



British Columbia Teachers' Federation

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A Union of Professionals

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TEACHER BARGAINING STRUCTURES

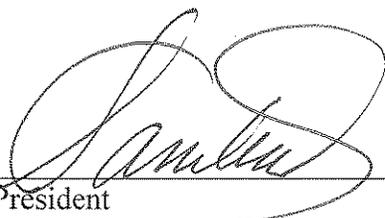
A Brief to the

Ministry of Education

from the

British Columbia Teachers' Federation

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President



Executive Director



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Teacher Bargaining Structures Brief 2012

BC Teachers' Federation

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Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly the *Charter*....All of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(d) of the *Charter*.¹

Introduction

Collective bargaining has evolved as a recognized way of creating a system of fairness and equity in the workplace. Full free collective bargaining is the fruition of the evolution of labour management relations. It is the mechanism that balances the power of the employer and prevents injustice and exploitation.

The Supreme Court of Canada has stated that the “...right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work”²

¹*Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, para. 81

² *ibid*, para. 82

In the same ruling, the court refers to the following from P. C. Weiler in *Reconcilable Differences* (1980):

Collective bargaining is not simply an instrument for pursuing external ends, whether these be mundane monetary gains or the erection of a private rule of law to protect dignity of the worker in the face of managerial authority. Rather, collective bargaining is intrinsically valuable as an experience in self-government. It is the mode in which employees participate in setting the terms and conditions of employment, rather than simply accepting what their employer chooses to give them ... [p. 33]³

While not perfect, collective bargaining has proved the best mechanism for resolving disputes between management and labour. It also establishes humane and dignified working conditions and adequate remuneration for workers. It has brought relative peace to labour relations previously subject to unpredictable disruptions, hostility, and even violence.

The Report of the Task Force on Labour Relations observed that:

Collective bargaining is the mechanism through which labour and management seek to accommodate their differences, frequently without strife, sometimes through it, and occasionally without success. As imperfect an instrument as it may be, there is no viable substitute in a free society.⁴

Recent court decisions have established that not only is free collective bargaining the preferable mechanism, it is a constitutional right. It is the most significant occasion upon which employees are able to participate in making decisions about matters that affect their daily working lives. This form of workplace co-determination is fundamental to a free and democratic society, as has been recognized by the Supreme Court of Canada.

In *BC Health Services*,⁵ the Supreme Court of Canada unanimously decided that the process of collective bargaining is a right guaranteed by the *Charter of Rights and Freedoms*. The recent

³Weiler, Paul C. *Reconcilable Differences: new directions in Canadian Labour Law*, (Toronto, Carswell, 1980), p.33

⁴Canada, Task Force on Labour Relations, and H. D. Woods, *Canadian Industrial Relations: The Report of Task Force on Labour Relations* (Privy Council Office, December 1968)

⁵*Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27[2007] 2 S.C.R. 391

BC Supreme Court decision regarding Bills 27/28 affirmed that the *Charter* guarantees the right to bargain all significant terms and conditions of employment. As Madam Justice Griffin stated:

It is clear from the history of teachers' labour relations that they have long considered their working conditions a significant priority to be negotiated collectively, and this includes the conditions of class size and composition, non-enrolling ratios, and hours of work. I conclude that the legislation purging the collective agreement of these matters, and prohibiting future collective bargaining over these matters, interfered with the teachers' ability to come together to collectively pursue goals, and significantly undermined the teachers' s. 2 (d) *Charter* guarantee of freedom of association.⁶

Any restructuring of the current bargaining structure must respect the letter and spirit of these recent court decisions.

To function well, collective bargaining must be based on a fair process acceptable to both parties. Effective collective bargaining occurs where the parties themselves sign the agreement. This may occur with or without assistance from third parties as a result of the leverage provided by the dispute-resolution mechanisms of strike/lockout. When both parties feel that the process is fair and equally weighted, they are motivated to reach an agreement and to abide by it.

In the BCTF's view, the conditions required for a successful collective bargaining system are:

1. face-to-face negotiations between the actual parties, both locally and provincially.
2. the right to bargain all terms and conditions of employment.
3. the right to dispute-resolution mechanisms under the *Labour Relations Code*.
4. adequate government funding.
5. no government interference in the process.

Current structure

Teachers in BC were granted the right to collective bargaining in 1987. A review of teacher collective bargaining reveals that the five conditions above have been largely absent in teacher

⁶ *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469, para. 295

collective bargaining rounds since 2001. Few of the conditions have been present at all since the imposition of provincial bargaining in 1994.

