

REFLECTION

Public Education: Reflections on Fifteen Years of Public Policy

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Any student of history or human nature recognizes that a natural tendency and desire of any political force is to attempt to consolidate and gather more power and to seek to diminish any restraint on that power. A democratic system has institutional checks to counter that tendency and to safeguard against tyranny ... Democratic institutions and democratic philosophy are at their root based on a belief that society should be structured in a way that is fair (BC Supreme Court Justice Susan Griffin, 2014 *BCTF v BC*).

WATCHING THE institutions of democracy crumble in the United States has sparked reflection and introspection in Canadians. The story of the British Columbia Teachers' Federation's (BCTF) struggle against BC's provincial Liberals is situated in this global context. Public education, collective bargaining and unions, the law and judicial system, and government and politics are four institutions of democracy that play pivotal roles in this story.

Prior to 1987 public school teachers in BC bargained salaries and benefits only. All other conditions of employment were excluded by provincial law from their scope of bargaining. Teachers organized politically and at times staged illegal strikes to improve working and learning conditions (WLC) but these meager improvements were not contractually guaranteed.

In 1987 teachers were given a choice by Premier Bill Vander Zalm: remain an association, or unionize, and gain full scope collective bargaining rights. At the time, the governing Socreds relied on their belief that unions and professional organizations were antithetical. They assumed teachers would reject full scope bargaining rights in order to retain their professional status in society. Vander Zalm misjudged the depth of commitment the profession had to improving WLC and their level of frustration.

The choice was welcomed. In a province-wide vote well over 95 percent of teachers chose to unionize to gain full bargaining rights. The concept of a union of professionals was born.

Over the next thirteen years bargaining was often characterized by sacrifices to wages and benefits to gain contractual class size limits and support for students with special needs.

In May of 2001 the BC Liberals (a coalition of Social Democrats, Liberals and Conservatives) won power in a landslide victory, taking 77 of 79 seats. Only two New Democrat MLAs, Joy McPhail and Jenny Kwan, formed the Opposition.

The day after the election, Premier Gordon Campbell announced a 25 percent across the board personal tax cut in addition to cuts to corporate and business taxes. Hand in hand with tax cuts was the promise to cut government spending. Every Ministry's budget was reduced or frozen for the next three years. Nothing was immune to cuts; including subsidies for bus passes for the disabled, talking books for the blind, single parent allowances and welfare rates. Public sector collective agreements provided some protection against this assault on public programs. Particularly problematic for BC's Liberals were the health services sector contractual protections against contracting out and the BCTF's WLC language that drove funding into public schools.

As the BCTF collective agreement ended in June of 2001, negotiations began in March of 2001 prior to the provincial election and continued after it. For teachers, a major objective at the table was improvement to WLC language achieved in bargaining since 1987. By the fall teachers were actively negotiating this language with government representatives at the bargaining table.

At the very same time the same government representatives were involved in drafting legislation to both eliminate WLC bargaining rights and current WLC contract language. It was dishonestly adopted at the highest levels of Campbell's administration. When then Minister of Education Christy Clark introduced the legislation in January, she said she was "delighted." Our assumption of the integrity of government in a civil society was irretrievably undermined.

BILLS 27, 28, 29: JANUARY 2002

When the Liberals swept into office 15 years ago, they did it on a promise of fair treatment for public sector unions ... "I don't believe in ripping up contract agreements" incoming premier Gordon Campbell

declared. “I am not tearing up any agreements.” Then he did. In a January 2002 legislative double cross that reverberates to the current day, the Liberals used their majority to strip provisions from a bunch of public sector labour contracts (Vaughn Palmer, *Vancouver Sun*, 11 November 2016).

In January 2002, Bills 27, 28 and 29, aimed at the bargaining rights of health services (HS) workers and teachers were tabled in the legislature. Bill 29 stripped provisions from HS collective agreements that protected employees from contracting out. Bills 27 and 28 stripped teachers’ right to bargain WLC and all WLC clauses from local collective agreements across the province. The legislation meant vast swaths of language would be excised. Despite an almost night-long filibuster by MLA Joy McPhail, the bills passed quickly.

This legislative vandalism devastated teachers. The level of harm was aptly described in the 2011 BC Supreme Court decision:

[444] ... recognize the hours of negotiations, the give and take, the resources and the research that went into the negotiation of so many collective agreement terms, many designed to respond to local conditions. The frustration and the sense that collective bargaining is ultimately a pointless exercise can only follow legislative interference with such a broad scale of negotiated terms (BC Supreme Court, 13 April 2011, Honourable Madam Justice Griffin, *BCTF v BC*, para 444).

