1989 CarswellBC 2126
British Columbia Supreme Court

Spier v. Burnaby School District No. 41

1989 CarswellBC 2126, 15 A.C.W.S. (3d) 120

BETWEEN: RICK SPIER suing on behalf of himself and on behalf of all other persons employed as teachers by the Defendant who are not currently members of the Burnaby Teachers' Association or the British Columbia Teachers' Federation, or both, by virtue of the exercise of their freedoms of conscience, religion or association and TERRILYN LAPTHORNE suing on behalf of herself and all persons employed as teachers by the Defendant who have become members of the Burnaby Teachers' Association and the British Columbia Teachers' Federation, or either, in the face of the direct or indirect coercion of the Defendant and against the free exercise of their freedoms of conscience, religion or association and who resign their membership in the Burnaby Teachers' Association or the British Columbia Teachers' Federation, or both, PLAINTIFFS AND: BOARD OF SCHOOL TRUSTEES SCHOOL DISTRICT NO. 41 (BURNABY) and BURNABY TEACHERS' ASSOCIATION, DEFENDANTS; AND: BRITISH COLUMBIA TEACHERS' FEDERATION, INTERVENOR

Gibbs J. in Chambers

Judgment: April 26, 1989
Docket: No. C884853

Counsel: Donald J. Jordan for the Plaintiffs
Katherine P. Young for the Board of School Trustees School District No. 41 (Burnaby), R. L. Edgar for Burnaby Teachers' Association, John Baigent for British Columbia Teachers' Federation

Subject: Constitutional

***GIBBS, J. (IN CHAMBERS)*:**

1 These two issues of law were set down by order for hearing and disposition prior to trial of the action:

1) Whether this Honourable Court lacks jurisdiction to try the within action;

2) If this Honourable Court has jurisdiction to try the within action, whether it ought to decline to try the same.

2 The action was commenced by writ of summons on September 27, 1988 naming only the Board of School Trustees (the School Board) as defendant. On October 6, 1988 Leggatt, LJSC ordered that the Burnaby Teachers' Association (the Union) be added as a defendant on the grounds that as a party to the agreement which is at the root of the litigation it would be "immediately, directly and contractually" affected by any declaration which might be made by the court. At the same time Judge Leggatt ordered that the British Columbia Teachers' Federation (BCTF) be given intervenor status as an interested party.

3 On October 6, 1988 the plaintiffs issued their statement of claim. The essence of the complaint is that a requirement in the collective agreement between the School Board and the Union that membership in the BCTF is a condition of employment constitutes a violation of the plaintiffs' rights under subsections 2(a) and 2(d) of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, Part 1 (the Charter). Section 2 provides:

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communciation;

(c) freedom of peaceful assembly; and

(d) freedom of association.

4 The prayer for relief in the statement of claim speaks in the present and future tense in requesting a declaration that "any agreement between the School Board and the Union is, to the extent that ... it requires that teachers ... be members of the BCTF, of no force or effect"; and in the past tense by the use of such expressions as "have violated", and "by using coercive action". It speaks similarly in all three tenses in requesting injunctive relief against present and future conduct, and damages in respect of past conduct.

5 It is common ground that prior to the advent of the *Teaching Profession Act*, SBC, 1987, chap. 19 teachers employed in this province were required by ss. 140 and 141 of the *School Act*, RSBC, 1979, Chap. 374 to be members of the BCTF. Under that regime the Union acted as local bargaining agent for teachers employed by the School Board and entered into collective agreements under the name "the Burnaby Teachers' Association of the British Columbia Teachers' Federation".

6 Legislation enacted in 1987 brought about fundamental changes in the professional status of teachers. As a consequence of the changes, effective January 1, 1988, the statutory requirement upon teachers to be members of the BCTF ceased to apply. Instead, the Union became eligible for certification under the *Industrial Relations Act*, RSBC, 1979, chap. 212. The Union here was certified as bargaining agent for all teachers employed by the School Board on January 12, 1988.