For example, in 2001 the government limited the right to strike by amending the *Labour Relations Code* to include education as an essential service.⁷ The Federation successfully challenged the essential services legislation at the International Labour Organization.⁸ The Federation continues to take the position that education should not be subject to section 72 of the *Labour Relations Code*.⁹

A chronology of recent teacher-bargaining legislation

2001

Aug 16 *Bill 18—Skills Development and Labour Statutes Amendment Act, 2001*
Makes education an essential service under the *Labour Relations Code*

2002

Jan 27 *Bill 27—Education Services Collective Agreement Act*
Ended partial teacher job action, imposed a collective agreement, and eliminated 10 local teacher agreements in school districts that had been amalgamated in 1996

Jan 27

Bill 28—Public Education Flexibility and Choice Act
Gave school districts the power to set the school calendar, stripped away all provisions concerning non-enrolling teachers as well as collective agreement language concerning class size and composition. It voided hours-of-work provisions and prohibited bargaining on all of these issues in future rounds

2004

Apr 22 *Bill 19—Education Services Collective Agreement Amendment Act, 2004*
Restored arbitrator Rice’s deletion of collective agreement provisions made pursuant to Bill 28. This was in response to arbitrator Rice’s decision being quashed by Supreme Court Justice Shaw

2005

Oct 7 *Bill 12—Teachers’ Collective Agreement Act, 2005*
Ended teachers’ partial job action and imposed a collective agreement extending the terms and conditions of the previous stripped collective agreement

⁷ *Labour Relations Code*, [RSBC 1996] Chapter 244

⁸ International Labour Organization Case No. 2173, contained in the 330th Report of the Committee on Freedom of Association in 2003

⁹ Section 72 of the *Code* includes the “provision of educational programs to students and eligible children under the *School Act*” making teachers subject to essential services designations

2006

May 11 *Bill 33—Education (Learning Enhancement) Statutes Amendment Act*
Established new class-size limits and addressed requirements for consultation and reporting; amended provisions for distance education courses

2012

Mar 15 *Bill 22—Education Improvement Act*
Ended teacher job action, imposed a cooling-off period, provided for a mediator constrained by the net-zero mandate and other restrictive terms. Prohibits teachers from bargaining working and learning conditions. Repeals and reintroduces parts of Bills 27/28

May 16 *Bill 36—School Amendment Act, 2012*
Enables school boards to eliminate the standard school calendar and permits year-round schooling; allows minister to determine certain classes will have no minimum hours of instruction

Since 1994, local teacher unions have been prevented from negotiating substantive items directly with their employers, the local boards of trustees. Local parties are forced to work under 20-year-old provisions that fail to address current circumstances. At the provincial level, the Federation bargains with the employers' agent, British Columbia Public School Employers' Association (BCPSEA). It is an organization with no control over resources and no incentive to conclude a collective agreement given repeated instances of government intervention.

Government intervention has been a constant problem with teacher collective bargaining. As Labour Relations' Board Vice-Chair Mark Brown stated when discussing the one-day political protest that followed the 2002 legislation imposing a contract on teachers:

...having established this public policy and statutory framework, governments have reacted to public pressure and imposed collective agreement terms by legislation to end several disputes. While the legislation may end a dispute it cannot force co-operation, it cannot force creative and innovative thinking to find long term solutions to problems and it cannot force the necessary dialogue to create productive, flexible and adaptable workplaces. Imposing terms of a collective agreement by legislative intervention has a chilling effect on the long term collective bargaining relationship. Parties may not be motivated to find collaborative solutions and will let government make the tough choices; or, parties may reach a short term strategic solution in order to avoid the legislative "hammer," but the long term relationship may not be improved.¹⁰

¹⁰ *Health Employers' Association of British Columbia*, BCLRB No. 395/2004, para. 84

In 2002, not only did government end a partial strike (where no instruction had been withdrawn), it significantly reduced the scope of teacher bargaining and eradicated 10 freely negotiated collective agreements in their entirety. The right to bargain class size, class composition, specialist-staffing ratios, processes for successful inclusion of children with special needs, and hours of work was legislated away, and the related provisions were stripped from the Provincial Collective Agreement with the exception of hours-of-work language, which was rendered void. These provisions, of course, were the result of bargaining over many years; negotiations in which teachers sacrificed monetary and other improvements to the collective agreement.

Since 2002, public education has suffered chronic underfunding. BC has fallen behind the national average in the percentage of Gross Domestic Product (GDP) spent on education. The expenditures in public school funding, as a percentage of GDP, has decreased in BC from 3.6% in 2002–03 to 3.3% in 2008–10. In 2009–10 alone, this represented a loss to the public school system of \$609 million.

