British Columbia Teachers' Federation (appellant/union) v. British Columbia Public School Employers' Association (respondent/employer)
(CA039123; 2012 BCCA 326)

Indexed As: British Columbia Teachers' Federation v. British Columbia Public School Employers' Association

British Columbia Court of Appeal
Prowse, Garson and Hinkson, JJ.A.
August 3, 2012.

Summary:

The British Columbia Teachers' Federation (the union) and the employer agreed to a process whereby certain of the over 1,600 grievances would be resolved as representative grievances. The union appealed from the May 18, 2011 decision of arbitrator Dorsey. The union took issue with the manner in which the arbitrator assigned the burden of proof in grievances alleging breach of the class size and composition standards created by ss. 76.1(2.2) and (2.3) of the School Act. It also appealed the arbitrator's related decision to create a formula ("the Rule of 33"). If a class exceeding the School Act class organization standards did not exceed 33, the arbitrator accorded presumptive deference to the opinions of the principal and superintendent that the class was "appropriate for student learning". He ruled that the burden was on the teacher, the grievor, to rebut the presumption of deference.

The British Columbia Court of Appeal, on the standard of review of correctness, allowed the appeal and set aside the arbitrator's decision, subject to the parties' agreement not to disturb the outcome of grievances that predated September 2010. While the use of the Rule of 33 "may enhance the efficiency of dealing with the unwieldy volume of grievances ... the formula was an impermissible modification of the statutory scheme." The appeal was "unique due to the representative nature of the arbitration and the large number of grievances, settled and unsettled, that stand to be affected."

Arbitration - Topic 4573

The hearing - Evidence - Burden of proof - The appellant, the British Columbia Teachers' Federation, took issue with the manner in which the arbitrator assigned the burden of proof in grievances alleging breach of the class size and composition standards created by the School Act - The British Columbia Court of Appeal began its analysis by stating that the terms "legal burden, persuasive burden and ultimate burden are synonymous. ... This is the burden on a party to prove a legal ingredient that is essential to that party's case. The evidential burden is the term used to denote the burden associated with proof or disproof of a fact. The difference between persuasive burdens and evidential burdens is succinctly addressed in Halsbury's Laws of Canada ..." - See paragraph 62 - "The authorities show that there are no steadfast rules regarding the placement of legal or evidential burdens." - See paragraph 65.

Arbitration - Topic 4573

The hearing - Evidence - Burden of proof - The British Columbia Teachers' Federation (the

union) contended that when a class's size and/or composition exceeded the standard stipulated in the School Act, the employer relied on an exception, and that the Act required the employer to establish that the exception applied - The arbitrator affirmed his formula, "the Rule of 33" - Classes that did not exceed the Rule of 33 were presumptively organized based on the employer's reasonable opinions that the classes were "appropriate for student learning", and the union "must adduce evidence to discharge its onus of proof" - The British Columbia Court of Appeal concluded that the arbitrator erred in placing the legal burden on the union to disprove the exception - "[O]nce the union establishes the statutory pre-requisites to the filing of a grievance, namely that the limits are exceeded and consultation has occurred, the proper allocation of the legal burden is on the employer to prove that the opinions were reasonable. This is a legal burden because failure to do so is fatal to the employer's success." - The employer "must show that the opinions that the class was appropriate for student learning were reasonable. If it fails to do so, the class organization violates the School Act" - Three factors supported that conclusion - First, the wording of the class size and composition limits was strict - Second, the principal and superintendent have expertise and knowledge on the relevant school-wide concerns - Third, placing the legal burden on the employer did not defeat the statutory intent to create flexibility - See paragraphs 63 to 71.

Arbitration - Topic 7959

Judicial review (incl. appeals) - Jurisdiction of arbitrator - General - Excess of jurisdiction - This appeal concerned the arbitrator's interpretation of certain of the class size and composition provisions of British Columbia's School Act - The arbitrator created a formula ("the Rule of 33") - He decided that if a class did not exceed 33 (but did exceed the statutory class size and composition requirements), he would accord presumptive deference to the opinions of the principal and superintendent that the class was "appropriate for student learning" as stated in ss. 76.1(2.2) and (2.3) - The union argued that the arbitrator erred in creating the Rule of 33, and exceeded his jurisdiction by creating a new category of classes at odds with the Act - The British Columbia Court of Appeal concluded that, while the Rule of 33 was expedient, it was not consistent with the School Act - "[T]he legislation creates clear limits; subject to identified exceptions: the board must ensure that class size and composition does not exceed the stated limits unless the exceptions apply. ... [A]ll classes that exceed the stated limits run afoul of the statutory rules and permit consideration of whether exceeding the limit was appropriate. The formulaic distinction drawn by the arbitrator is not supported by the wording of the statutory scheme and may, in some instances, improperly partially insulate decisions concerning classes that exceed the statutory limit but do not exceed the Rule of 33 from review. ... This is not a sliding scale [of deference] but a categorical rule that is not supported by the wording of the statute." - See paragraphs 41 to 49.

Arbitration - Topic 8003.1

Judicial review (incl. appeals) - Jurisdiction of arbitrator - Error of law on the face of the record - Misconstruction or nonapplication of statute law - [See second **Arbitration - Topic 4573** and **Arbitration - Topic 7959**].

Arbitration - Topic 8009

Judicial review (incl. appeals) - Jurisdiction of arbitrator - Error of law on the face of the record - Error respecting burden of proof - [See second **Arbitration - Topic 4573**].

