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June 5, 2006

Labour Relations Board of British Columbia
600 - 1066 West Hastings Street
Vancouver, B.C. V6E 3X1

Attention: Registrar

Dear Sirs/Mesdames:

**Re: British Columbia Teachers' Federation -and- British Columbia Public
School Employers Association
(Application pursuant to sections 11, 14 and 133 of the Code)**

This is an application by the British Columbia Teachers' Federation ("BCTF") which asserts that the British Columbia Public School Employers Association ("BCPSEA") has refused to bargain collectively in good faith contrary to section 11 of the *Code*. A copy of this application has been faxed concurrently to the offices of Harris & Company as we have been advised that Judith Anderson is counsel for BCPSEA on this matter.

REQUEST FOR AN EXPEDITED HEARING

As the Board is no doubt aware, BCTF and BCPSEA are currently engaged in collective bargaining for a new provincial collective agreement. This application has urgency as the government has created a fund which would establish a significant signing bonus for individual teachers if a collective agreement is reached by June 30, 2006. However, clearly a collective agreement cannot be reached when one party is refusing to bargain in good faith, contrary to section 11.

BACKGROUND

1. Section 27(3) of *The School Act* states as follows:
 - (3) 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 program 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 and the regulations,
 - (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 number 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.

2. Subsections (d) to (j) were added to the *School Act* pursuant to the *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3 ("PEFCA"), which came into force on January 28, 2002.

3. Section 28 of the *School Act* was also amended by section 10 of *PEFCA* to read as follows:

- (1) The Provincial union, as defined in the *Public Education Labour Relations Act*, may, on matters in respect of which a board has been given power or discretion under this *Act* or the regulations, enter into a collective agreement containing provisions respecting
 - (a) the manner in which the power or the discretion may be exercised, and
 - (b) the consequences that flow from the exercise of the power or discretion.
- (2) Despite subsection (1), if this *Act* or the regulations contain provisions that limit or restrict any matter described in subsection (1)(a) or (b), those provisions prevail over the collective agreement in the event of a conflict.

4. That is, BCTF is entitled to bargain the manner in which school boards discretions or powers under the *School Act* are exercised, and the consequences that flow from the exercise of that power or discretion.

5. Section 9 of *PEFCA* established a process whereby the government appointed an arbitrator “to determine whether a provision in the teachers’ collective agreement constituted under the *Education Services Collective Agreement Act* conflicts or is inconsistent with section 27(3)(d) to (j), as enacted by the *Public Education Flexibility and Choice Act*.”

6. On August 30, 2002, Arbitrator Eric Rice, the arbitrator appointed by the government, issued his decision. In that decision, he held that section 28 had no application in respect of the matters set out in section 27(3)(d) to (j).

7. BCTF applied for judicial review of Arbitrator Rice’s decision. One of the grounds was the argument that Arbitrator Rice had misinterpreted section 28 of the *School Act* and had failed to apply the principle of harmonization.

8. Mr. Justice Shaw issued a decision on January 22, 2004 quashing the decision of the arbitrator. In that decision, he provided a lengthy interpretation of section 28 of the *School Act*. Given the significance of this decision for this application, we have set out the relevant passages from the decision in full:

POINT 2: INTERPRETATION OF SECTION 28

46 Section 28 provides that the manner in which a School Board may exercise a power or discretion, and the consequences that flow therefrom, are matters that may be included in the collective agreement, unless the School Act or the regulations limit or restrict those matters.

School Board Powers

47 The arbitrator held that section 28 had no application to what he had to decide because, as a prerequisite to the application of section 28, the School Act or regulations must give the school boards power or discretion in respect of the matters described in section 27(3)(d) to (j), and no such power or discretion is given by the School Act or regulations.

48 The arbitrator said, in his Determination:

59. In order for Section 28 to apply, a board of school trustees must be given a power or a discretion under the School Act or the Regulations. There is no "power" or "discretion" for a board under the School Act or Regulations in relation to the matters contained in section 27(3)(d) to (j) at this time.

