COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.,*** 2009 BCCA 39

Date: 20090204
Docket: CA034975; CA034982

Docket: CA034982

Between:

British Columbia Teachers' Federation

Appellant
(Petitioner)

And

British Columbia Public School Employers' Association and Attorney General of British Columbia

Respondents
(Respondents)

And

Business Council of British Columbia

Intervenor

- and -

Docket: CA034975

Between:

Hospital Employees' Union

Appellant
(Petitioner)

And

Health Employers' Association of British Columbia and Attorney General of British Columbia

Respondents
(Respondents)

And

Business Council of British Columbia

Intervenor

Corrected Judgment: The text of the judgment was corrected at paragraphs [9], [13], [17], and [59] on June 19, 2009

Before: The Honourable Mr. Justice Mackenzie
The Honourable Madam Justice Levine
The Honourable Mr. Justice Frankel

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Place and Date of Hearing:	Vancouver, British Columbia 12-14 November 2008
Place and Date of Judgment:	Vancouver, British Columbia 4 February 2009

Written Reasons by:
The Honourable Mr. Justice Mackenzie

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[1] The appellants British Columbia Teachers' Federation ("BCTF") and Hospital Employees' Union ("HEU") challenge the definition of "strike" in s. 1 of the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the "*Code*") on the ground that it restricts their ability to engage in political protests and thereby infringes their rights under s. 2 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The main challenge to the definition of "strike" is based on the right to freedom of expression under s. 2(b) of the *Charter* but BCTF also advances submissions under ss. 2(c) and 2(d).

[2] The BCTF and HEU staged work stoppages to protest legislation interfering with their conditions of employment. The work stoppages went ahead notwithstanding anticipatory declarations of the Labour Relations Board (the "Board") that the intended work stoppages were "strikes" that contravened s. 57 of the *Code*. The appellants' *Charter* challenges followed. The appellants essentially define a protest work stoppage as one directed at government action, in these instances legislation, as distinguished from collective bargaining work stoppages aimed at their direct public sector employers. For convenience I will refer to them as "protest strikes" and "collective bargaining strikes".

[3] The definition of strike in s. 1 of the *Code* was amended in 1984 to include all concerted work stoppages that restrict production or services. Previously the definition had been limited to strikes for a collective bargaining purpose. In short,

the amendment replaced a “purpose based” definition of strike with an “effects based” definition, thereby extending it to include protest strikes. Section 57 of the *Code* prohibits strikes during the term of a collective agreement, referred to as “mid-contract strikes”.

[4] For the reasons that follow, I have concluded that the effect of the strike definition infringes the freedom of expression guaranteed by s. 2(b) of the *Charter* but the infringement is justified under s. 1. There is no infringement of s. 2(c) or s. 2(d).

Adjudicative Facts

[5] On Friday, 25 January 2002, the provincial government introduced three bills in the Legislature imposing a collective agreement on the BCTF and modifying the terms of the HEU’s collective agreement. The three bills, Bill 27, *Education Services Collective Agreement Act*, 2nd sess., 37th Parl., British Columbia, 2002 (“Bill 27”), Bill 28, *Public Education Flexibility and Choice Act*, 2nd sess. 37th Parl., British Columbia, 2002 (“Bill 28”), and Bill 29, *Health and Social Services Delivery Improvement Act*, 2nd sess., 37th Parl., British Columbia, 2002 (“Bill 29”), were passed by the Legislature and became law on Monday, 28 January 2002. Bill 27 and Bill 28 designated education as an essential service and precluded school boards and teachers from bargaining class sizes as well as overriding other existing contractual rights. Bill 29 modified the terms of HEU’s existing collective agreement to allow contracting out of work and restricting bumping and layoff rights.

[6] The BCTF work stoppage occurred on 28 January 2002, the date Bills 27 and 28 were enacted. The HEU work stoppage occurred on the anniversary date one year later, 28 January 2003. Both one day stoppages contravened interim orders of the Board enjoining the work stoppages obtained by the respective employer respondents, the British Columbia Public School Employers' Association ("BCPSEA") and the Health Employers' Association of British Columbia ("HEABC").

[7] The circumstances of the BCTF protest were summarized by Vice-Chair Saunders of the Board in his original decision on the legality of the work stoppage: BCLRB No. B92/2004 (19 March 2004), at para. 10 (the "BCTF Original Decision"). Teachers throughout British Columbia engaged in a concerted withdrawal of services following a request not to attend work by the BCTF. A large majority of teachers chose not to attend work, leading to widespread disruption of classes. The large majority of students in the public school system did not receive instruction that day. Teachers participated in protest rallies and demonstrations across the Province but schools were not picketed. Participation by teachers was voluntary and no disciplinary action was taken by the BCTF against non-participating teachers. Teachers who did participate were paid $50 from the BCTF Collective Bargaining Defence Fund. The BCTF Original Decision (at para. 185) estimated that hundreds of thousands of students were likely affected and inferred that thousands of parents of young children would have had to make alternative arrangements for supervision. Vice-Chair Saunders declined to draw any inference as to the extent of serious parental inconvenience or hardship in the absence of evidence on that point.

[8] The work stoppage by the HEU members one year later was the subject of a separate hearing and decision by Vice-Chair O'Brien: BCLRB No. B64/2004 (24 February 2004) (the "HEU Original Decision"). The parties filed an agreed statement of facts which summarized the context of the protest and the details of the concerted work stoppage. At about 6:00 a.m., without notice, HEU members put up picket lines at healthcare facilities in the Lower Mainland. The HEU directed members reporting for the morning shift into work to provide essential service levels generally as determined by the Board for a 2001 healthcare dispute. HEU members not designated essential were directed not to report for work and they converged for a protest rally at Vancouver's Plaza of Nations. There were some instances of picket line intimidation and at least one instance where a car driven by a management employee was banged on by fists, as it entered Children's & Women's Hospital. As a result of the work stoppage and picket lines, elective surgeries were cancelled and services to patients were disrupted. Patients, physicians and non-HEU staff had difficulty gaining access to hospitals and delivery of hospital supplies, including pharmaceuticals and oxygen, was impeded. Picket lines came down shortly after noon and the work stoppage ended by the commencement of the afternoon shift at 4:00 p.m.