Matching the loss of full scope bargaining rights and language, teachers felt keenly the loss of civil rights they had assumed were constitutionally guaranteed. If government can unilaterally shred the Charter-protected right of association and tear up freely negotiated collective agreements do citizens really live in a constitutional democracy?

The legislation was first challenged in court by the Health Employees Union (HEU). In 2007 the Supreme Court of Canada decided that Bill 29 was a violation of the Charter right to freedom of association. It was an historic decision unequivocally defining collective bargaining as constitutionally protected. Freedom of association, the judges wrote, was not an empty right, but one that allows citizens to collectively pursue common goals.

At this point the provincial government knew that Bills 27 and 28, parallel legislation to Bill 29, were also a violation of the Charter. They ignored the implications and continued to deny teachers bargaining rights. Successive provincial budgets cut hundreds of millions from public

education. The BCTF activated their challenge in provincial Supreme Court in 2010.

Gordon Campbell resigned from politics and Christy Clark was sworn in as Premier on 14 March 2011.

Chronic underfunding continued, forcing districts to vie for sources of revenue. Competition was encouraged with legislation permitting districts to set up School Business Companies. School boundaries were eliminated. Online education burgeoned as students shopped around the province for courses. International students were courted. West Vancouver eventually came to rely on international students for fifteen percent of its annual budget.

School districts set up private for-profit schools in China promising the “Dogwood” grade 12 graduation certificate as an entry into Canadian universities. Class sizes increased and support for students with special needs dwindled. All non-enrolling teaching roles were targeted and slashed.

A province-wide testing program, the Foundational Skills Assessment (FSA) program, was used by the Fraser Institute to publish school rankings inevitably comparing public schools at the bottom of the rankings with elite private schools that always came out on top. The testing program also had the collateral effect of “teaching to the test,” decreasing the breadth and depth of curriculum.

The burden on teachers was immense. In 2005 anger simmered over and manifested in a two-week illegal strike. Teachers only reluctantly stood down when faced with massive fines. The acrimony between the BCTF and government intensified. As Justice Griffin noted:

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 (BC Supreme Court, 13 April 2011, Honourable Madam Justice Griffin, *BCTF v BC*, para 380).

In March of 2011 a new round of bargaining opened. Government had imposed a “net zero” mandate on all public sector bargaining, which required any financial benefits be paid for by concessions within the contract itself. As well, government came to our table seeking strips to clauses protecting fair evaluation practices, seniority rights, autonomous professional development and hours of work. It was not surprising that bargaining in this context was frustrating and futile.

BC SUPREME COURT, *BCTF v BC*: APRIL 2011

On 13 April 2011 the BCTF won in provincial Supreme Court.

... the Charter protects against unconstitutional actions by the state ... [and] ... government is subject to the law when it pursues public policy, including the most supreme law, the Constitution ... the process of bargaining must be done from a level playing field ... a fundamental precept of collective bargaining is equality of bargaining strength (BC Supreme Court, 13 April 2011, Honourable Madam Justice Griffin, *BCTF v BC*, paras 207, 216, 294).

In her conclusion Madam Justice Griffin wrote:

The historical evolution of collective bargaining as a protected right recognizes that there is a psychological benefit to workers to be able to collectively bargain over their working conditions, a benefit that goes beyond the economic benefits they might obtain. 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. ... collective bargaining is a fundamental institution of democracy ... It has been regarded as a form of industrial democracy, where the worker gains a sense of worth and freedom by the ability to participate. ... It is only common sense that citizens who participate in a lawful collective bargaining process resulting in an agreement that affects the way they earn their very livelihood, will feel more like partners in the employment relationship, to the benefit of the entire community ... Conversely, the inability to participate in collective bargaining about one's working conditions can exacerbate industrial conflict. Workers who negotiated and relied on the give-and-take of negotiations and the resultant collective agreement will likely feel betrayed, disrespected and disheartened if their negotiated collective agreement is subsequently torn up by the state (BC Supreme Court, 13 April 2011, Honourable Madam Justice Griffin, *BCTF v BC*, paras 301, 302, 305).

Government was given a year to rectify the legislation. The BC Liberal government chose not to appeal the ruling. We were jubilant. "This changes everything!" we told our members.

Christy Clark, now Premier, refused to meet with the BCTF but responded to the ruling on radio:

We need to go back and make sure that we address the issues that the court raised and we absolutely will do that. You know, I think whenever you bring in legislation that ten years later turns out not to have worked, you have to take responsibility for that absolutely. Every time, you want to get it right and that time, we didn't get it right (Christy Clark, CKNW, 14 April 2011).