British Columbia now has the worst student-to-educator ratio in the country. To reach the national average, the BC system would need to add 5,800 teachers to the public education system.¹¹ The addition of these teachers would bring BC’s class sizes closer to the national average, and significantly improve the system’s capacity to address the unique learning challenges of students with special needs.

It is no surprise that a system lacking most of the conditions of effective collective bargaining has failed to conclude a voluntary collective agreement in all but one of the recent rounds of bargaining.

The voluntarily negotiated collective agreement reached in 2006 was the direct result of government bringing resources to the bargaining table.

¹¹ *BC Teachers’ Federation 2012 Education Funding brief to the Select Standing Committee on Finance and Government Service*, <https://www.bctf.ca/uploadedFiles/Public/Publications/Briefs/2012EdFundingBrief.pdf>; for data sources, see p.20. Also, Statistics Canada. (2011). *Summary Public School Indicators for Canada, the Provinces and Territories, 2005/2006 to 2009/2010*, available at: <http://www.statcan.gc.ca/pub/81-595-m/81-595-m2011095-eng.pdf>, 2009–10 FTE enrolment figures (548,153): Table A.2.1, p. 10. 2009–10 SER figure for BC and Canada: Table A.14, p. 27. 2009–10 FTE educators in BC (33,054): Table A.13.1, p. 25

The current system does not provide the necessary elements for productive collective bargaining. The scope of bargaining has been significantly reduced so that teachers have no voice and no mechanisms available to influence fundamental working conditions. In addition, local unions are unable to bargain issues that are important and specific to their needs. Government consistently underfunds the public education system and repeatedly imposes legislation. All of this prevents the parties from voluntarily reaching a collective agreement.

Currently and repeatedly, teachers are denied their *Charter* right to collective bargaining. The current system has resulted in damaged relationships, deteriorating working and learning conditions, wasted resources—and most importantly—significant damage to the public education system.

Proposed Structure

At the core of the Federation's proposed structure is the return of bargaining authority to the local parties with respect to all but a limited list of items. The BCTF proposes:

1. provincial bargaining between the BCTF and government regarding salary, benefits, hours of work, paid leaves, class size, class composition, and staffing levels for specialist teachers.
2. local bargaining of all other items.
3. both local and provincial bargaining be conducted pursuant to the full rights and obligations of the *Labour Relations Code*.

Local bargaining

Full free collective bargaining can be a positive process that improves relationships and renews a common understanding and commitment to the provisions of the collective agreement. It is a process where equal partners, with an intimate understanding of the issues and problems, find compromise and mutually acceptable solutions.

The Federation has long advocated for a return to local bargaining, particularly for relationship issues. Such provisions were originally bargained locally to address unique local geographic and demographic conditions. They become part of the culture of a district. Thus, it is impractical to bargain these provisions provincially, and experience has proven they have not been addressed in any of the rounds of provincial bargaining since 1994. Post and fill, transfer, and layoff and recall, for example, are best dealt with by the parties that must administer those provisions.

Under the current structure, there has been little to no opportunity to revisit these, and similar provisions, for more than 20 years. And so, because they no longer address current situations, a significant amount of resources are taken up in grievances and legal costs that could be greatly reduced if the parties administering those provisions were able to renegotiate the language.

The Korbin commission acknowledged that local bargaining was very effective in bringing the parties together to address local issues:

The major strength of the present collective bargaining arrangement is that both parties are responsible for living within the contract they negotiate. There is more incentive for both parties to take long term relationships and the feelings of the community into account. There is also the opportunity of both parties to work together on problems during the course of the contract without worrying about stepping outside the bounds of their authority. The parties that are working on the problem are also the parties that will be negotiating when the contract comes up for renewal.¹²

Increased local bargaining would expand the role of school boards and promote a stronger connection between trustees and teachers. Trustees are accountable to the public that elect them. They are members of the community, and therefore accessible when parents and others wish to address concerns. It is the trustees who are ultimately responsible for ensuring the workplace is safe and harassment-free, and that the collective agreement is respected. In short, trustees are the employer.

¹² Korbin, Judi: *Report of the Commission of Inquiry into the Public Service and the Public Sector* (July 1993)

Similarly, teachers in a school district are part of the social fabric, and understand the needs of their community. Local unions are better able to address those needs in the context of local bargaining than a provincial union, at a provincial table.

Returning significant bargaining authority to the local parties will strengthen relationships, allow the parties to effectively address unique issues, and minimize the number of disputes between the parties.

Provincial bargaining

The Federation proposes that the negotiation of salary, benefits, hours of work, paid leaves, class size, class composition, and staffing levels for specialist teachers take place between the Federation and the provincial government. This is consistent with the position that face-to-face negotiations take place between the parties, not with an intermediary with no vested interest in the outcome.