The Procedural History

[9] The Board issued its interim orders on an expedited basis in advance of the work stoppages, deferring a hearing on the merits. The BCTF and the HEU raised the *Charter* challenge to the definition of strike and the Supreme Court directed that

the constitutional issues be addressed first by the Board. The Board held separate hearings resulting in the HEU Original Decision and the BCTF Original Decision, upholding the injunctions. The BCTF and the HEU applied to the Board for reconsideration. The Board granted leave and, following a hearing before a three member panel, dismissed the applications in a decision indexed at BCLRB No. 395/2004 (17 December 2004) (the "*Reconsideration Decision*"), Associate Chair Fleming dissenting with respect to the BCTF order.

[10] Both the BCTF and the HEU petitioned for judicial review of the Board's orders. The petitions were heard together by the chambers judge. They were dismissed with reasons dated 20 March 2007, indexed at 2007 BCSC 372.

[11] The reasons of the several Board members and the chambers judge varied on the *Charter* issues. Both original decisions characterized the work stoppages and related activity as political protests that were strikes as defined by the *Code* and, as "mid-contract strikes", *prima facie* prohibited by s. 57. Both Vice-Chair O'Brien in the HEU Original Decision and Vice-Chair Saunders in the BCTF Original Decision concluded that the protests involved expressive activity within the meaning of s. 2(b) of the *Charter* and the strike prohibition infringed s. 2(b) rights. They differed on whether or not the infringement was justified under s. 1. Vice-Chair O'Brien concluded that the definition of strike was largely justified but a complete prohibition was overbroad. In her view, the *Charter* required an exception for the occasional "day of protest" types of political protest strikes that do not undermine the integrity of the labour relations regime and do not have a significant adverse impact on the

public interest. However, she also concluded that the picketing activity by HEU members was inconsistent with the nature of constitutionally protected political protest strikes and excluded from protection.

[12] Vice-Chair Saunders in the BCTF Original Decision concluded that an exception as outlined by Vice-Chair O'Brien was unworkable and the adverse effects of protest strikes justified their complete prohibition during a collective agreement.

[13] The reconsideration panel agreed without further detailed analysis that protest strikes can be distinguished from collective bargaining strikes and that the work stoppages in issue were political strikes with a free expression dimension that engaged s. 2(b) of the *Charter*. They addressed the s. 1 issue — Is a complete prohibition of mid-contract protest strikes justified under s. 1 of the *Charter*? The majority agreed with Vice-Chair Saunders that a complete prohibition was justified, with Chair Mullin adding the caveat that any exception that might be recognized in the HEU circumstances of a unilateral drastic legislative modification of an existing collective agreement was a matter for the courts. Associate Chair Fleming dissenting with respect to the BCTF order, agreed with Vice-Chair O'Brien that a "day of protest" type exemption to a general prohibition was constitutionally required.

[14] The chambers judge accepted that the protest strikes involved expressive activity but, contrary to the Board consensus, she concluded that it did not engage s. 2(b) protection. In the alternative, she concluded that any infringement was justified under s. 1. Accordingly she dismissed the petitions for judicial review.

[15] On 8 June 2007, the Supreme Court of Canada delivered judgment in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia,* [2007] 2 S.C.R. 391, 2007 SCC 27 ("*Health Services*"), declaring that certain sections of Bill 29 infringed health care employees' right to a process of collective bargaining under s. 2(d) of the *Charter* and that the impugned provisions failed the test of minimal impairment under s. 1. A similar challenge by the BCTF to Bills 27 and 28 is at the pre-trial stage of litigation.

The Legislative History

[16] The issues are raised against a background of the legislative history of the definition of strike in British Columbia. The current definition is the result of an amendment to the *Labour Relations Code,* R.S.B.C. 1979, c. 212 in 1984. The definition now reads;

> **"strike"** includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services, […]
>
> [Underlining added]

The pre-1984 definition limited strikes to work stoppages for the purpose of compelling employers to agree to terms and conditions of employment.

[17] The current definition of strike accords with the definition of strike in the *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 3(1) and the labour relations statutes of six other provinces: *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 1; *Labour*

Relations Act, R.S.N.L. 1990, c. l-1, s. 2(v); *Labour Relations Act*, S.O. 1995, c. 1, s. 1(1); *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 7(1)(l); *Labour Code*, R.S.Q. c. C-27, s. 1(g); *Trade Union Act*, R.S.S. 1978, c. T-17, s. 2(k.1).

[18] Under the earlier definition, a Board panel chaired by then-Chairman Paul Weiler concluded that a work stoppage by electrical workers protesting a federal anti-inflation program was not a strike as then defined because the purpose was not employer related: *BC Hydro & Power Authority v. International Brotherhood of Electrical Workers Locals 258 & 213, et al.,* [1976] B.C.L.R.B.D. No. 71 ("*BC Hydro*"). The Board noted the definition of strike was of long standing in British Columbia, and that it contrasted sharply with the Ontario definition which was expressly directed to the effects of a concerted work stoppage as "designed to restrict or limit output". The Board concluded that the contrast between a purpose based and an effects based definition was a matter of legislative policy and it was not for the Board to stretch the British Columbia wording to accord with an effects based result. The Board noted that the purpose definition was integrated with other provisions of the *Code* that would have to be revised if an effects based test was substituted, otherwise such innocuous activity as a small group of mining company employees unilaterally taking time off work together to go fishing would contravene no-strike provisions. The Board recognized that the exclusion of protest strikes not directed at employers was the primary difference between the BC and Ontario provisions.