On 20 May 2011, while contract negotiations were ongoing and government was still refusing to accord us our right to bargain WLC, we met with Paul Straszak, CEO of the Public Sector Employers Council (PSEC). Straszak had been appointed by Minister of Education George Abbott to represent government in addressing "the repercussions of the decision."

We couldn't wait to restore our language, and, using that language as the floor, resume WLC negotiations. We also felt it was our right to pursue reparations for the harm done by the legislation over the last decade. We met Straszak and his team thirteen times between May and November.

They were the most difficult meetings I have ever experienced.

It did not take us long to learn that government's interpretation of the decision was far different from ours. Far from returning our rights and the WLC language itself, government determined their only obligation was to consult with us before passing "corrective legislation."

In our view the court did not challenge government's objectives in passing the legislation; the breach was that government didn't follow, to a good faith standard, its obligation to consult with the union (Paul Straszak, May 2011).

From government's point of view the decision had not returned bargaining rights or language to teachers. It had only required government to "consult" with us "to a good faith standard." After this consultation government's view was that it could enact the legislation all over again and be invulnerable to a Charter challenge. We were astounded by this position. We began to question our faith in Canadian democracy. In support of bargaining, teachers voted to enact a limited strike action beginning in the fall. While full teaching duties were maintained teachers refused to do administrative duties and supervision. Eliminating the burden of "adminis-trivia" meant teachers could focus solely on the work of teaching. We dubbed the action "The Year of Joyful Teaching." Government ended the consultation talks in November 2011.

In May of 2012 Bill 22 was passed in Victoria. It replicated the clause stripping of Bill 28, returned full scope bargaining rights but delayed the implementation for a year to exclude WLC bargaining from the current round, ended current negotiations, imposed a two-year wage freeze, and imposed a government-appointed mediator whose job it was to resolve bargaining and produce a collective agreement. Both the British Columbia Public Schools Employers' Association (BCPSEA), representing school districts and government interests, and the BCTF were either to bargain an agreement or have one imposed by the mediator Dr. Charles Jago, appointed by Minister of Education George Abbott, by the end of June.

The Bill also legislated punitive fines (\$475/day for each individual member, \$2500/day for each local association president and member of the BCTF Executive and \$1.3 million/day for the union) should the BCTF fight the legislation. Resistance, it appeared, was futile.

There must not be included in a teachers' collective agreement any provision

- (a) regulating the selection and appointment of teachers under this Act, the courses of study, the programs of studies or the professional methods and techniques employed by a teacher,*
- (b) restricting or regulating the assignment by a board of teaching duties to principals, vice principals or directors of instruction,*
- (c) limiting a board's power to employ persons other than teachers to assist teachers in the carrying out of their responsibilities under this Act,*
- (d) restricting or regulating a board's power to establish class size and class composition,*
- (e) establishing or imposing class size limits, requirements respecting average class sizes, or methods for determining class size limits or average class sizes,*
- (f) restricting or regulating a board's power to assign a student to a class, course or program,*
- (g) restricting or regulating a board's power to determine staffing levels or ratios or the number of teachers or other staff employed by the board,*
- (h) establishing minimum numbers of teachers or other staff,*

(i) restricting or regulating a board's power to determine the number of students assigned to a teacher, or

(j) establishing maximum or minimum case loads, staffing loads or teaching loads.

[Bill 22: Education Improvement Act, 2012, 27(3)]

Dr. Jago was restricted to mediating a collective agreement which addressed only the strips government had brought to the table, within the context of the “net zero” mandate.

Dr. Jago proved to be an adept and patient mediator. His background as a college professor gave him insight into the experience of teachers and he was able eventually to convince government negotiators to take the strips off the table. As well the federation was able to achieve some small health benefit improvements that actually violated government’s net zero mandate. In the final hours before government’s own imposed deadline a deal was crafted that both parties were able to sign. The deal infuriated government. Both Jackie Griffiths, the BCPSEA chief negotiator, and Hugh Finlayson BCPSEA CEO, paid the price. Griffiths was fired and Finlayson demoted as a result.

At the same time the BCTF had to challenge Bill 22 in court. During the course of the Bill 22 hearing the duplicity and manipulations of the BC Liberal government in this round of bargaining were revealed. Testimony, emails and cabinet-level documents outlined strategies to usurp teacher bargaining rights, provoke internal dissent and possibly a “coup” in the BCTF, and goad the union into taking a full-scale strike to bolster public support for government legislative intervention in teacher bargaining.

