

BCLRB No. B214/2011

**BRITISH COLUMBIA LABOUR RELATIONS BOARD****BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS'  
ASSOCIATION**

("BCPSEA")

-and-

**BRITISH COLUMBIA TEACHERS' FEDERATION**

("BCTF")

**PANEL:** Michael Fleming, Associate Chair,  
Adjudication**APPEARANCES:** Delayne M. Sartison and Thomas A.  
Roper, Q.C., for BCPSEA  
John D. Rogers, Q.C. and Carmela  
Allevato, for BCTF**CASE NO.:** 62789**DATE OF DECISION:** November 29, 2011

## DECISION OF THE BOARD

### I. NATURE OF APPLICATION

1 BCPSEA applies to vary a Board essential services order set out in BCLRB No. B132/2011 (the "Order") as follows:

- A. To require BCTF members to prepare and distribute report cards and perform all activities related thereto;
- B. To require the BCTF, upon notice from BCPSEA, to reimburse each School District monthly in an amount equal to 15% of the total gross salaries and benefits costs paid to or on behalf of BCTF members by the School District for that month. BCPSEA will provide notice to BCTF each month that it requires reimbursement and will provide BCTF with the total amount to be reimbursed to each School District.

2 BCPSEA's application is brought in the midst of ongoing job action by BCTF. Phase 1 of that job action is subject to the terms of the Order. Accordingly, an expeditious answer to BCPSEA's application to vary the terms of the Order is required. I find I am able to decide the application on the basis of the parties' written submissions, without the need for an oral hearing.

### II. BACKGROUND

3 The collective agreement between the parties expired June 30, 2011. BCTF applied for the designation of essential services pursuant to Section 72 of the *Labour Relations Code* (the "Code"), and on June 7, 2011 the Minister of Labour, Citizens' Services and Open Government issued a direction that the Board designate essential services for the purpose of preventing immediate and serious disruption to the provision of educational programs.

4 The parties engaged in mediated discussions, with the Board's assistance, regarding the terms of an essential services order, and reached agreement on all of the terms of the Order except for one issue. That agreement was reflected in the Order issued July 26, 2011. The one remaining issue was decided by the Board in BCLRB No. B143/2011 ("B143/2011") issued August 5, 2011.

5 The Order addresses Phase 1 of the BCTF job action plan. Consistent with the approach adopted in the 2001 and 2005 rounds of bargaining, the Order sets out a list of activities that BCTF members need not perform during Phase 1 job action. Activities not listed must be continued in the normal fashion.

6 Among other things, the parties agreed that, during Phase 1 job action, BCTF members need not:

- Prepare or distribute report cards.

(the Order, para. 5)

7 This term of the Order was also present in the two previous essential services orders which were the product of agreement by the parties in 2001 and 2005. On December 17, 2001, the parties entered into a consent order providing how teachers were to communicate assessment and evaluation information in the absence of the provision of report cards during BCTF job action.

8 There is no provision in the Order addressing the reimbursement of School Districts for the non-essential duties not performed by teachers during Phase 1 job action nor has there been in previous orders between these parties.

### III. POSITIONS OF THE PARTIES

#### 1. BCPSEA

9 With respect to its application seeking to vary the Order to require BCTF members to prepare and distribute report cards and perform all activities related thereto, BCPSEA submits that, when the Order was issued in late July 2011, there was no immediate threat to educational programs or public welfare related to report cards. BCPSEA says, at that time it believed the Order contained sufficient flexibility for teachers to provide parents with ongoing feedback so that they would be aware of their child's progress or difficulties.

10 BCPSEA says it has "now become apparent that sufficient feedback has not and/or will not occur to ensure that the successful education and welfare of students is not put at serious risk". It says this is because BCTF has directed its members to fully implement Phase 1 job action as permitted by the Order.

11 BCPSEA submits that, in addition, recent memos and directions from BCTF "are instructing teachers to limit the nature and sufficiency of information that is provided to parents and administrators regarding student progress, including advising them not to mark provincial exams".