[19] The purpose based definition in British Columbia can be traced to the federal *Industrial Disputes Investigation Act,* S.C. 1907, c. 20 made applicable in British Columbia by the *Industrial Disputes Investigation Act,* S.B.C. 1925, c. 19. It was continued in revised labour relations statutes enacted in 1937, 1947, 1954, and 1973. In 1983, political protests organized by the Solidarity Coalition in opposition to a broad package of legislative initiatives culminated in widespread work stoppages in the education and other public sectors. The Board refused to declare the work stoppages to be strikes, relying on its earlier decision in *BC Hydro* that political protest work stoppages fell outside the purpose based definition: *Pacific Press Limited and Vancouver-New Westminster Newspaper Guild, Local 115 et al*., [1985] B.C.L.R.B.D. No. 140. The 1984 amendment followed.

Issues

[20] The appellants raise the following issues:

1. Does the definition of strike, in conjunction with s. 57 of the *Code*, infringe the appellants' right to freedom of expression under s. 2(b) of the *Charter*? BCTF also raises the issue of infringement of the rights of freedom of peaceful assembly and freedom of association under ss. 2(c) and 2(d) of the *Charter*.

2. If "strike" so defined infringes s. 2 rights, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

3. Does the engagement by some individual members of the HEU in some acts of intimidation and violence exclude the entire protest strike from the protection of s. 2(b)?

The Context of Public Sector Collective Bargaining and Strikes

[21] Before addressing the issues directly, it may be of assistance to reflect briefly on the context of public sector strikes. Public sector unionism is a relatively recent development in the history of collective bargaining, gaining impetus beginning in the 1970s: Paul Weiler, *Reconcilable Differences* (Toronto: Carswell, 1980) at 61-62. In my view, public sector bargaining has a different dynamic than the system prevailing in the "blue-collar" private sector which, according to Weiler, had by the end of the 1970s become relatively mature. Government is intimately involved in the delivery of public services by members of public sector unions. Government revenues pay for the services and governments are accountable at the ballot box for the quality and quantity of the services. Public sector employers are formally the bargaining agents and the parties to the collective agreements but, unlike private sector employers, they are substantially constrained by government determination of available resources and policy. A public sector strike has a different impact than a strike in the private sector. Typically a public sector employer saves money during a work stoppage. There may be little or no loss of revenue to the employer, and it does not have to pay the wages of the striking employees. The adverse impact is felt by the public in the interruption of public services; the union objective is to influence the government to direct or allow the public sector employer to make

concessions. In that sense a public sector strike is more a political than an economic weapon.

[22] The appellants' protest strikes were political in the sense that they were aimed at the government but the legislation they were protesting changed conditions of employment and overrode collective bargaining processes. The protests illustrate the symbiotic relationship between governments and public sector employers that blurs the line between bargaining and politics.

Freedom of Expression – Application of the *Irwin Toy* Analysis

[23] The parties are agreed that the standard of review of the chambers judge's decision and the underlying decisions of the Board is correctness.

[24] Section 2(b) of the *Charter* guarantees freedom of expression as a fundamental freedom. The appropriate analytical framework is outlined in *Irwin Toy Ltd. v. Québec (Attorney General),* [1989] 1 S.C.R. 927 ("*Irwin Toy*"). It sets out a two-stage approach to the issue of whether a law infringes the right to freedom of expression. The first stage addresses the question whether the activity affected by the law is expressive activity presumptively protected by the s. 2(b) guarantee.

i) Expressive Activity

[25] Any activity is expressive if it attempts to convey meaning: *Irwin Toy* at 968. The chambers judge and the Board all accepted that the conduct in issue was expressive activity, so defined, and the purpose was political protest directed at an attempt to influence government rather than their public sector employers.

[26] The *Code* contains a broad endorsement of free expression. Section 8 states:

> **8** Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.

[27] Free expression in a collective bargaining context extends to leafleting, non-coercive distribution of information at secondary sites for the purpose of discouraging purchase of an employer's products during the course of a strike or lockout. *U.F.C.W., Local 1518 v. KMart Canada Ltd.,* [1999] 2 S.C.R. 1083 ("*KMart*") held that non-coercive consumer leafleting was protected under s. 2(b) of the *Charter* and could not be restricted under picketing provisions of the *Code*. *Allsco Building Products Ltd. v. U.F.C.W., Local 1288P,* [1999] 2 S.C.R. 1136 followed *KMart* and relied on the New Brunswick equivalent of s. 8 in the interpretation of the New Brunswick *Industrial Relations Act,* R.S.N.B. 1973, c. I-4 to exclude leafleting from picketing restrictions.

[28] The chambers judge noted that the BCTF protest strike was peaceful and it was not excluded from s. 2(b) protection by reason of its method and location. She concluded that the HEU protest strike was excluded because of the instances of picket line violence and intimidation. The HEU accepts that the picket line activity is not within the *Charter* guarantee. It contends that the picket line activity is severable from the protest strike *per se* and that the strike activity apart from picketing should not have been excluded. I will come back to this issue later in these reasons.

[29] The respondents and the Attorney General do not challenge the conclusion that peaceful protest strikes meet the first stage of the *Irwin Toy* criteria and involve expressive activity presumptively not excluded from the s. 2(b) guarantee.