To put further pressure on teachers, school boards were threatened with funding cuts if they didn’t adhere to government directives to eliminate professional development days and recess in elementary schools, and seek a Labour Relations Board (LRB) ruling to reduce teacher pay.

The BCTF won the Bill 22 challenge in BC’s Supreme Court only to have government appeal. Government won in provincial appeal court with one of five justices, Judge Ian Donald, dissenting. The BCTF decided to appeal this decision to Canada’s highest court. By now almost fifteen years had elapsed and both government and the BCTF had spent millions in legal fees. On 10 November 2016, Canada’s Supreme Court heard the appeal. Five BCTF past presidents and several members flew to Ottawa, at their own expense, to witness the proceedings.

SUPREME COURT OF CANADA APPEAL, NOVEMBER 2016

After about two hours of testimony from both sides, and energetic questioning of all presenters, Chief Justice Beverley McLachlin recessed the hearing. We were about to leave the court for a lunch break when we read a notice on the TV screens that the court had adjourned for a brief period and the bench would return momentarily. We waited, tense and anxious, for a quarter of an hour and until the judges returned. McLachlin read the decision. The appeal was allowed. We had won. The judgment restored our rights and language immediately.

It was a very emotional moment. While we did feel vindicated, more importantly we felt incredibly reassured that Canada is a civil and just society, guarded by a rigorous and vigilant justice system. Governments, in Canada, cannot ignore the constitution and violate the rights of citizens. The most fundamental building block of civil democracy had been upheld by our highest court.

It took fifteen years, millions of dollars, and the determination of forty thousand teachers acting in union, but we had won.

Immediately and shamelessly, Christy Clark, with appalling dishonesty announced she was pleased by the decision. On the radio and in the papers she said:

If it costs more money, that's a good thing in lots of ways because it's a good investment to put money into classrooms and our kids ... The discussion then is going to be how do we go about allocating that ... The idea that we want classrooms to be the right size, that we want more special needs teachers in classrooms, now is a chance to sit down and decide how we are going to make that happen ... Kids are only going to do better when we put more resources in.

... We all want to get to the same place, which is let us have class sizes that work and more special assistants.

... Now is a chance to sit down and decide how we're going to make that happen ... government anticipated the ruling and is ready to sit down with the BC Teachers' Federation to negotiate ... We've already put \$100 million aside into this learning improvement fund which is in response to the expectation this is where we'd end up ... It's a chance for us to invest more money in kids ... It's a chance for us to talk about how to invest more money in kids (Christy Clark 11-13 November 2016, CKNW, CBC, *Vancouver Sun*, *Globe and Mail*).

The hypocrisy and deception is breathtaking. That a sitting premier who fought tooth and nail, for well over a decade could make such statements while smiling is instructive to say the least.

But, of course, we haven't heard the last of it. During the Straszak "consultation," prior to the passing of Bill 22, retired Associate Superintendent of Surrey, Peter Drescher calculated that returning 2001 language to the collective agreement in Surrey would cost \$33 million a year. As a government witness, he later testified to this point in court. Surrey coincidentally is the largest school district in the province and serves about 10 percent of the provincial public school population. So it is easy to calculate the financial cost of returning WLC language provincially should be about \$330 million annually.

The cost of these cuts to the public school children of BC and the damage to the system over a decade and a half is inestimable.

The underfunding of public education over the last 15 years was not negligence, it was a deliberate and concerted attack on an institution of democracy. Premier Clark, as Minister of Education in 2002, deliberately set out to mine public education budgets and encourage competition from elite and religious private schools. The forced return of public education funding was not welcome news to a government that attacked public education for fifteen years, despite the political spin in the media by Clark.

There are lesson for citizens. The first is the need for eternal vigilance. It is distressing to acknowledge the need for constant and critical analysis of the spin and lies of government. The second is the awareness that defending constitutional rights, even in a democracy, is a difficult, expensive and lengthy undertaking. It is one that requires resources and determination. Unions provide the ability to challenge governments, an ability that individuals may not have.

Because of the commitment of teachers, their tenacity, and willingness to pool resources and pursue this case to Canada's Supreme Court, in the Coquitlam school district where I live, over one hundred new teachers are supporting students right now, with more to be hired this fall. It's a start.

And crumbling institutions of democracy in a Trump era? Three critical institutions – our judicial system, union rights, and public education – are strong and getting stronger. Our next task is to hold individuals and politicians to account, and strengthen our electoral political system.

Clearly the arc bends increasingly toward workplace Justice

(Madam Justice Rosa Abella, *Saskatchewan Federation of Labour v Saskatchewan*, 2015, para 1).