COURT OF APPEAL FOR BRITISH COLUMBIA

Date: 20090114
Docket: CA035974

Between:

The Faculty Association of the University of British Columbia

Appellant

And

The University of British Columbia

Respondent

And

Canadian Union of Public Employees, Local 2278

Intervenor

And

Canadian Association of University Teachers

Intervenors

And

Association of Universities and Colleges of Canada

Intervenor

Before: The Honourable Madam Justice Prowse
(In Chambers)

Oral Reasons for Judgment

A.E. Black, Q.C.	Counsel for the Appellant
D.M. Sartison	Counsel for the Respondent
L. McGrady, Q.C.	Counsel for the Intervenor, CUPE, Local 2278

J.J. Arvay, Q.C.	Counsel for the Intervenor, CAUT
L.B. Herbst	Counsel for the Intervenor, AUCC
Place and Date:	Vancouver, British Columbia 14 January 2009

(application to strike paragraphs from intervenors' factums
or to extend time to file Respondent's factum)

[1] **PROWSE J.A.**: The Faculty Association of UBC is appealing from the Award of Arbitrator David C. McPhillips, pronounced March 12, 2008, in which the arbitrator concluded that he was without jurisdiction over the content of UBC's Senate's Policy on Student Evaluation of Teaching.

[2] On September 26, 2008, Mr. Justice Lowry made an order granting the Canadian Association of University Teachers ("CAUT"), the Association of Universities and Colleges of Canada ("AUCC"), and the Canadian Union of Public Employees, Local 2278 ("CUPE") leave to intervene in the appeal. At that time, UBC consented to the intervention of CAUT and AUCC, but objected to the intervention of CUPE.

[3] On this application, UBC seeks to strike certain paragraphs from the factums filed by both CAUT and CUPE on the basis that they go beyond the arguments raised by the appellant Faculty Association in its factum. UBC submits that certain arguments of the intervenors extend beyond what is permissible according to established authorities. In the alternative, UBC submits that, if the impugned paragraphs of the intervenors' factums are not struck, UBC should be granted an extension of time for filing its factum.

[4] CAUT replies that UBC consented to its intervention before Mr. Justice Lowry without restriction, and that all of the arguments in its factum were in its materials before Mr. Justice Lowry. CAUT submits that any objection to the scope of its intervention should have been made before Mr. Justice Lowry and that it is now too late for UBC to object. In the alternative, CAUT submits that the argument to which

UBC takes exception is well within the scope of proper argument, and does not impermissibly expand the scope of the arguments which it is entitled to make as an intervenor.

[5] While UBC objected to the intervention of CUPE in the appeal, and Mr. Justice Lowry expressly declined to rule on the scope of CUPE's proposed arguments on appeal, CUPE also submits that its submissions are well within the bounds of accepted intervention according to the authorities.

[6] I will deal firstly with UBC's objection to various provisions in CAUT's factum. With respect to CAUT's intervention, UBC takes exception to the argument raised at paras. 37 – 43 of CAUT's factum, in which CAUT seeks to argue that the arbitrator's interpretation of the *University Act*, RSBC 1996, c-468, would bring provisions of that *Act* into conflict with rights of freedom of association under s. 2(d) under the *Charter of Rights and Freedoms*. CAUT's argument, as I understand it, is that relevant *Charter* values should inform the interpretation of the *Act* and, in turn, this Court's view of the correctness of the Arbitrator's Award, and that if *Charter* values are used as an interpretive tool in analyzing the relevant provisions of the *Act*, the result will necessarily be different.

[7] CAUT's submission on this point is set out in para. 13 of its written argument on this application where it states:

> 13. This is not a new issue, but a different argument on the issue framed by the appellant. CAUT raises the *Charter* solely as an interpretive tool (and only in the alternative in the event of any ambiguity). This is a pure argument of law that does not expand

> the *lis* between the parties or require any additional facts. There is no rule that an intervenor cannot raise a legal argument which has not been advanced by the parties. Indeed if an intervener cannot raise a new argument, it is difficult to see how it can "provide the court with a helpful fresh perspective."

[8] In support of its submissions, CAUT relies on several authorities, including *M.(K.) v. M.(H.)*, 1992 3 S.C.R.. In that case, LEAF was given leave to intervene to raise the *Charter* as an interpretive tool with respect to the *Limitations Act*, R.S.O. 1980, c. 240, subject, of course, to the right of the court hearing the appeal to determine whether, and to what extent, it would consider and give effect to the intervenor's argument.

[9] As I advised counsel during the course of submissions, I am not satisfied that it would be appropriate in this case to decide UBC's application in relation to CAUT on the basis that UBC consented to its application for intervenor status, and should be deemed to have also consented to the extent of the arguments CAUT could make in intervening. I accept that counsel for UBC did not intend that result when it consented to CAUT's intervention.

[10] In the result, however, I am not persuaded that CAUT's submission unacceptably expands the arguments raised by the Faculty Association in its factum. There is no suggestion that further evidence or materials are required for the Court to deal with any of the arguments raised by CAUT, or that UBC would suffer any significant prejudice if CAUT's full arguments were to be placed before the Court.

[11] I now turn to UBC's objection to provisions of CUPE's factum. In particular, UBC takes exception to paras. 24 – 28 of CUPE's factum, in which it addresses what it refers to as "the additional error set out below":

> b) Did the Arbitrator err in determining that the overriding element of the Senate Policy is fundamentally one of academic governance and, therefore, not subject to collective bargaining or to challenge through the collective agreement grievance/arbitration process mandated by the *Labour Relations Code*.

[12] UBC submits that the impugned paragraphs of CUPE's factum amount to an argument that the "Senate's introduction of the Policy was *ultra vires* its statutory authority". I agree with CUPE that UBC has misconstrued CUPE's argument in this respect. In my view, while CUPE has reframed the argument made by the Faculty Association with respect to the alleged manner in which the Arbitrator erred in interpreting the *University Act* in relation to the Policy, both the Faculty and CUPE are essentially arguing, amongst other things, not that the Senate had no jurisdiction over teaching evaluation, but that the Senate and Board of Governors have overlapping jurisdiction which does not preclude the jurisdiction of the Arbitrator to determine a grievance made under the Collective Agreement in relation to the policy. Further, as with CAUT, the impugned arguments raised by CUPE do not require consideration of further evidence or materials.

[13] In the result, I would dismiss UBC's application to strike paragraphs from the factums of the intervenors. I would, however, grant UBC an extension of time in which to file its factum and I am advised by counsel for UBC that she is satisfied that she and other counsel will be able to agree on an appropriate schedule for filing.

(discussion with counsel)

[14] **PROWSE J.A.**: I am prepared to make an order that UBC's factum may be up to 40 pages in length, with leave to UBC to apply to file a longer factum if it considers it essential to do proper justice to its argument.

(discussion with counsel regarding costs)

[15] **PROWSE J.A.**: I am prepared to permit the intervenors, if they wish to do so, to make a brief written submission on costs as to why they should receive costs and to give UBC the opportunity to reply. I will give the intervenors seven days to make their submission as to why they should be awarded costs, and I will give a further seven days after that for UBC to reply. I will give my decision as soon thereafter as possible. I do not expect this to be a lengthy submission because, frankly, I suspect there is not much authority on the point.

The Honourable Madam Justice Prowse