[30] The second stage is whether the purpose or effect of the law restricts freedom of expression.

ii) Purpose

[31] *Irwin Toy*, at 971-73, distinguishes between restrictions aimed at controlling content of expression or form of expression tied to content, which trenches upon the *Charter* guarantee and restrictions aimed only at control of the physical consequences of particular conduct not tied to content, which does not. The appellants contend that the purpose of the amendment is to restrict the right of unionized employees to participate in political protest. The respondents and the Attorney General say that the purpose is to control the consequences of mid-contract work stoppages, politically protest motivated or otherwise. The chambers judge concluded that the purpose is to address the disruptive consequences of mid-contract work stoppages.

[32] While the appellants contend that the prohibition curtails the ability of union members to attend protest rallies, the restriction only affects their attendance during working hours. The content and form of protest rallies is otherwise unconstrained.

[33] The background to the 1984 redefinition of strike was widespread and escalating politically motivated work stoppages as part of the Operation Solidarity

protests in 1983. Mid-contract production and services were disrupted. The 1984 amendment was a government response. The objective apparent on the face of the 1984 definition is the prohibition of mid-contract strikes that restrict services or production, irrespective of purpose. No distinction is made between collective bargaining strikes and protest strikes. The emphasis is on the consequences of strike action and not on the expressive purpose of the strike or the form of expression tied to its expressive content.

[34] In *Dunmore v. Ontario (Attorney General*), [2001] 3 S.C.R. 1016, 2001 SCC 94, Bastarache J. (at para. 33) stressed the difficulties of assessing legislative intent and discouraged attempts to go behind the wording of a statute in search of a subjective legislative intent. It is generally more appropriate to be guided by the effects of the impugned provision. With that caution in mind, I do not read the statements of the Minister of Labour and the Attorney General in the Legislature, to which we have been referred, as inconsistent with the objective of constraining the effects of work stoppages involved in political protests and not the otherwise free expression of the protest. That is the purpose of the redefinition of strike on the face of the wording. I agree with the chambers judge that the purpose of the definition of strike does not trench upon the s. 2(b) guarantee. I turn to the effects of the strike definition.

iii) Effect

[35] The chambers judge in considering the effects of the mid-contract political strike prohibition emphasized the contractual nature of the obligation to attend at the

workplace during normal working hours. She drew an analogy between union members under a collective agreement and non-union employees under contracts of personal service. Neither has a contractual right to unilaterally withdraw services. She observed that a right to political expression has never been associated with a right to breach employment contracts and political messages can be effectively communicated by other means.

[36] In my respectful view, the chambers judge's analysis fails to adequately reflect the effects of strike action as an economic weapon to convey a message, particularly in the context of the changing face of public sector employment.

[37] Public sector unions have been given the right to strike for collective bargaining purposes, apart from essential services staffing requirements, and the political dimension of such strikes cannot be ignored. Unlike the private sector, the primary target of the strike weapon is the government and public opinion; the strike is in that sense political. Theoretically a protest strike could be directed at a political issue unrelated to employment but the instances where unions mobilize their strike forces for a purely altruistic objective are likely to be rare. Certainly it was not the case with the work stoppages at issue here. I accept that the objectives were not restricted solely to the economic interests of union members. No doubt teachers are genuinely interested in the effects of class size on the quality of education as well as the personal burden of the teaching load. Health care workers are properly concerned about the quality of patient care as well as their job security and other directly-related employment conditions. Motivations are mixed and strike objectives

in the public sector cannot be conveniently divided into political protest and collective bargaining categories. In both cases, the strike exerts pressure directed beyond the formal public sector employers to the governments that are their masters. It is a form of effective expression that is curtailed by its inclusion within the strike definition. In my view, the effect of the mid-contract strike prohibition is a restriction on an effective means of expressive action and for that reason alone, it trenches on the s. 2(b) guarantee of free expression.

[38] It is therefore necessary to address the question of whether the infringement can be justified under s. 1 of the *Charter*.

Infringement of Freedom of Peaceful Assembly – *Charter* s. 2(c)

[39] The BCTF submission under this heading is linked to the rallies scheduled by the BCTF to protest Bills 27 and 28. The BCTF contends that the strike prohibition infringes the right of teachers to peacefully assemble at protest rallies. The chambers judge agreed with Vice-Chair Saunders that there was no s. 2(c) infringement because there was no restriction on the right to peacefully assemble away from the workplace outside of working hours. In my view, in the context of the BCTF protest, any s. 2(c) issue of infringement is subsumed under the issues related to the right of free expression under s. 2(b). The fact that teachers went to rallies when they withdrew their services is a means of expression but in this case the withdrawal of services to engage in free expression is the central fact rather than the means of expression at rallies or otherwise. I do not think that the infringement

issues are advanced by characterizing them as issues of freedom of assembly as an alternative or in addition to infringement of freedom of expression.

Freedom of Association – *Charter* s. 2(d)

[40] Collective bargaining rights are included within the right to freedom of association protected by s. 2(b) of the *Charter*. Strikes are part of the system of collective bargaining. In *Health Services* (at para. 75) McLachlin C.J. endorsed the principle, taken from the dissenting reasons of Dickson C.J. in *Reference re: Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313 (the "*Alberta Reference*"), that the ability "to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits." *Health Services* overruled the opinion of the *Alberta Reference* majority that the *Charter* guarantee of freedom of association did not extend to collective bargaining. McLachlin C.J. did note at para. 19 of *Health Services* that the issues did not concern the right to strike. In the *Alberta Reference*, McIntyre J. concluded in separate reasons that a right to strike is outside *Charter* guarantees. He warned of the dangers inherent in attempting to determine the limits of strike action as a matter of constitutional law (at 416-19). He cautioned that the courts are ill-equipped to deal with the political, social and economic questions that arise frequently in labour disputes. In his view, judicial re-engagement in those disputes under a constitutional rubric would be a retrograde step. Complicated and sophisticated questions would arise where there would be no clearly correct answers and for which the courts are ill-equipped to resolve.