49 In my opinion, the arbitrator erred in law in finding that school boards have no powers or discretion under the School Act or regulations in respect of the matters set out in section 27(3)(d) to (j). A review of the powers in the School Act points out this error.

50 The School Act confers broad powers on the school boards. These powers include, for example: section 15, employment and management of employees; section 20, appointment of principals, vice-principals and directors of instruction; section 22(1), supervision and direction of educational staff; section 65(2)(c), delegation of administration and management duties to employees; section 22(2), general direction of the organization and administration of educational programs and of the operation of schools; section 74(1), management of schools; section 74.1,

enrollment of students; section 75(1), provision of educational programs; section 75(4), assignment of students to schools and programs; section 76.1(1), ensure that average class sizes do not exceed specified numbers; section 76.1(2), ensure that class sizes for primary grades do not exceed specified numbers; section 82, provide education instruction and resource materials to students; and section 85(2), set local policy for the operation of schools. These powers delegate considerable exercise of discretion to school boards. The powers largely include those described in subparagraphs (d) to (j) of section 27(3).

Application Of Section 28(2)

51 Section 28(1) allows the collective agreement to contain provisions respecting "manner" or "consequences". Section 28(2) puts a limit on this right. It says that where the School Act or the regulations limit or restrict "manner" and "consequences", the Act or regulations will prevail.

52 The arbitrator held that there is no scope for section 28(1) to operate because section 28(2) is applicable. He said, in paragraph 63:

In my opinion there is no scope for Section 28(1) to operate...because section 28(2) is applicable....

53 I find that the arbitrator erred in law in holding that the application of section 28(2) left no scope for section 28(1).

54 For convenience, I repeat section 28(1) and (2):

28 (1) The Provincial union, as defined in the Public Education Labour Relations Act, may, on matters in respect of which a board has been given power or discretion under this Act or the regulations, enter into a collective agreement containing provisions respecting

- (a) the manner in which the power or the discretion may be exercised, and
- (b) the consequences that flow from the exercise of the power or discretion.

(2) Despite subsection (1), if this Act or the regulations contain * provisions that limit or restrict any matter described in subsection (1)(a) or (b), those provisions prevail over the collective agreement in the event of a conflict.

* This is where the word "express" was removed by the Public Education Flexibility and Choice Act.

55 The provisions of the School Act that limit or restrict matters in the collective agreement are section 27(3), which forbids the collective agreement to contain provisions of the nature described in subsections (d) to (j), and section 27(5), which renders such provisions void. The issue here is whether these provisions limit or restrict "manner" or "consequences" contemplated by section 28(1).

56 The subject matters described in subparagraphs (d) to (j) must be analysed to see whether they include "manner" or "consequences" of their exercise. If they do, then section 27(3) and section 27(5) limit or restrict their usage in the collective agreement.

57 The phrasing in subparagraphs (d), (f), (g) and (i) is quite different from the phrasing in subparagraphs (e), (h) and (j). I will analyse each group separately.

Subparagraphs (d), (f), (g) and (i)

58 The common wording in subparagraphs (d), (f), (g) and (i) is the phrase "restricting or regulating a board's power to..." do the things described in those subparagraphs.

59 I think there is no doubt that the regulating of a power to do something includes regulating the manner in which the power may be exercised. Thus, in this instance, section 28(2) leaves no scope for the operation of section 28(1) in respect of "manner".

60 On the other hand, there is a distinction between regulating and the consequences that flow from regulating. While they are related, they are nonetheless quite different. A decision-maker may take into account the potential consequences of regulating, but that does not make the act of regulating the same as its consequences.

61 It follows that the application of section 28(1) in respect of "consequences" is not limited or restricted by section 27(3) and section 27(5). Thus, section 28(2) does not apply. I find the arbitrator erred in law in holding otherwise.

Subparagraphs (e), (h) and (j)

62 The operative words in subparagraph (e) are "establishing or imposing". In subparagraphs (h) and (j) the operative word is "establishing".

