negotiation. Consequently, section 4 of ESCAA did not amount to substantial interference with the union's ability to engage in collective bargaining and did not violate section 2(d) of the *Charter*.

### **SECTION 1 OF THE CHARTER**

Once a violation of s. 2(d) is found, the burden is on government to establish that it is a reasonable limit that can be demonstrably justified in a free and democratic society. The government was unable to establish this.

Although Justice Griffin found “some strength” to the BCTF's argument that the objectives of the legislation were to increase management rights and to cut costs, she ultimately accepted the government argument that the objectives of the legislation were to provide greater flexibility to schools boards to manage class sizes, to respond to the choices of parents and students, and to make their own decisions on the use of facilities and human resources. She also found that these objectives were pressing and substantial and that the legislation was rationally connected to these objectives.

The government failed under the section 1 minimal impairment test. First, there was no consultation. Second, the government argued that manner and consequence preserved collective bargaining. Justice Griffin easily rejected that argument. She held that the manner and consequence provision was very narrow and left little bargaining power for the union. Third, the union's ability to file grievances under the legislation was not a substitute for collective bargaining.

In addition, the legislation regarding the school calendar replaced a meaningful process of collective bargaining with a “diluted process of consultation”. There was no access to any kind of dispute resolution mechanism and there was no requirement that the employer act in good

faith. Justice Griffin held that this did not support the conclusion that the impairment of collective bargaining was minimal (para. 362).

Justice Griffin was also troubled by the fact that the government did not explain how legislation removing the right of employees to collectively bargain class size and related provisions was logically linked to any ongoing labour dispute. As she stated:

As I have reviewed in detail in considering the contextual background, the evidence does not support an inference that the labour relationship between BCTF and BCPSEA was such that there was virtual paralysis of the school system. Even if this inference was supported on the evidence, there is no evidence to support the conclusion that there was a causal link between the labour difficulties and teachers' demands in the collective bargaining process relating to class size and composition and related issues (para. 366).

Rather than a labour situation that was urgent, Justice Griffin found that the difficulties throughout 2001-02 was largely a result of the government's decision to only consult with BCPSEA. This negatively affected the bargaining process.

Justice Griffin also questioned why the legislation was so broad. She questioned why it did not provide for a traditional solution to solve a labour dispute since a traditional labour solution (e.g., mediation, interest arbitration) would involve a process through which the BCTF would be permitted to negotiate.

Justice Griffin concluded that:

The legislation undoubtedly was seen by teachers as evidence that the government did not respect them or consider them to be valued contributors to the education system, having excluded them from any freedom to associate to influence their working conditions. This was a seriously deleterious effect of the legislation, one adversely disproportionate to any salutary effects revealed by the evidence (para. 380).

In the end, sections 8 and 15 of *PEFCA* and section 5 of the *Amendment Act* violated section 2(d) of the *Charter* and were not saved by section 1.

The declaration of invalidity was suspended for a year to grant the government time to address the decision.

This analysis was prepared by Diane MacDonald, BCTF Legal Counsel