12 BCPSEA acknowledges the Order requires teachers to continue to engage in regular assessment, evaluation and marking of students. It does not assert that this is not occurring. However, BCPSEA says the Order allows teachers to refuse to provide student assessment data to administrators (with the exception of Grade 12 marks) and to refuse to prepare and distribute report cards.

13 BCPSEA says the withdrawal of those activities might not have raised a serious  
concern had what it characterizes as "evaluation feedback" occurred on an ongoing  
basis. However, BCPSEA says BCTF has advised its members to limit the nature and  
sufficiency of information provided to parents and administrators. It submits that the  
provision of what it characterizes as "summative assessment and evaluation  
information", including marks, is not occurring.

14 BCPSEA submits that in these circumstances a report card, as a complete  
record of a student's progress including grades, effort, absences, late arrivals and  
general comments, is essential. "Evaluation Data" is essential to determine if a student  
will progress to the next grade or semester, and to that end, report cards are essential.  
Accordingly, it seeks a variation to the Order to require BCTF members to prepare and  
distribute report cards and perform all activities related thereto.

15 With respect to the reimbursement order it seeks, BCPSEA submits that an  
essential services strike is by definition a controlled strike. It is controlled to ensure the  
public interest is protected while, at the same time, preserving to the extent possible the  
dynamic of collective bargaining so as to foster an early conclusion of a collective  
agreement.

16 BCPSEA says the Board has a broad discretion under the Code's essential  
services provisions to impose conditions that will ensure that economic pressure is felt  
by both parties in an essential services labour dispute. It submits the Order should  
achieve a "perceived balance" in the bargaining power of the parties.

17 BCPSEA further submits that there has been no real progress in bargaining to  
date, and it may drag on "unless balance is restored to the bargaining dynamic". It  
submits that the current Order "has the effect of distorting the collective bargaining  
dynamic" because teachers have withdrawn services yet continue to receive their full  
salary and benefits.

18 Consequently, BCPSEA submits, teachers are able to apply pressure on the  
employer without any economic impact on them. BCPSEA asserts this is unbalanced  
and does not foster meaningful collective bargaining. It submits that its proposed  
variance is intended to correct this imbalance by putting economic pressure on the  
BCTF and its members.

19 With respect to the terms of its proposed variance, BCPSEA submits:

In the absence of any information to the contrary from the BCTF, it  
can be assumed for the purpose of the essential services Order  
that all BCTF members are engaged in Phase 1 strike activities  
consistent with the BCTF's direction. Several senior educators  
estimate that on an aggregate basis, the activities that have been  
withdrawn account for between 15% and 20% of the work normally  
performed by a teacher.

20 BCPSEA adds that the fact that it would be difficult to determine the actual time that would have been spent by each teacher in performing non-essential duties, does not mean that the Board should not determine the extent to which the employers are incurring a loss of service. It submits that its 15% estimate is adequate and reasonable in the circumstances.

21 BCPSEA submits that the current Order does not require, but rather permits, BCTF members to refuse to perform this activity. It says that if the BCTF chose to direct its members to prepare and issue report cards, then BCPSEA might well not seek reimbursement of a percentage of salary and benefit costs.

22 BCPSEA submits that if its application were to be granted, it would be taking a "nuanced approach to this very complex and protracted labour dispute that will hopefully assist in bringing the dispute to an early conclusion".

## 2. BCTF

23 BCTF submits that the essential service orders made in 2001, 2005 and 2011 were the products of extensive submissions, mediation and hearings involving the parties. It submits that, on all three occasions, the parties agreed that the preparation and distribution of report cards was not an essential service.

24 It further submits that at no time during the process that led to the Order did BCPSEA raise any concerns regarding the preparation and distribution of report cards, or regarding any necessary modifications to the pay and benefit provisions of the collective agreement.