[41] Strikes remain an integral feature of systems of collective bargaining in the private sector and they have also become a feature of public sector bargaining in British Columbia. In the light of *Health Services*, it is an open question whether a right to strike is within the ambit of the freedom of association guarantee. For the purposes of these reasons, I assume that a right to strike is included within the *Charter* guarantee in principle. The question then is whether the statutory restriction on the right to strike consequent on the 1984 redefinition is within reasonable limits.

[42] The BCTF accepts that a statutory prohibition of mid-contract strikes is a reasonable limitation in the context of collective bargaining, but it contends that the prohibition ceases to be a reasonable limit when extended to protest strikes. As discussed earlier the boundary between collective bargaining strikes and protest strikes is blurred. The BCTF and HEU protests were directed at legislation impacting the collective bargaining process and part of Bill 29 was struck down because it unjustifiably infringed *Charter* protection of that process. A similar challenge to Bills 27 and 28 by the BCTF is pending. The appellants contend that the difference between a collective bargaining strike and a protest strike is that the former is directed at the employer and the latter at the government. The associative dimension of the BCTF protest, as distinct from its s. 2(b) expressive dimension is directed at an interference with free collective bargaining, which is properly the subject of the s. 2(d) challenge to Bills 27 and 28, rather than the strike issue.

[43] In my view, the BCTF *Charter* challenge before us stands or falls on the issue of justification of the s. 2(b) infringement of freedom of expression. Infringement

issues related to freedom of association are properly addressed in the proceedings challenging Bills 27 and 28, which are not part of this appeal.

[44] I would not give effect to BCTF's submissions on ss. 2(c) and 2(d) of the *Charter*. I turn to the issue of justification of the s. 2(b) infringement of the guarantee of freedom of expression under s. 1 of the *Charter*.

Justification of Infringement under s. 1 of the *Charter* — the *Oakes* Analytical Framework

[45] The chambers judge addressed the s. 1 issue, in the event she was in error in her conclusion that there was no s. 2(b) infringement.

[46] The analytical framework for determining whether a law infringing the *Charter* can be saved under s. 1 as a reasonable limit is outlined in *R. v. Oakes*, [1986] 1 S.C.R. 103, at 138-39. The objective of the law must be of "pressing and substantial" concern. The means chosen by the law must be reasonably and demonstrably justified under a three part test. The means must be rationally connected to the objective. They should impair the right as little as possible. Finally, there must be proportionality between the effects of the chosen measures and the objective. The government has the onus of establishing each of the *Oakes* components.

[47] The BCTF submits that principles of international law inform the *Charter* scrutiny of the strike definition. In *Health Services*, McLachlin C.J. (at para. 20) observed that collective bargaining is an integral component of freedom of association in international law. BCTF and HEU were parties to complaints

concerning Bills 27, 28 and 29 under *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17 ("*Convention No. 87*"). Report No. 330 of the committee investigating the complaints was critical of the legislation but the thrust of the criticism was directed to the adverse effects of the legislative intrusion into the collective bargaining process: International Labour Office, Committee on Freedom of Association, Report No. 330, Cases Nos. 2166, 2173, 2180 and 2196, "Complaints against the Government of Canada concerning the Province of British Columbia", *I.L.O. Official Bulletin, vol. LXXXVI*, 2003, Series B, No. 1 ("Report No. 330"). That was also the focus of *Health Services* which declared much of Bill 29 to be an unjustified infringement of collective bargaining rights protected by s. 2(d) of the *Charter*. McLachlin C.J. noted (at para 19) that *Health Services* was not concerned with the right to strike and Report No. 330 did not comment on the protest strike dimension of the dispute. While Report No. 330 and Convention No. 87 inform the collective bargaining rights aspects of *Charter* guarantees they do not address the strike dimension.

[48] The issues here are framed in terms of the prohibition of mid-contract protest strikes generally, but "mid-contract" is a controversial designation in the particular circumstances because the contracts were not the result of normal collective bargaining. The terms and conditions were imposed unilaterally by legislative fiat over strong union opposition. The several opinions at the Board level indicate that the Board members were troubled by the heavy handed nature of the government intervention and understandably sensitive to the override of the *Code's* collective bargaining process. Neither the Board nor the chambers judge had the benefit of

Health Services where the HEU successfully attacked the validity of much of Bill 29 on the ground that it unjustifiably infringed the right to freedom of association under s. 2(d) of the *Charter*. BCTF is challenging Bills 27 and 28 in similar litigation that is in the pre-trial stage. *Health Services* decided that there were *Charter* limits to the Legislature's power to override collective bargaining rights. That decision highlights the fact that while the protests here were politically aimed at the government, the subject of the protests had a central collective bargaining dimension vulnerable to a *Charter* challenge on other grounds.

i) Pressing and *Substantial* Objective

[49] There is broad agreement that the objective of the prohibition of mid-contract work stoppages in the context of collective bargaining is to create certainty and stability in the workplace during the term of a collective agreement. The appellants accept the validity of the pre-1984 strike definition that prohibited mid-contract collective bargaining strikes to prevent workplace disruption. The prohibition of mid-contract strikes is balanced by the requirement that every collective agreement must contain an arbitration provision to resolve mid-contract disputes.

[50] In *RWDSU v. Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573, McIntyre J. (at para. 23) emphasized the social costs of industrial conflict:

> When the parties do exercise the right to disagree, picketing and other forms of industrial conflict are likely to follow. The social cost is great, man-hours and wages are lost, production and services will be disrupted, and general tensions within the community may be heightened. Such industrial conflict may be tolerated by society but only as an inevitable corollary to the collective bargaining process.

