SHIBLEY RIGHTON LLP
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BC Government chastised and penalized for re-enactment of unconstitutional legislation

The British Columbia government is licking its wounds after a British Columbia judge struck the *Education Improvement Act*, legislation targeted at limiting collective bargaining regarding certain issues, and awarded the British Columbia Teachers' Federation (the "BCTF") $2 Million in compensatory damages.

In 2002, the British Columbia government enacted several pieces of legislation targeting collective bargaining in the public sector including education and health care. The legislative enactments, which included the *Heath and Social Services Delivery Improvement Act* and the *Public Education Flexibility and Choice Act* (Bill 28), were designed to provide employers with greater flexibility to organize operations. In effect, the legislation voided numerous terms of existing collective agreements and prohibited future bargaining on the same matters. Bill 28 specifically removed the ability of the BCTF to negotiate matters related to class size, class composition and supports for special needs students. Moreover, the legislation voided any terms in existing collective agreements that conflicted with these new bargaining restrictions.

The legislative enactments were subsequently challenged by unions on the basis that they violated the freedom of association protected by s. 2(d) of the *Charter*. In a 2007 decision entitled *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia* (2007 SCC 27), the Supreme Court of Canada held that the *Health and Social Services Delivery Improvement Act* was unconstitutional because the legislation infringed on collective bargaining pursuant to s. 2(d) of the *Charter* and because the provincial government was unable to demonstrate that it had considered other less obstructive options before rapidly passing the *Act* in three days.

Accordingly, it is probably unsurprising that in 2011 the British Columbia Supreme Court also declared Bill 28 as unconstitutional, closely following the Supreme Court of Canada's reasoning in *Health Services*. (*British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 1372 (CanLII)). Notwithstanding the declaration that the legislation was unconstitutional, the court provided the province with a 12-month grace period to allow it to address the repercussions of the decision. The provincial government did not appeal the decision; instead, and following unproductive discussions with the BCTF, it proceeded to enact new legislation, known as Bill 22. Bill 22 repealed the offending legislation; however, it also re-enacted the previously declared unconstitutional provisions. Bill 22 voided the same collective bargaining terms retroactive to July 1, 2002 and again prohibited future bargaining in respect of those issues. The only material difference between Bill 22 and Bill 28 was that the prohibition on future collective bargaining was not indefinite and expired on June 30, 2013.

Again, unsurprisingly, the BCTF filed a civil claim alleging that Bill 22 violated teachers' *Charter* rights insofar as it merely re-enacted the provisions of the legislation that had previously been declared to be invalid. In its decision styled *British Columbia Teachers'*

Federation v. British Columbia [2014] B.C.J. No. 91, the Supreme Court of British Columbia agreed. Justice Susan Griffin held that Bill 22 substantially interfered with teachers' freedom of association. In this respect, Justice Griffin made several significant findings.

First, Justice Griffin held that the consultation process with the BCTF prior to the enactment of Bill 22 did not remedy the breach s. 2(d). Justice Griffin accurately recognized that consultation is not generally required prior to the enactment of legislation, but that consultation would not likely act to remedy a *Charter* breach. In any event, the court held that the government's actions demonstrated that its consultation with the union did not exhibit a good faith negotiation. The evidence accepted by the court was that the province started from the position that it was going to re-enact the legislation regardless of the consultation. With this in mind, the court held that there was no meaningful dialogue between the parties.

Second, the court held that the expiry of the restrictions on collective bargaining did not save the legislation. The impugned legislation voided and completely deleted certain terms from collective agreements, which would not be restored after June 30, 2013. Therefore, and contrary to the government's assertion that the right to bargain would be fully restored, the rights that had been previously bargained between parties were removed entirely and there was no guarantee that those rights would ever be restored. In Justice Griffin's opinion, the expiry date written into Bill 22 did not alleviate the serious impairment to collective bargaining.

Finally, although the court held that the government's objectives of promoting flexibility and choice were pressing and substantial, the province had already failed in relying on these goals for justifying the infringement of s. 2(d) of the Charter in its attempt to defend Bill 28; the 2011 decision clearly provided that these goals could be accomplished within the collective bargaining process.