25 BCTF says its members commenced Phase 1 job action as permitted by the Order at the start of the 2011-2012 school year. It submits the parties have had an informal process for addressing essential services concerns as they arose, and that in addition, some issues that could not be resolved informally by the parties, have been referred to and resolved by the Board.

26 BCTF submits it was only after the Minister of Education made his views known in the media that he was concerned about the prospect of report cards not being provided to parents, that BCPSEA changed its long-held position that report cards are not essential. BCTF submits that the BCPSEA application is political in nature, resulting from the direction of the government. It seeks production of documents to establish that assertion.

27 With respect to BCPSEA's argument that it is seeking a variance now because at the time the Order was made there was no immediate prospect of report cards not being issued, BCTF submits that, that was also the case for all the other activities set out in the Order.

28 BCTF says its members are fully complying with the Order and, to the extent to which BCPSEA believes that is not the case, it should first raise its concerns with BCTF and attempt to resolve them through the informal process the parties have established. It further submits that if BCPSEA has any evidence that teachers are not communicating with parents about their children's progress through other means as required by the Order, it should provide particulars of that evidence. BCTF submits that BCPSEA should not be allowed to advance its application on the basis of unsubstantiated allegations, and it seeks particulars of BCPSEA's allegations that teachers are not communicating with parents about students' progress as contemplated under the Order.

29 BCTF submits that a recent letter from the Superintendent of School District #39 (Vancouver) clearly confirms the extent to which teachers are communicating with parents about the progress of students. The letter, dated November 3, 2011, states in part:

During this phase of job action, teachers are continuing to plan, teach, gather and record assessment and evaluation information related to your child. Teachers are also continuing to communicate progress to their students through individual feedback, marks on assignments, tests and other indications of progress.

We encourage you to contact your child's teacher directly or contact the school office to leave a message asking that the teacher contact you, should you have any questions about your child's progress.

30 With respect to the proposed reimbursement order sought by BCPSEA, BCTF submits that the order is beyond the jurisdiction of the Board. Alternatively, even if the Board were to find it has the jurisdiction, BCTF submits it should decline to exercise any such jurisdiction.

31 BCTF submits that BCPSEA has asserted, without any evidence, that teachers are working at least 15% less under Phase 1 of the job action than they would normally. In fact, BCTF submits, teachers continue to work their full, regular work hours. They simply do not perform duties which BCPSEA has agreed, or the Board has declared, are non-essential and are instead providing more teaching time to students.

32 BCTF says that Section 72 of the Code requires that the terms of a collective agreement remain in effect. The collective agreement between these parties requires teachers to be paid a monthly salary and benefits. BCPSEA has not applied to amend the collective agreement, yet it seeks to avoid paying wages and benefits payable under the terms of the collective agreement.

33 BCTF says the objective of BCPSEA's reimbursement order is "expressly to provide school districts with the ability to pressure teachers not to exercise their rights" to choose not to perform non-essential duties under the terms of the Order. BCTF

submits that this is inappropriate, and that the Board should decline to grant such a variance of the Order.

### 3. BCPSEA's final reply

34 In final reply, BCPSEA submits that BCTF's submission assumes that essential services orders are static; that once they are agreed to or issued they cannot be revisited. BCPSEA submits that, in fact, the Board has full jurisdiction to monitor an essential services strike and judge the effectiveness or appropriateness of an order, and to modify it as needed to meet the requirements and purposes of the Code.

35 BCPSEA says it is not asserting that teachers are not complying with the existing Order or that teachers are working less than prior to Phase 1 of the job action. BCPSEA submits that "BCPSEA never asserted as the Union claims, that teachers are working 15% less". Rather, its position is that the withdrawn Phase 1 activities account for an estimated 15% of a teacher's normal duties.

36 BCPSEA says it does not assert that teachers "must perform non-essential duties or reduce working time by 15%". BCPSEA submits that its application is not based on an assertion that teachers are working 15% less but rather on a "simple proposition: a union and its members cannot be on strike and withdraw duties from an employer without financial consequence".