In Canada, provincial governments have constitutional authority and responsibility for education. The province establishes the budget for education and sets the mandate for public sector bargaining. For the major monetary items, it will be a far more meaningful exercise for the Federation to bargain directly with the party that has the authority to make fiscal decisions.

This will require the government to come to the table, and, consistent with the requirements of the *Labour Relations Code*, “bargain collectively in good faith, and make every reasonable effort to conclude a collective agreement.”¹³

Dispute resolution

The *Labour Relations Code* establishes a full range of mechanisms to address dispute resolution. The leverage provided by these mechanisms is critical to the success of collective bargaining, a process that tries to balance the interests of the parties in an employer-employee relationship. The code ensures that such leverage is equally accessible to both parties, should the need arise.

¹³*Labour Relations Code, supra note 4, s. 47*

For these reasons, the ultimate dispute-resolution mechanisms of strike/lockout are fundamental to the health of a collective bargaining structure. Without them, the table does not have two equal partners and loses its most effective means of exerting pressure on the process. Without them, there is no incentive to bargain seriously when the issues are contentious.

For bargaining to succeed, the government must be willing to let the process proceed without interference. The government must also commit to the dispute-resolution processes in the *Labour Relations Code* and accept that both parties may be subject to the pressures resulting from a strike or a lockout. It is this pressure—often without resort to a strike or lockout—that resolves disputes.

The right to strike is a fundamental element of collective bargaining and is protected by the *Charter*. As Justice Ball in Saskatchewan recently stated:

I am satisfied that the right to strike is a fundamental freedom protected by s.2(d) of the *Charter* along with the interdependent rights to organize and to bargain collectively. That conclusion is grounded in Canada's labour history, recent Supreme Court of Canada rulings and labour relations realities.¹⁴

Paul Weiler, Harvard law professor and author, argues in *Reconcilable Differences* that without the right to strike unions cannot truly engage in collective bargaining. He states:

If we cannot accept the cold-blooded logic of collective bargaining, let us be candid about what we are doing. If we tell a school union that in order to secure concessions from the school board they can go on strike, as long as they do not interrupt the delivery of education—or we tell other government unions that they can strike but they cannot disturb the welfare of the public—then we are really telling these unions that they will not have an effective lever with which to budge a recalcitrant government employer from the bargaining position to which it has committed itself. We do leave the public employees with the right to unionize, to try to persuade their employer to improve their contract offers—with the right to collective “begging” as some unionists derisively put it—but we do not give them collective bargaining in the true sense of the word.¹⁵

¹⁴ *Saskatchewan v. Saskatchewan Federation of Labour*, 2012 SKQB 62

¹⁵ *Supra note 3*, p. 240

The International Labour Organization—an agency of the United Nations—has stated that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests.¹⁶ It has consistently ruled that the withdrawal of services by teachers is protected under international law.¹⁷

Legislative attempts to limit the right to strike have not resulted in labour peace, and in fact have been counter-productive. There is a well-established recognition that the right to strike/lockout exerts a powerful deterrent to workplace disruption, which negatively impacts both employers and employees, alike. If the government is contemplating removing the right to strike from teachers, the BCTF strongly advises it to reconsider. Removing the right to strike will not bring labour peace, and it will not repair relationships. In fact, it will have a significant negative impact on public education. As Mr. Comeau, past president of the BC School Trustees Association, put it to Mr. Wright:

School trustees are well aware that strikes are not the worst thing that can happen to the school system. Neither is the cost control the most important thing to be accomplished through bargaining. The most important thing, and the reason trustees care about and need to continue to be involved with collective bargaining with teachers, is the effect on the students. Not only bargaining content, but also bargaining processes, have an effect on the classroom. A demoralized, de-motivated teaching force *is* one of the worst things that can happen, and the government needs to be sensitive, in this review, to avoid this outcome.¹⁸

Collective bargaining and public education

In the three rounds of full free collective bargaining between 1988 and 1993, local bargaining was successful. Substantial improvements to the public education system were made as a result of concluding local collective agreements: class sizes were reduced; support for students with special needs was added; preparation time for teachers was ensured; specialist teacher support was provided; and class composition was controlled to ensure quality education for all students.