63 There is a clear distinction between the power to establish or impose something and the manner in which that power is exercised. Likewise, there is a clear distinction between the power to establish or impose something and the consequences that flow from the exercise of that power.

64 It follows that the application of section 28(1) in respect of both "manner" and "consequences" is not limited or restricted by section 27(3) and section 27(5). Thus, section 28(2) does not apply. I find the arbitrator erred in law in holding otherwise.

Deletion of "express" from Section 28(2)

65 The arbitrator said at paragraphs 60 and 61:

60. In fact, when section 27(3) was amended by Bill 28 to include subsections (d) to (j) section 28 was changed from its prior form. It was amended to remove the word "express" in section 28(2)....

61. Deletion of the word "express" in Section 28(2) tends to restrict the application of Section 28(1) and expands the applicability of Section 28(2).

66 I have considered the effect of the deletion of the word "express" from section 28(2). I agree with the arbitrator that the deletion of the word "express" expands the scope of section 28(2) and thereby reduces the application of section 28(1). In my view, the real effect of the amendment is to engage the concept of "by necessary implication" as well as "express".

67 I have kept this interpretation in mind in finding that "regulating" includes the "manner" of regulating. I have also kept it in mind in my findings that the phrase "restricting or regulating a board's power to" does not include the consequences that flow from the exercise of the power, and that "establishing or imposing" does not include "manner" and "consequences".

68 I conclude that the elimination of the word "express" from section 28(2) does not support the arbitrator's ruling that section 28(2) leaves no scope for the application of section 28(1).

Relevance

69 In paragraph 63 of his Determination the arbitrator said:

...In any event I found no example where I concluded that "manner and consequences" could work to avoid deletions.

70 At first glance, this finding appears to render irrelevant the issue of the application of section 28(1). However, the arbitrator was referring to "deletions" in the sense of the severance approach he applied to deletions, not in the sense that I have found should apply. Viewed this way, the arbitrator's finding does not render irrelevant the application of section 28(1).

71 Moreover, based upon various examples of provisions in the collective agreement brought to my attention by counsel for BCTF, I think it is likely that a number of provisions will be preserved, at least in part, by the application of section 28(1).

Summary

72 In summary, I find that the arbitrator erred in law in (1) misinterpreting section 28 of the School Act, and (2) in failing to apply subsection (1) thereof.

British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn., [2004] B.C.J. No. 84, 2004 BCSC 86, paras. 46-72

9. Mr. Justice Shaw also held that the arbitrator erred in failing to apply the principle of harmonization:

73 The principle of "harmonization" was developed in *Durham Regional Police Association v. Durham Regional Board of Commissioners of Police*, [1982] 2 S.C.R. 709 and articulated in *British Columbia Government Employees' Union v. British Columbia (Government Personnel Services Division)* (1987), 12 B.C.L.R (2d) 97 (C.A.). In the latter case, Hutcheon J.A. for the Court said at 102:

The decision of the Supreme Court of Canada in *Durham Regional Police Assn.* is authority for the proposition that the existing legislation must be read in such a way as to harmonize with the collective agreement unless the operation of the latter is clearly excluded....

74 In dealing with the above two cases, the arbitrator said at paragraph 51 of the Determination:

The foregoing cases are distinguishable as they do not involve statutes with a provision similar to section 27(3), which provides that the terms and conditions of the collective agreement must not be inconsistent with the School Act and which prohibits the continuation of provisions which in any way regulate or restrict the matters referred to in subsections (d) to (j). No discretion is offered, so there is little room for harmonization.

75 In my opinion, the legislation in the present case is suited for the application of the principle of harmonization. In my rulings above, I have applied the principle of harmonization. I have also applied the limitation to the principle - "unless the operation of the [collective agreement] is clearly excluded" - when I found "regulating" necessarily includes "manner".

76 I conclude that the arbitrator erred in law in failing to apply the harmonization principle.

BCTF, supra, paras 73-76

10. That is, the Supreme Court of British Columbia unequivocally held that BCTF was entitled to bargain the consequences of a board's exercise of its power to establish class size and class composition, to assign students to a class course or program, to establish minimum number of teachers or other staff, and to determine the number of students assigned to a teacher.