37 BCPSEA submits that its application does not seek amendment to the collective agreement, but that even if it is viewed as requiring a modification of the collective agreement, the Board has the jurisdiction to do so as a necessary condition to implement the principles of the Code.

## IV. ANALYSIS AND DECISION

38 Under Section 72 of the Code, the strike or lockout is controlled by the Board through the designation of essential services. Through that designation process, the public interest is protected while also preserving, to the extent possible, the ability of the parties to each put economic pressure on the other side.

39 As noted by BCPSEA, essential services orders are somewhat fluid, not static, in nature. They can be varied or amended as necessary to address changing circumstances. At the same time, as noted by BCTF, the Board goes to considerable efforts to involve the parties in discussing and determining the terms of such orders. The parties are in the best position to know what aspects of the work performed by employees is "essential" in nature and what is not. The Board relies on them to turn their minds to issues that might arise during the course of job action when the terms of such orders are crafted.

40 Accordingly, the essential services designation process is based on significant input by the parties. That allows the parties the ability to fashion an appropriate

outcome to reflect the realities of their sector. The current Order is typical in that its terms are the product of mediated agreement between BCPSEA and BCTF. The parties were able to agree on all but one of the terms which was then decided by the Board in B143/2011. That term is not relevant to the present application.

41 The term of the Order relevant to the variance sought by BCPSEA is the agreed upon term that, during Phase 1 of job action, teachers are not required to prepare and distribute report cards. As noted, this term has been a feature of essential services orders between these parties not only in this round of bargaining but also in the two previous rounds, in 2001 and 2005.

42 In terms of the reimbursement issue, there is no dispute that no such measure has ever previously been in place or sought. BCPSEA did not formally raise the issue of reimbursement or seek any term similar to the order now being sought, when the terms of the current Order was being determined earlier this year.

43 There are several unique features of the Order. First, as noted above, the Order sets out the duties teachers need not perform during a strike or lockout. This differs from other sectors where essential services orders normally set out the duties bargaining unit members will perform during a labour dispute.

44 Second, the Order deals with a partial strike/lockout while essential services orders in other sectors are normally based on a full withdrawal of services.

45 While the Order was produced over the summer, when school was not in session, it would be reasonable to expect that both parties would have anticipated Phase 1 of job action would commence once the school year began. In agreeing that preparing and distributing report cards was not an essential service, the parties would reasonably have anticipated that teachers would not prepare and distribute report cards during Phase 1 job action, as permitted by the Order. In agreeing that teachers would not be required to perform certain duties that the parties agreed (or the Board found) were not essential, it would have been reasonable to anticipate that teachers would not perform those duties.

46 Thus, I find it could reasonably have been anticipated by both parties during the discussions leading up to the Order in the summer, that the circumstances during Phase 1 job action would be what they are today. That is, teachers would be working their full scheduled hours and receiving full pay, but would not be performing non-essential duties as permitted by the Order.

47 I find this is not a case where the implications of the terms of the Order were not reasonably foreseeable. Nor is it one where the terms of the Order are outdated or not current. Both parties had an opportunity to seek amendments or changes to the essential services order that had governed their two previous disputes, in 2001 and 2005, at a time in 2011 when job action was not only contemplated, but imminent. In that context, it would be reasonable to expect that the parties would be focused on, and



conscious of, the potential implications of the replication of the terms of the two previous orders in this round of bargaining.

48 In this context, I find I must be persuaded that circumstances have changed, or that the Order has had unforeseen or unexpected consequences, such that it would be necessary or appropriate to make the variances sought at this juncture in order to prevent the immediate and serious disruption to the provision of an educational program. If circumstances have not changed in a material way and the Order is not functioning in unforeseen or unexpected ways, there must be some other compelling basis established to vary the Order in the manner sought.