¹⁶ J. Hodges–Aeberhard & O. de Dios, *The Principles of the Committee on Freedom of Association Concerning Strikes* (1987), 126 Int'l Lab. Rev. 543, at 548

¹⁷ *Supra note 8* and Committee on Freedom of Association Digest of Decisions 2006, para. 585

¹⁸ Letter from Gordon Comeau, past-president, BC School Trustees Association, to Don Wright (Sept. 22, 2003)

There is clear evidence that unionized public school systems have a positive effect on achievement. A review of 17 major studies by researcher R.M. Carini validated the basic premise that teacher unions and collective bargaining enhance student achievement. As Carini stated:

While the higher costs associated with teacher unionism are confirmed...the benefits to students are gained by recruiting and retaining superior teachers, providing teachers a forum for decision-making and ownership, and creating an environment conducive to high morale and job satisfaction.¹⁹

In his address to the 2012 Educational Leadership Conference: Partnerships for Personalization, Ben Levin noted that “high performing jurisdictions have strong teacher unions.”²⁰

Collective bargaining is a positive force in the maintenance of a strong public education system. It gives teachers a vehicle to improve not only the terms of their employment, but also the learning conditions for the students of BC. In past rounds, BC teachers have chosen improved learning conditions over improvements to salary and benefits. Unfortunately, many of those provisions were subsequently stripped from collective agreements, by unconstitutional legislation.

There are those who would argue that whatever benefits collective bargaining brings to public education, they are outweighed by the disruption of periodic strike action. The government has stated that one of its goals in this review is to curtail disruptions related to bargaining.

In the BCTF’s view, the disruptions—certainly in the last decade—have been the result of government interference. In the fall of 2001, the Federation and BCPSEA were engaged in bargaining. At the same time, BCPSEA was discussing, with government, pending legislation that would end negotiations. Justice Griffin found, in her ruling regarding Bills 27 and 28, that the knowledge of legislation must have informed BCPSEA’s bargaining strategy.²¹ Not

¹⁹ Carini, R.M., Teacher unions and student achievement. Education Policy Studies Laboratory, Arizona State University—2002

²⁰ Levin, B. (2012). *Building great schools*. Plenary presentation at Partnerships for Personalization: Leading and Transforming Together (2012 BCSSA Education Leadership Conference). Retrieved from <http://www.bcssa.org/PDFs/fall2012/benlevin.pdf>

²¹ *British Columbia Teachers’ Federation v. British Columbia*, 2011 BCSC 469, para. 170

surprisingly, there was no progress at the table and the Federation began limited job action in the fall, while teachers kept teaching.

Despite the fact that there had been no withdrawal of instruction, the round of bargaining was brought to an end by the passing of legislation,²² which imposed a collective agreement and stripped out all provisions related to class size and composition, staffing ratios for specialist teachers, processes for successful inclusion of children with special needs, and hours of work.

Despite this unprecedented provocation, teachers walked out for only a single day in January of 2002.

While negotiations were taking place in the next round of bargaining in 2005, the government once again imposed a collective agreement through legislation.²³ This action precipitated a two-week walkout by teachers. The walkout, which was focused on reducing class sizes and improving class composition, garnered overwhelming public support.

Government intervention guarantees disruption and demoralizes the teaching profession. There may have been little or no disruption if collective bargaining had been allowed to run its course.

Proposal for 2013 bargaining round

The BCTF asks that, prior to the next round of bargaining, a mutually agreeable independent researcher be appointed to prepare a comparative analysis of the terms and conditions of employment for public school teachers across Canada. Specifically, we request that the researcher examine salaries, benefits, and hours of work (including preparation time), as well as the cost of living, in different jurisdictions.

²² *Education Services Collective Agreement Act, S.B.C. 2002, c. 1 [ESCAA] (Bill 27) & Public Education Flexibility and Choice Act, S.B.C. 2002, c. 3 [PEFCA] (Bill 28)*

²³ *Teachers' Collective Agreement Act, S.B.C. 2005, c. 27*

Conclusion

With regard to a new bargaining structure for teachers, the BCTF submits that the following points would ensure a workable system that meets the needs of both employers and teachers:

1. face-to-face negotiations between the actual parties
2. the right to bargain all terms and conditions of employment²⁴
3. the right to dispute-resolution mechanisms under the *Labour Relations Code*
4. adequate government funding
5. no government interference in the collective bargaining process.

Consistent with the above conditions, the BCTF proposes the following:

1. provincial bargaining between the BCTF and government regarding salary, benefits, paid leaves, class size, class composition, hours of work, and staffing levels for specialist teachers.
2. local bargaining of all other items.
3. both local and provincial bargaining be conducted pursuant to the full rights and obligations of the *Labour Relation Code*.

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²⁴ We have not focused on the scope of issues that can be bargained because the *Education Improvement Act*, S.B.C. 2012, c. 3, returns full-scope bargaining to teachers and the issue of remedy and repercussions for 13 years of loss of bargaining rights is before the Courts