7 The collective agreement in effect when the legislative changes were made in 1987 had been entered into on January 1, 1985. One of the clauses duplicated the legislation in that it made membership in the BCTF a condition of employment by the School Board. So as to preserve "certainty and stability in the interests of harmonious labour relations" on September 28, 1987, when the applicable new legislation was still in bill form, the School Board and the Union entered into a "transition agreement" (referred to in the statement of claim as the "memorandum"). The transition agreement continued the BCTF membership condition. It recited that "wherever legally possible" (neither party could then be certain of what the final provisions of the legislation would be) the terms and conditions of employment would continue to be as in the then version of the January 1, 1985 collective agreement.

8 In April of 1988 the School Board and the Union began negotiating a new collective agreement to take effect on July 1, 1988. Some difficulties arose during the negotiations and there were grievance proceedings and ultimately, by letter dated August 10, 1988, the School Board confirmed agreement that effective July 1, 1988 "mandatory membership in the BTA and the BCTF will be a condition of employment for all teachers covered by the certification held by the BTA". The final form of the new collective agreement was ratified by the parties in early 1989. It includes as a condition of employment, a clause requiring membership in the Union and the BCTF. The term of the new collective agreement runs from July 1, 1988 to June 30, 1990.

9 The plaintiff Spier has been employed as a teacher by the School Board for 20 years, and the plaintiff Lapthorne for 15 years. Throughout their employment each was and is a member of the Union and the BCTF, and each was and is bound by the terms of the collective agreements negotiated by the Union on behalf of its members. Neither objects, in this proceeding, to compulsory membership in the Union. The objection of each is confined to the BCTF membership condition of their employment. All of the heads of the prayer for relief in the statement of claim are directed at the BCTF membership requirement.

10 The plaintiffs assert that many of the political, religious, and social policy objectives of the BCTF are in conflict with their personal beliefs. They assert that the BCTF membership requirement has coerced them into contributing financially to policies they would choose not to support if they were free to do so. They allege that the rights of freedom of association,

freedom of conscience, and freedom of religion guaranteed to them uder s. 2 of the *Charter* have been violated, and they request declarations the effect of which would be to exempt all the Union members from compulsory membership in the BCTF.

11 The issue of jurisdiction set down on this application arises out of the contention of the defendants that the dispute between the parties falls to be resolved under the provisions of the *Industrial Relations Act* and not by way of the customary court process. The contention has merit. The definition of "dispute" in s. 1 of the Act includes a difference between an employer and an employee over terms and conditions of employment, and that is the essence of the action here. The writ was issued by 2 employees against the employer over a condition of employment. The Union was subsequently added as a defendant only because it might be affected by any order made by the court. Under Part 6 of the Act there are arbitration procedures for the intent and purpose of "resolving disputes under the provisions of a collective agreement" (s. 92(2)). Under s. 108 an appeal lies from an arbitration board to the Industrial Relations Council, and under s. 109 there is limited review jurisdiction in the Court of Appeal.

12 Counsel advise that *Industrial Relations Act* proceedings have been initiated and that a trial set for February of this year was adjourned generally to facilitate the conduct of those proceedings.

13 This is a case where the court ought to refrain from interfering with or overriding the processes for which provision is made in the *Industrial Relations Act*. Mr. Justice Seaton, speaking for the Court of Appeal in *Mulherin v. United 241 Steelworkers of America* (1987) 12 BCLR (2d) 251, drew attention at page 257 to the increasing trend of deference by the court to specialized tribunals:

> This is another trend. Courts are showing increasing deference to specialized tribunals. After the judgment now under appeal, *St. Anne Nackawic Pulp & Paper*, *supra*, was decided. Estey, J., speaking for the Supreme Court of Cnaada, made it clear that these matters were to be left to the specialized tribunals. He said (at pp. 718-19):
>
> > The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.
>
> I conclude that the Supreme Court of British Columbia does not have jurisdiction to hear this case, that the statement of claim raises issues that are within the exclusive jurisdiction of the Labour Relations Board, and that *Stoyles* was wrongly decided.

14 The plaintiffs' counter argument is that they cannot obtain the relief they seek under the *Industrial Relations Act* because the tribunals under the Act are not courts of competent jurisdiction within the meaning of the *Charter*. However, that argument is met by the judgment of Mr. Justice Macfarlane of the Court of Appeal in *Moore v. R. in Right of British Columbia* (1988) 23 BCLR (2d) 105. At page 115 he said:

> An arbitrator, acting pursuant to the terms of the collective agreement, has jurisdiction over the parties, the subject matter (dismissal), and can provide all of the remedies which it would be appropriate for a court of competent jurisdiction to grant under s. 24(1) of the Charter.