Arbitration - Topic 8221

Judicial review (incl. appeals) - Bars - General - The British Columbia Teachers' Federation (the union) and the employer agreed to a process whereby certain of the over 1,600 grievances would be resolved as representative grievances - The union appealed from a 2011 arbitration decision (the Second Representative Decision), concerning the arbitrator's interpretation of certain of the class size and composition provisions of the School Act - That decision followed and was related to a 2009 arbitration award made by the arbitrator (the First Representative Decision) - The employer argued that the Court of Appeal should not address the issues raised by the union (the burdens on the parties and the "Rule of 33") because those issues were determined in the First Representative Decision and that decision was not appealed - The British Columbia Court of Appeal did not agree with the employer that the union's failure to appeal the First Representative Decision was a barrier to the grounds of appeal raised in this appeal - In the court's view, the proceedings before the arbitrator were divided for administrative convenience, and were treated by the arbitrator as one continuing grievance - Further, the arbitrator effectively revisited and confirmed his prior decision on those issues in the Second Representative Decision - See paragraphs 38 to 40.

Arbitration - Topic 8705

Judicial review (incl. appeals) - Practice - Appeals - Standard of review - This appeal concerned an arbitrator's interpretation of certain of the class size and composition provisions of British Columbia's School Act - The parties agreed that the appeal was properly brought pursuant to s. 100 of the Labour Relations Code ("On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law not included in section 99(1) [appeal jurisdiction of Labour Relations Board]" - The parties also agreed that the standard of review on the appeal was correctness - The British Columbia Court of Appeal agreed - The court's 2011 decision in British Columbia Teachers' Federation v. British Columbia Public School Employers' Association, was applicable and was binding - See paragraph 37.

Education - Topic 714

Education authorities - School commissions or boards - General - Class size and organization - [See second **Arbitration - Topic 4573** and **Arbitration - Topic 7959**].

Education - Topic 714

Education authorities - School commissions or boards - General - Class size and organization - This appeal concerned an arbitrator's interpretation of certain of the class size and composition provisions of British Columbia's School Act - The British Columbia Court of Appeal stated that the appeal "marks a further development in the decades-long conflict over classroom organization. The present statutory scheme attempts to ease the tension between the desire of teachers to teach classes of manageable size and composition and the school administrators' need for a degree of flexibility in meeting broader demands

on resources. ... The legislative scheme sets class organization limits and grants school administrators latitude to exceed those limits for a given class if doing so does not compromise student learning." - The court set out a brief summary explanation of the relevant sections - See paragraphs 5, 9 to 11.

Education - Topic 714

Education authorities - School commissions or boards - General - Class size and organization - The British Columbia Teachers' Federation (the union) appealed from an arbitrator's interpretation of certain of the class size and composition provisions of the School Act - The union contended that when a class's size and/or composition exceeded the standard stipulated in the Act, the employer relied on an exception, and that the Act required the employer to establish that the exception applied - Section 76.1(2.2) provided that: "Despite subsection (1) ... a board must ensure that the size of any class ... does not exceed 30 students unless (a) in the opinions of the superintendent ... and the principal.... the ... class is appropriate for student learning" - It submitted that the use of the word "unless" showed that an exception to the general rule was created - The employers' association argued that "unless" did not create an exception but was consistent with the legislation's flexible approach - The British Columbia Court of Appeal held that an exception was created - The union's interpretation was more consistent with the statutory language (the employer "must ensure" that the standards were met "unless ...") and the dictionary meaning ("except when" or "if not") - Flexibility and deference were fulfilled through the creation of a relatively easily satisfied exception - See paragraphs 50 to 60.

Education - Topic 6002

Teachers (incl. principals and non-teaching professional employees) - General - Legislation - Interpretation - [See second **Education - Topic 714**].

Statutes - Topic 2407

Interpretation - Interpretation of words and phrases - By context - [See third **Education - Topic 714**].

Statutes - Topic 2420

Interpretation - Interpretation of words and phrases - General principles - "Must" - [See third **Education - Topic 714**].

Cases Noticed:

British Columbia Teachers' Federation et al. v. British Columbia, [2011] B.C.T.C. Uned. 469; 2011 BCSC 469, refd to. [para. 8].

British Columbia Teachers' Federation et al. v. British Columbia Public School Employers' Association (2011), 303 B.C.A.C. 130; 512 W.A.C. 130; 17 B.C.L.R.(5th) 170; 2011 BCCA 148, appld. [para. 37].

Bell v. Grand Trunk Railway Co. (1913), 48 S.C.R. 561; 15 D.L.R. 874, refd to. [para. 58].

Statutes Noticed:

Labour Relations Code, R.S.B.C. 1996, c. 244, sect. 100 [para. 37].

School Act, R.S.B.C. 1996, c. 412, sect. 76.1, sect. 76.2 [para. 11].

Authors and Works Noticed:

Halsbury's Laws of Canada, Evidence (1st Ed.), Burden and Quantum of Proof, online, LexisNexis Canada Inc. (2010), HEV-61 [para. 62].

Sopinka, John, Lederman, Sidney M., and Bryant, Alan W., The Law of Evidence in Canada (3rd Ed. 2009), pp. 94 to 97 [para. 68].

Wigmore on Evidence (3rd Ed. 1940), vol. 9, § 2486 [para. 65]; § 2488 [para. 67].

Counsel:

C. Allevato and C.D. Bavis, for the appellant;

J.C. Anderson, for the respondent.

This appeal was heard at Vancouver, British Columbia, on February 16 and 17, 2012, before Prowse, Garson and Hinkson, JJ.A., of the British Columbia Court of Appeal. In reasons written by Garson, J.A., the Court of Appeal delivered the following judgment, dated August 3, 2012.

Appeal allowed.

Editor: E. Joanne Oley