11. Mr. Justice Shaw also held that BCTF was entitled to bargain the manner by which a board establishes class size limits, requirements respecting average class sizes, or methods of determining class size limits or average class sizes, and the consequences of the exercise of those powers. Similarly, BCTF is entitled to bargain the manner in which the minimum number of teachers or other staff are established, and the consequences of that determination, and to bargain the manner in which a school board establishes maximum or minimum case loads, staffing loads, or teaching loads, and the consequences of the exercise of that power.

12. Although BCPSEA filed a Notice of Appeal of Mr. Justice Shaw's decision, it did not pursue that appeal.

13. Despite the clear and unequivocal decision of Mr. Justice Shaw, BCPSEA has refused to bargain proposals dealing with the manner and consequences of the exercise of the powers and discretions described in section 27(3)(d) to (j). Clearly that refusal to even enter into collective bargaining on these issues constitutes bargaining in bad faith prohibited by the *Code*.

14. BCPSEA has advised BCTF that its position is that BCTF's proposals concerning manner and consequences are contrary to law as a result of the *Education Services Collective Agreement Amendment Act, 2004*, S.B.C. 2004, c. 16.

15. Pursuant to this legislation, the government implemented the "specific changes to teachers' collective agreements identified by the arbitrator, Mr. Eric Rice."

Hansard, Tuesday, April 20, 2004, Afternoon sitting, Vol. 23, No. 9

16. However, that implementation did not involve any amendment to the *School Act*, including section 27.

17. However, apparently BCPSEA relies on section 4 of the *Education Services Collective Agreement Amendment Act, 2004* which added the following provision to section 28:

28(3) For certainty and despite any decision of a court to the contrary made before or after the coming into force of this subsection, nothing in this section is to be construed as authorizing a board or the Provincial union to enter into a collective agreement that includes a provision that is prohibited under section 27(3) or void under section 27(2), (5) or (6).

18. However, that provision has no impact on the decision of Mr. Justice Shaw. The whole point of Mr. Justice Shaw's decision on section 28 was that negotiation of the manner and consequence of the exercise of a power, or where restricted, the negotiation of the consequences of the exercise of a power, was not prohibited under section 27(3).

19. Further, the Minister of Labour made no claim that section 4 had the result asserted by BCPSEA. When section 4 was debated, he claimed that the purpose was to bring finality to the collective agreement in order to permit the parties to sit down and negotiate the next contract.

Hansard, Thursday, April 22, 2004, Vol. 24, No. 2 at p. 10378

20. Similarly, at page 10380, the Minister stated that what section 4 was "all about" was to add finality to the contract that expires on June 30, 2004 so that the parties could get on with the process of being able to negotiate new contracts.

21. Consequently, there is no basis for the position taken by BCPSEA on the legality of the Union's proposal on manner and consequences. In spite of that, BCPSEA has persisted in that error in collective bargaining. At the bargaining table BCPSEA has received specific proposals from the Union on manner and consequences but continues to contend they are illegal and cannot be bargained. Although the Union has requested the Employer to specify those parts of its proposals which it says are illegal, BCPSEA has refused to do that. In the result the Union says BCPSEA, contrary to the *Labour Relations Code*, is failing or refusing to bargain in good faith and is not making every effort to reach a collective agreement.

22. The Union seeks declarations, orders, and such other remedies as counsel may advise or the Board deems fit to achieve compliance with the statute and to relieve the Union from the consequences of the Employer's wrongful conduct.

VICTORY SQUARE LAW OFFICE LLP
Labour Relations Board of British Columbia, Att.: Registrar
June 5, 2006

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ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Yours truly,

VICTORY SQUARE LAW OFFICE LLP
per:



John Rogers
/afp

c(s): British Columbia Teachers' Federation, Att.: Diane MacDonald/Brian Porter
Harris & Company, Attention: Judith Anderson