As a result, and having declared both Bill 28 and its successor, Bill 22, unconstitutional, the court held that the collective agreement provisions that had been deleted by virtue of the legislation were restored, retroactive to 2002, and could be the subject of future bargaining. In addition, in ordering that the British Columbia government to pay the BCTF $2 million in damages Justice Griffin stated that such an award would deter future attempts to re-enact unconstitutional legislation.

In our view, this decision raises interesting issues as they relate to government negotiation with bargaining units. Ontario is no stranger to these types of negotiations, the most recent round of negotiations resulting in the hotly-debated *Putting Students First Act* (Bill 115), which was subsequently repealed. However, these decisions will not likely impact ongoing government involvement in collective bargaining. Based on previous jurisprudence regarding judicial review of legislative decision-making, unless required by statute or other legitimate expectation, there will be little requirement for a legislature to consult with any party prior to the enactment of legislation. However, both the *Health Services* and the *British Columbia Teachers' Federation* decisions above suggest that meaningful consultation with a union may provide an avenue by which the legislature could justify the infringement of a *Charter* right. Whether meaningful consultation will ever, in fact, lead to such a decision remains to be seen; it is unlikely that the British Columbia government will be testing those waters anytime soon.

I cannot tell a lie: I should have chopped down the cherry tree

It won't come as a surprise to any reader when I say that there are many risks of injury to students on the schoolyard. One need only look at an asphalt play area to see the potential of injury ranging from skinned knees to broken or twisted ankles or worse. Courts have held that occupiers' liability will not hold an occupier to a standard of perfection; the question will be whether the defendant's actions were reasonable in all the circumstances, which will require a case-by-case analysis.

Occupier's liability was front and center in a recent British Columbia decision entitled *Paquette v. School District No. 36 (Surrey)*, 2014 BCSC 205 (CanLII) involving a student injury. On March 4, 2008, a 12-year-old student of Peach Arch Elementary School in Surry School District No. 36 in British Columbia, accessed the school roof by way of a cherry tree. The facts were uncomplicated – two students climbed a cherry tree that was located close to the school building and accessed the roof. When the principal heard movement on the roof and yelled for the students to get down, they ran to the far side of the school. Although one student managed to get climb down from the roof safely, the plaintiff fell while descending, sustaining injuries.

In its decision regarding liability, the British Columbia Supreme Court accepted evidence that the School District was aware that people had been accessing the roof and that this had, in fact, been an ongoing issue. Although there was no actual knowledge that students or other individuals had used the cherry tree in question to access the roof, it was acknowledged that a tree that close to the roof would create a temptation to adventurous youth. The court held that it was foreseeable that trees close to the school would be used to access the roof and, consequently, that a fall from the roof would result in serious injury.

The court also held that there was no "regular monitoring" of potential access points to the roof, and that any action in response to knowledge that persons had been on the roof was "only reactive and ad hoc". Given these findings, the court held that it was unreasonable that the School District allowed the cherry tree to grow so close to the school.

Notably, however, the court did not attribute any liability to the school's principal. At trial, the plaintiff argued that the principal's conduct, yelling in an angry voice for the students to get off the roof rather than calmly telling them to wait for instructions for a safe exit, was unreasonable and contributed to the student's injuries. Finding that students who were engaged in misbehaviour were likely to flee regardless of what the principal had said, the court did not find that the principal's conduct contributed to the injuries.

Ultimately, the court found that the School District was 75% liable for the injury on the basis that the student should bear some responsibility for his actions, but that the School District had failed to take action to prevent children from accessing the roof via the cherry tree.

This decision certainly doesn't break new ground regarding occupier's liability, but does serve as a reminder that proactive monitoring, supervision and attention to possible risks, as opposed to a "reactive and ad hoc" response to issues as they arise, will help establish that the administration has acted in a reasonable manner to prevent or avoid injury. In this case, given that there was clear knowledge that individuals had accessed the school's roof in the past, pro-active efforts to identify, monitor, and/or remove those access points would have helped to establish that the school had satisfied its reasonable duty of care to its students. Although we aren't in a position to say whether chopping down, or merely trimming the cherry tree in question would have satisfied this duty, we would suggest that any pro-active action taken to minimize risk would have helped the School District's case.