[51] His observations were made specifically in the context of picketing, which the appellants exclude from their concept of limited *Charter* protection, but it has equal application to disruptions caused by strikes apart from picketing. The appellants accept that the right to engage in protest strikes is not unlimited. From that fair concession it follows that at some point the disruption of services and production caused by a protest strike must become a pressing and substantial legislative objective. The strike definition satisfies the *Oakes'* test's objective requirement.

[52] The appellants note that the definition of lockout was not amended when the strike definition was amended in 1984. The lockout purpose definition has been retained, limiting a "lockout" to suspension of employment for the purpose of compelling employees to agree to conditions of employment. They submit that the lack of symmetry is unfair as it allows employers to engage in lockouts for non-collective bargaining purposes. The hypothetical illustration advanced is an employer led shutdown of businesses to support or protest the 2010 Olympics in Vancouver.

[53] The chambers judge considered that a political protest lockout was without historical precedent and improbable. The 1984 amendment of the strike definition was a response to work stoppage activity actual or threatened by employees and unions. There was no similar apprehension concerning lockouts and redefining "lockout" simply to achieve formal legislative symmetry would serve no practical purpose and could have added unnecessary complications. Employers may be required to suspend or permanently shut down operations and lay off employees for

legitimate business reasons unrelated to collective bargaining, and a broad effects-based definition of lockout that fails to recognize the range of non-collective bargaining reasons for lay-offs or terminations would be problematic.

[54] The appellants also unfavorably contrast the position of unionized employees, whose right to strike is restricted, with non-union employees who are not so restrained by legislation. This submission ignores the collective bargaining rights that unionized employees are given under the *Code*. The *quid pro quo* of those rights is regulation of the right to strike, including prohibition of mid-contract strikes. Non-union employees have no *Code* protection and employers would be free to exercise contractual remedies for breach. In my view, there is no merit in the proposition that the prohibition of protest strikes unfairly prejudices employees subject to a collective agreement in comparison to non-union employees.

ii) Rational Connection

[55] A prohibition of all mid-contract strikes is intended to curtail the disruption caused to services or production caused by such strikes and therefore is rationally connected to the law's objective.

[56] The real issues of justification are whether the complete prohibition of mid-contract strikes can meet the tests of minimal impairment and proportionality.

iii) Minimal Impairment and Proportionality

[57] The BCTF acknowledges that "employers and the public must be protected against the more severe effects of protest activities." Essentially it contends that a

complete mid-contract prohibition is overbroad and the limited work stoppages in issue were within the limits of *Charter* protection. The BCTF submits that the proper limits of legislative intervention are set by the "wrongful action model" outlined in *R.W.D.S.U. Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.,* [2002] 1 S.C.R. 156*,* 2002 SCC 8, ("*Pepsi*"). In *Pepsi*, the Court held that *Charter* values required common law limits on secondary picketing to be modified to accord with core principles of collective bargaining. Secondary picketing is lawful at common law unless it involves violence, intimidation or other tortious conduct. The Legislature may modify the common law balance between free expression and protection of neutral third parties provided limits on the *Charter* value of free expression can be justified. The BCTF contends by analogy with peaceful secondary picketing incident to a lawful strike that mid-contract protest strikes also involve core principles that should be *Charter* protected provided they are peaceful and avoid tortious or criminal conduct. Notwithstanding *Charter* protection, the BCTF raises the possibility that employers could invoke grievance and arbitration procedures for breach of the collective agreement. On this point Vice-Chair Saunders observed: "It seems an odd rationale, to declare legislation an impermissible infringement of *Charter* rights in part because those same rights are adequately restricted elsewhere".

[58] In my view, the wrongful action model, while appropriate to regulate secondary picketing ancillary to a lawful strike, fails to provide a practical test for strikes. Under that model, peaceful protest work stoppages of indefinite scope and duration could not be restrained in the absence of tortious or criminal conduct.

Accepting the BCTF's questionable assumption that *Charter* protection would not insulate protest strikes from breach of contract grievances by employers, arbitral compensation remedies would be ineffective in the public sector as employers would not typically suffer financial losses and disciplinary suspensions would be a questionable and perhaps a counterproductive deterrent. The harm to the public as third parties would be outside the arbitral purview.

[59] The HEU accepts that political strikes may be curtailed to the extent that they result in undue harm to the public. It suggests that notice of job action (absent in this case) and staffing of essential services would address the risk of harm. The HEU supports the opinion of Vice-Chair O'Brien in the HEU Original Decision (at paras. 218 -19) that a general prohibition against mid-contract strikes is "largely justifiable" but overbroad to the extent that it prohibits "short, occasional political protest strikes which neither threaten the integrity of the labour relations system nor have a significant adverse impact on the public interest." Vice-Chair O'Brien concluded that the disruption of medical services caused by the one shift HEU work stoppage "while undoubtedly causing hardship to some individuals, did not pose a significant threat to the public interest". Associate Chair Fleming on the Reconsideration Panel agreed with Vice-Chair O'Brien that limited mid-contract political work stoppages were *Charter* protected, with the caveat that reasonable notice of the work stoppage be provided to the employer to permit an application to the Board in opposition.