49 Turning first to the preparation and distribution of reports cards, I find BCPSEA has not established that circumstances have changed, or that the Order is functioning in unforeseen or unexpected ways. BCPSEA notes that BCTF has directed its members to "fully implement" Phase 1 of job action as permitted by the Order. However, this could not reasonably be found to be unforeseen or unexpected. The reason for the preparation of the Order was to set out the limits of permissible job action by the BCTF during Phase 1.

50 It is apparent that BCTF members are providing a range of feedback to students and parents. The essence of BCPSEA's position on this point is that complete feedback requires the provision of report cards. I accept that the provision of report cards would likely mean that more complete information would be more readily available to parents. However, the parties presumably turned their minds to that issue when the Order was being discussed and agreed that providing complete information through report cards, although no doubt helpful and even important, was not essential (except in the case of Grade 12 marks).

51 BCPSEA's initial application arguably suggested that teachers were refusing to inform parents by other methods regarding the progress of students. However, I find BCPSEA has not provided an evidentiary basis for this suggestion, and in any event in its final reply BCPSEA concedes that it is not asserting that teachers are in breach of the Order, which contemplates that teachers will provide progress information to parents and students.

52 Accordingly, I find there is no basis for concluding that teachers are refusing to inform parents by other methods as to the progress of their children, as contemplated by the Order. To the extent BCPSEA believes that is not the case, or that teachers are not otherwise complying with the terms of the Order, BCPSEA could raise the issue with BCTF and attempt to resolve the matter through their informal process. If that were not successful in resolving the issue, it would be open to BCPSEA to file a complaint of non-compliance with the Board.

53 Given there is no complaint that BCTF members are failing to comply with the terms of the Order, and there are no changed circumstance or consequences flowing from the Order that could not have been foreseen and anticipated when the Order was made, I am not persuaded it is necessary or appropriate to vary the term of the Order

regarding report cards, at this time, in order to prevent the immediate and serious disruption of the provision of educational programs.

54 The BCTF alleges that BCPSEA's recent changed position regarding the essential nature of report cards occurred for "political" reasons. However, I find it is irrelevant to the variance application why BCPSEA made its application to vary the Order. Either party to an essential services order is entitled to seek a variance that it thinks is appropriate in the circumstances. In my view it will rarely, if ever, be relevant why the variance is sought. Rather, the question is whether the variance sought is appropriate in the circumstances to meet the objectives and purposes of Section 72 of the Code.

55 Based on my conclusion that the motivation for BCPSEA's variance application was not relevant to my decision in this case, I declined to order production of the documents sought by the Union to support its allegations concerning the alleged "political" motivation for the application.

56 While it is open to the parties to attempt to amend or modify the terms of the Order in the future, at this juncture the considerations of predictability and certainty are important ones. Those considerations would be undermined if the parties could achieve a variation to the Order, which they had significant input in developing, without showing a change of circumstances or unforeseen consequences of a nature that would justify the variance sought.

57 Having reached the conclusion the Order should not, at this juncture, be varied to require teachers to prepare and distribute report cards, I also accept that a service that is not initially essential at the beginning of an essential services dispute may become essential with the passage of time. However, in the circumstances of this case, it would be reasonable to conclude that the parties would, at the very least, have anticipated that the preparation and distribution of the first report cards would not be essential in Phase 1.

58 Given my conclusion that the Order should not be varied at this time to require teachers to now prepare and distribute report cards, I find it is unnecessary to order the particulars sought by BCTF with respect to the factual assertions made by BCPSEA in support of its application for its first proposed variance to the Order.

59 Turning to the proposed reimbursement order, BCPSEA does not seek to have the Board vary the Order through the designation of essential services levels. Rather, BCPSEA says the Board should vary the Order in order to ensure a "balance" in the bargaining dynamic between the parties is achieved. It proposes this balance be achieved by the Board ordering BCTF members to "reimburse" School Districts 15% of their salaries and benefits, for the non-performance of non-essential duties, which BCPSEA estimates account for at least 15% of teachers' job duties.