15 The *Moore* case is authority in this province for a number of other principles which have application to the facts here: the plaintiffs can obtain the same relief under the *Human Rights Act*, SBC, 1984, chap. 22 as could be granted under the *Charter* (pp. 109-110); the court should decline to entertain *Charter* claims unless it is necessary to do so (p. 110); and, consistent with *Mulherin* (*supra*), "regulation of employer/employee relations where there is a collective agreement is beyond the purview of the court, and is governed by the collective agreement and the statutory scheme under which it arises" (p. 112).

16 On the authority of these Court of Appeal decisions, and the decisions which each, in turn, relies upon, the defendants' contentions on the jurisdictional issues must prevail.

17 It may be of help to the parties to point out that on the facts of this case it is unlikely that the plaintiffs could have succeeded even if properly before the court. In *Re McKinney and Board of Governors of the University of Guelph* (1988) 63 OR (2d) 1, a 5 member panel of the Ontario Court of Appeal (Blair, J.A. dissenting on another issue) held that the mere exercise by a creature of statute (the School Board) of powers permitted by the statute does not automatically attract *Charter* scrutiny. See page 14:

> It is our responsibility as a court to scrutinize the legislative and other acts of both levels of government to ensure in specific cases that come before us that they are not inconsistent with the Charter, but the objects of this scrutiny are the two levels of government and generally not those who are subject to their authority. Those who are subject to the authority of government include those legal entities which are the creation of those governments by Acts of Parliament and the legislatures. Unless it can be said, however, that in a particular case an emanation of the government is itself the government, or a branch of it, the emanation is not subject to Charter scrutiny. The statute which creates a non-governmental entity is subject to Charter scrutiny because it is a piece of legislation, but the non-governmental entity whose enabling statute survives Charter scrutiny has the status of a private person, and, like any private person, is subject only to the appropriate federal or provincial human rights legislation.
>
> The approach of the appellants in this case is to characterize the respondent universities as government and to submit that the acts of the universities are the acts of the government that created, succours and controls them. With respect, this approach is flawed in our judgment because it confuses the exercise by the government of a constitutionally permitted legislative power with the powers exercisable by the creature of that legislation. *Because a government creates a corporation does not necessarily mean that the corporation is an extension of government*. (Emphasis added.)

18 The power exercised by the School Board here when entering into the collective agreements was permissive only. Under s. 89(1)(f) of the *School Act* the School Board may "enter into agreements with associations respecting the terms and conditions of employment of teachers". The complementary permissive power in the Union, assuming the Union needs permission, is found in s. 131.2. There does not appear to beg in either the *School Act* or the *Teaching Profession Act*, the kind of overriding government approving power that led the Court of Appeal in *Douglas/Kwantlen Faculty Association v. Douglas College* (1988) 21 BCLR 175 to apply the *Charter* to a collective agreement. It is clear from what was said at page 184 that in the absence of the requirement of government approval the *Charter* would not have been applied:

> Generally the provisions of a collective agreement or a private contract, for instance, those in issue in the *Univ. of B.C.* case, are not regarded as law. That is because such agreements are usually the result of the will of the contracting parties and are not imposed by government. Law is not created by negotiation, or by agreement between the parties, even if one of them is government; it is imposed.
>
> In this case, however, the collective agreement does not take effect as a result of the will of the contracting parties. It takes effect only as a result of the decision of the commissioner under the *Compensation Stabilization Act*, in exercise of government power to impose terms. The fact that the impugned provision depends for its validity upon government approval takes it out of the realm of a privately negotiated agreement and places it in the realm of law, subjecting it to scrutiny under s. 15(1) of the Charter.

19 For all of these reasons, and in answer to the questions set down for determination, the court lacks jurisdiction to try the action. Alternatively, if that conclusion should be found to be in error, this is a circumstance where jurisdiction ought to be declined in favour of the *Industrial Relations Act* tribunals, or in favour of the council or a board of inquiry under the *Human Rights Act*.

20 There will be an order pursuant to Rule 34(2) of the Rules of Court dismissing the action. Costs may be spoken to.

End of Document