[60] Vice-Chair Saunders rejected a *Charter*-based exception to the strike prohibition on the ground that it would be too uncertain and unworkable: BCTF Original Decision at para. 154. He addressed those considerations at paras. 135 to 154 of the BCTF Original Decision. His view is summarized as follows:

> 151 My point in citing these examples is not to be judgemental of this phenomenon one way or another. But in assessing the viability of an exception to the "strike" definition — or, conversely, the Legislature's need for certainty in respect to it — the reality of the situation must be taken into account. Labour disputes (and political strikes, to the extent that they are part of an ongoing conflict) are a type of economic and political warfare. Each side uses various tactics to maximize its leverage and achieve the best results. Neither side judges success at the end of the day by the accuracy or objectivity of its communications during the conflict. The purpose of those communications is not to present the most objective depiction of matters, but to present the depiction most likely to cause relevant individuals to believe or act in a manner favourable to one side or the other.
>
> 152 It is into this impassioned and essentially political environment that a *Charter*-created exception to the "strike" definition would be injected. The Legislature's compelling need for certainty in this area is simply not compatible with the application of principled case-by-case exceptions to the strike definition. And, as I stated earlier, in my view a principled exception is the only kind of exception mandated by the *Charter*.
>
> 153 In conclusion, an exception for certain political strikes would create far more uncertainty than the difficulty of distinguishing between political strikes and collective bargaining ones — which the Ontario Board found prohibitive in General Motors. The *objective* of a strike is typically ascertainable, because it is intended to compel a reaction of some sort, and is less likely to do so if it is unclear at whom the strike is directed and why it is taking place. Where the labour board can identify what would end the strike, it can determine its objective. (See e.g., *The Government of the Province of British Columbia*, BCLRB No. 28/80, [1980] 2 Can LRBR 355; *Ontario Hospital Association*, *supra*.). This approach is not available in the abstract balancing of interests that an exception for certain political strikes would require.

[61] The chambers judge reached a similar conclusion at paras. 194 to 205 of her reasons. Vice-Chair Brown agreed with the conclusion of Vice-Chair Saunders and emphasized the importance of clear and practical tests for all those involved in collective bargaining to provide certainty and stability in the workplace. In his view, the definition of strike provided necessary "bright line" clarity for the benefit of the participants. An indeterminate test would require hearings and adjudication in particular cases, leading to undesirable uncertainty and instability in the workplace.

[62] Chair Mullin generally agreed with Vice-Chairs Saunders and Brown although he considered that the unique nature of the government rewriting of an existing collective agreement through Bill 29 might support a *Charter*-based exception to the general prohibition. Subsequently, *Health Services* has provided a *Charter* remedy for Bill 29, albeit by a different route.

[63] The chambers judge considered the boundary between collective bargaining strikes and protest strikes to be uncertain. She quoted extensively from the opinion of the Ontario Labour Relations Board in *General Motors of Canada Ltd.,* [1996] O.L.R.D. No. 2056 (at para. 199) emphasizing the definitional difficulty and supporting a blanket prohibition of mid-contract strikes by the Ontario *Labour Relations Act,* S.O. 1995, c. 1, irrespective of purpose, as a legislative response to the objective of containing industrial conflict which was not disproportionate to that goal.

[64] There is general agreement that at some point legislative intervention to restrict political protest work stoppages is justified. The Legislature has imposed a

standard based on the effects of the work stoppage, one that is “designed to or does restrict or limit production or services”. This can be fairly described as a bright line test, leaving little ambiguity or discretion in the Board charged with the supervision of its application. No distinction is made between collective bargaining strikes and protest strikes and no question of characterizing a strike as one or the other arises. Part 5 of the *Code* permits strikes by public sector unions, subject to certain essential services staffing obligations, as part of the collective bargaining process with certain pre-requisites and limits. Vice-Chair Brown referred to this as the controlled strike/essential services model. The prohibition on mid-contract strikes is an integral part of the labour relations scheme.

[65] The test supported by Vice-Chair O’Brien and Associate Chair Fleming would protect protest strikes that do not significantly affect the public interest. That standard is wide open to differing conclusions. Here, the BCTF work stoppage deprived hundreds of thousands of school children of one day’s educational instruction and the HEU stoppage resulted in the cancellation of some elective surgeries and disrupted some patient care, notwithstanding that the union provided essential service staffing. Vice-Chair O’Brien recognized that the HEU work stoppage “undoubtedly caus[ed] hardship to some individuals”, but “did not pose a significant threat to the public interest”. Associate Chair Fleming was of a similar view that the BCTF work stoppage did not have a significant adverse impact on the public interest. A patient whose elective surgery was cancelled and parents whose routines were disrupted and whose children lost a day’s class instruction likely would disagree.

[66] The appellants contend that there was no evidence presented to demonstrate harm caused by protest strikes to support their prohibition as justified infringement. The chambers judge concluded (at para. 198) that harm to school children entitled to a certain level of educational services and to patients needing a certain level of health care services could be inferred from the context of the work stoppages. There was evidence that school instruction and patient care were disrupted by the BCTF and HEU protest strikes and I agree that it can be inferred generally that a collective work stoppage in the public sector will cause an adverse impact on public services. An impact is obvious and self-evident. The variable will be the degree of harm not harm *per se*. I do not accede to the appellants' evidentiary submission.

[67] The leafleting cases protected expressive conduct that did not involve harm to third parties. In *KMart*, Cory J., writing for the court, emphasized (at para. 56) that the consumer leafleting in issue was not coercive and left consumers free to choose without being unduly disrupted by the message of the leaflets or the manner in which they were distributed. It was not distinguishable from other forms of publicity and communication of the message and was conduct that could not be restrained under the common law. In *Allsco*, following *KMart*, the picketing provisions of the New Brunswick *Industrial Relations Act* were interpreted to exclude leafleting on s. 2(b) *Charter* grounds. Iacobucci J. observed (at para. 28) that the freedom of expression protected by the *Charter* in leafleting was limited to the extent "that those who are engaged in persuasive expression have respected the right of those receiving the message not to be coerced or intimidated into undertaking a particular course of conduct." Peaceful protest strikes do not directly involve coercion or intimidation but

they nonetheless cause harm to neutral third parties through the disruption of services. I do not think that the leafleting cases assist the appellants' position.