60 I appreciate BCPSEA's frustration with the fact that Phase 1 and its limited job action has now been in place for several months and that BCTF members are not facing

financial pressure during the limited job action. However, the parties agreed to that regime and there is no dispute teachers are continuing to work their regular or normal hours during Phase 1 of the BCTF job action. They are not performing certain non-essential duties but there is no assertion teachers are working only 85% of their scheduled time while receiving 100% of pay. Rather, the assertion is they are working their regular hours teaching but not performing non-essential duties, as permitted by the Order.

61 Under Section 73(2), the terms of the collective agreement remain in effect. The collective agreement contemplates payment of wages for teachers who are working full time unless the collective agreement is amended by the Board to implement the designation of essential services. No such application has been made here.

62 An essential services order in education is designed to designate those services that are essential to prevent the immediate and serious disruption to the provision of an educational program (Section 72(2.1)). A partial strike or limited job action, which only peripherally impacts the provision of essential services, can present a challenge to both sides in terms of the economic pressure that is brought to bear. In this case, the parties may not have expected Phase 1 to last as long as it has. The status quo has not apparently moved the parties appreciably closer to a collective agreement, which is no doubt of concern to both sides. This would indicate some apparent challenges in the existing essential services arrangement. I note that in BCLRB No. B161/2011, the Board provided its initial views regarding some problems with the existing regime and recommendations regarding how the essential services regime should function.

63 The fact that Phase 1 has been in place for several months now, without either party triggering an escalation in job action either by increased job action or lockout, may cause one or both parties to decide the next time they engage in discussions regarding the terms of their essential services order that this is no longer an appropriate model or to build in mechanisms to address the challenges which have become evident. However, for this job action, that is the structure the parties agreed to. The consequences of the current model, in terms of non-reduction of both hours of work and pay, would not have been unforeseen by either party.

64 In these circumstances, assuming the Board has the jurisdiction to make the second variance sought by BCPSEA, I am not persuaded it is appropriate to make the order at this time, in the midst of the current job action.

65 I note that BCPSEA does not dispute that BCTF members are now teaching more in place of the non-essential duties captured in the Order. Nor does BCPSEA assert those teaching activities are extraneous or should not be performed. BCPSEA is not seeking to have the Order varied to have the duties currently performed by BCTF members reduced and thereby experience a concomitant pay reduction. That would more closely resemble essential services orders in other sectors, but the parties have chosen (and the Board has endorsed) a different approach in this sector.

66 While BCPSEA argues the change is needed for "balance", BCTF submits that balance would not result, citing other factors affecting bargaining, including the provincial government's ability to impose a collective agreement by legislation.

67 In a controlled strike, the Board tries to preserve the ability of parties to apply economic pressure to the extent possible while still protecting the public interest through the designation of essential services. However, it is not the role of the Board in an essential services dispute, to attempt to balance the respective bargaining power of the parties beyond the designation of essential services and ensuring that essential services are provided or that a Board order is being given effect. That is particularly the case where, as here, the "balance" sought is in the context of a limited job action which only peripherally impacts the provision of essential services.

68 I note the parties do have other options by which to ensure maximum economic pressure is brought to bear in this dispute. For example, while unattractive, the parties have the right to expand the strike or to lockout which would trigger the next phase in the labour dispute and more fully engage the essential services designation process.

69 The Board attempts to apply Code provisions such as Section 72 consistent with the principles and duties set out in Section 2. These include encouraging the practice and procedures of collective bargaining between employers and unions, promoting conditions favourable to the orderly, constructive and expeditious settlement of disputes, and ensuring that the public interest is protected during labour disputes. Bearing these principles and duties in mind, I am not persuaded that it is appropriate to make the variances to the Order sought by BCPSEA at this time.

V. CONCLUSION

70 For the reasons given, BCPSEA's application is dismissed.

LABOUR RELATIONS BOARD



MICHAEL FLEMING  
ASSOCIATE CHAIR, ADJUDICATION