[68] The difficulty is that significant disruption of the public interest is a vague standard capable of a wide variation in application. As Associate Chair Fleming observed, the concerted withdrawal of services is a powerful and effective way of communicating a political message. Its power and effectiveness is reinforced by its economic weapon, the disruption of public services. There is an inherent tension between the effectiveness of the protest strike and the disruptive impact on the public. As Associate Chair Fleming summarized his position: "If the harm caused by the expressive activity is sufficient, the freedom of expression can be overridden under a Section 1 analysis". Who is to decide how much harm is sufficient? Attempting to draw a line at a point of significant disruption seeks a balance that is at best elusive. It tempts a weighing of the merits of the protest against the harm to the public interest. The higher the threshold of significant harm, the more powerful the protest. In my view, this type of balancing is primarily a political policy judgment that is incompatible with the neutral adjudicative function of labour boards and courts.

[69] A majority of the Board expressed serious reservations about its capacity to apply an indefinite standard in a politically charged atmosphere, even with the benefit of the Board's specialized expertise. The difficulty is particularly acute when the strike is said to be a political protest outside collective bargaining norms. I agree with the conclusion of Vice-Chairs Saunders and Brown and the chambers judge

that a vague test that leaves a wide discretion to the Board or the courts is not compatible with *Charter* standards.

[70] It is not clear from the appellants' submissions whether the jurisdiction to supervise *Charter* protected protest strikes would reside in the courts or with the Board. Either way, supervision of protest strikes under a standard requiring case by case evaluation would be particularly problematic. The warning by McIntyre J. in the *Alberta Reference* about judicial re-engagement in the control of strikes reflects the lessons of past experience. They reinforce the degree of deference to be accorded to the Legislature in imposing limits on strike action that avoid the exercise of judicial or administrative discretion. In my view, the effects based definition of strike satisfies the requirements of minimal impairment.

[71] Unions and their members are free to engage in protest activities outside working hours. The mid-contract strike prohibition is limited in its restriction of those activities and proportionate to the disruption of services or production resulting from the prohibited strike activity.

[72] As I have concluded that the impugned definition of strike satisfies the *Oakes* test of justified infringement under s. 1, it is unnecessary to address the BCTF submission, relying on *Allsco*, that s. 57 of the *Code* be read down to exclude protest strikes.

Conclusion

[73] The pre-1984 definition prohibited mid-contract collective bargaining strikes; the 1984 amendment extends that mid-contract prohibition to strikes for any purpose. The right to strike when no collective agreement is in force is maintained, subject to *Code* procedural requirements and essential services limits. The object of the prohibition is the prevention of disruption of services or production. That objective is pressing and substantial; the mid-contract prohibition is rationally connected to that objective. The prohibition extends a limit that is non-controversial in a collective bargaining context to a political protest context. Means of free expression other than through work stoppages remain unimpaired. The mid-contract prohibition meets the standard of minimal impairment and is proportionate to the balance between free expression and harmful impact. The indeterminate and politically charged dimensions of a *Charter* guarantee of limited protest strike action reinforces the validity of the Legislature's imposition of a clear standard.

[74] In the result, I conclude that the impugned definition of strike, through its effects, infringes the guarantee of free expression in s. 2(b) of the *Charter* but the infringement is justified under s. 1. It follows that the HEU protest strike was

properly enjoined, independent of the picketing activity and the severance issue raised by the HEU is immaterial. Accordingly, I would dismiss the appeals.

"The Honourable Mr. Justice Mackenzie"

I AGREE:

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Mr. Justice Frankel"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.,*** 2009 BCCA 39

Date: 20090619
Docket: CA034975; CA034982

Docket: CA034982

Between:

British Columbia Teachers' Federation

Appellant
(Petitioner)

And

British Columbia Public School Employers' Association and Attorney General of British Columbia

Respondents

(Respondents)

And

Business Council of British Columbia

Intervenor

- and -

Docket: CA034975

Between:

Hospital Employees' Union

Appellant
(Petitioner)

And

Health Employers' Association of British Columbia and Attorney General of British Columbia

Respondents
(Respondents)

And

Business Council of British Columbia

Intervenor

CORRIGENDUM

Before: The Honourable Mr. Justice Mackenzie
The Honourable Madam Justice Levine
The Honourable Mr. Justice Frankel

J. Rogers, Q.C. and M. Brown	Counsel for the British Columbia Teachers' Federation
C. Boies Parker	Counsel for the Hospital Employees' Union
K. Murray	Counsel for the British Columbia Public School Employers' Association
G.H. Copley, Q.C. E.W. Hughes and K. Wolfe	Counsel for the Attorney General of British Columbia

E. Harris, Q.C.	Counsel for the Health Employers' Association of British Columbia
E.F. Miller	Counsel for the British Columbia Labour Relations Board
D. Sartison and B. Korenkiewicz	Counsel for the Business Council of British Columbia
Place and Date of Hearing:	Vancouver, British Columbia 12-14 November 2008
Place and Date of Judgment:	Vancouver, British Columbia 4 February 2009
Place and Date of Corrigendum:	Vancouver, British Columbia 19 June 2009

Written Reasons by:
The Honourable Mr. Justice Mackenzie

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[75] In Reasons for Judgment dated February 4, 2009, the following changes should be made.

1. When referring to Reconsideration Decision 13CLRD No. 395/2004 in paragraphs 9, 13 and 59, all references to Vice-Chair Fleming should be changed to read Associate Chair Fleming.
2. In paragraph 17, the reference to the *Labour Act*, should read: *Labour Ac*t, R.S.P.E.I. 1988, c. L-1, s. 7(1)(l).

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The Honourable Mr. Justice Mackenzie