

FILE NO. 2195-013

December 13, 2011

VIA COURIER

British Columbia Labour Relations Board  
Suite 600, Oceanic Plaza  
1066 West Hastings Street  
Vancouver, BC V6E 3X1

**Attention: Ms. Allison Matacheskie  
Registrar**

Dear Sirs/Mesdames:

**Re: British Columbia Public School Employers' Association – and – British  
Columbia Teachers' Federation  
(Application for Reconsideration of BCLRB No. B214/2011)**

We are counsel for British Columbia Public School Employer's Association ("BCPSEA") and hereby make application for reconsideration pursuant to section 141 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the "Code") of the Board's decision in BCLRB No. B214/2011 (the "Decision").

1. In the Decision, the Board considered BCPSEA's application to vary the Essential Services Order set out in BCLRB No. B132/2011 as follows:
  - a. That the Order be varied so as to require British Columbia Teachers Federation ("BCTF") members to prepare and distribute report cards and perform all activities related thereto;
  - b. That the Order be varied to require BCTF, upon notice from BCPSEA, to reimburse each School District monthly in an amount equal to 15% of the total gross salaries and benefit 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 applies for reconsideration only of the aspects of the Decision relating to the second variance sought, hereinafter referred to as the "Reimbursement Variance".

3. Section 141 of the *Code* provides in part:

(2) Leave to apply for reconsideration of a decision of the board may be granted if the party applying for leave satisfies the board that

...

(b) the decision of the board is inconsistent with the principles expressed or implied in this *Code* or in any other Act dealing with labour relations.

4. In *RG Properties Ltd.*, BCLRB B378/2003, the Board confirmed the test to meet on an application for leave:

To obtain leave to apply for reconsideration, an applicant "must demonstrate a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration": *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 CLRBR (2d) 44, 93 CLLC ¶16,043 ("*Brinco*"), p. 11. Briefly stated, those grounds are: (i) the original decision is inconsistent with the principles expressed or implied in the *Code* (or another Act dealing with labour relations); (ii) a party was denied natural justice; or (iii) new evidence has emerged that is likely to have a material and determinative effect on the original decision.

5. BCPSEA submits that this application meets the test for leave and supports its position on the merits that the Decision with respect to the Reimbursement Variance should be reversed.

6. BCPSEA submits that the aspects of the Decision dealing with BCPSEA's application for the Reimbursement Variance are inconsistent with the principles expressed or implied in the *Code*. In particular, in reaching the Decision with respect to the Reimbursement Variance, the Board erred as follows:

- a. In misinterpreting its jurisdiction and role in making, monitoring, and modifying an essential services order;
- b. In applying the wrong test for variance of an essential services order;
- c. In interpreting the job of teachers in a manner that is patently unreasonable; and
- d. In breaching the duty of procedural fairness in failing to provide adequate reasons.

**Misinterpretation of Board's Jurisdiction and Role**

7. BCPSEA submits that the Decision discloses a fundamental error on the part of the Board with respect to the Board's jurisdiction and role in making, monitoring, and modifying an essential services order. In particular, the Board held that it had no role in

maintaining an appropriate collective bargaining dynamic between the parties (at para. 67):

...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.

8. BCPSEA submits that this determination by the Board represents a fundamental error with respect to the Board's jurisdiction, and is inconsistent with the principles expressed in the *Code*.
9. The Board has previously held, including in decisions that have been confirmed on judicial review and at the Court of Appeal, that not only does it have the jurisdiction to attempt to balance the respective bargaining power of the parties, but that it has an obligation to do so, including in the context of an essential services strike.
10. In *Beacon Hill Lodge and BCNU and HEU*, BCLRB No. 1/86, the Board held that it would direct HEU to perform essential services but only if the employer did not engage replacement nurses during a BCNU strike. The employer challenged the Board's jurisdiction to impose that condition, as the *Code* did not, at that time, preclude the use of replacement workers. In explaining the role of the Board in essential services disputes, the panel held:

On the one hand, the Board must designate those services performed by the striking union members which are essential to the life, health or safety of the public. On the other hand, the Board designates the manner in which the facility, production or services is to be run or maintained with a view to preserving the maximum disruption to the employer's operation while putting out of work the maximum number of union members. By maximizing the amount of economic pressure on both sides, the Board places the greatest degree of economic pressure possible on the parties to conclude a collective agreement and thus end the collective bargaining dispute.

\* \* \*

This direction to the Board includes having regard to the purpose of developing effective industrial relations in the interest of, among other things, the well-being of the public, and specifically includes the direction that the Board is to have regard to the purpose and object of "promoting conditions favourable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade unions". Thus, the Board, as it did in the Vancouver General Hospital dispute in 1976, and as did the original panel in the instant dispute in connection with the Beacon Hill Lodge, is entitled to protect the public interest by taking such steps necessary to shorten the duration of a labour dispute by proceeding in a manner which places maximum economic pressure on the employees and the employer so that both parties will seek ways of concluding the labour dispute thus minimizing the negative impact the dispute necessarily has on the public interest.



[Emphasis added]

11. This decision was upheld on judicial review, and ultimately by the BC Court of Appeal where the Court held that the Board had broad authority to impose conditions to achieve the objectives of the *Code*, even if the conditions interfered with a party's legal rights ([1987] B.C.J. No. 713):

In my opinion the Board, in making an order under s. 73(1)(b) has, by implication, the power to attach any condition which is required to achieve the purpose of the section and, in any event, has the express power under s. 28(2) or s. 29(1) to attach such a condition.

\* \* \*

It is clear that it is not an unfair labour practice for an employer to hire paid replacement workers during a strike or lockout, so long as they are not professional strike breakers. It appears to be lawful for an employer to hire such persons. But it does not follow that the Board is without power to attach a condition just because it involves the suspension of an otherwise lawful activity. Conditions are imposed not to determine legal rights, but to achieve an authorized objective. Many valid conditions involve the temporary suspension of otherwise legal rights.

12. The objective of preserving economic pressure in an essential services dispute was enunciated again in *Chantelle Management Ltd et al and BCGEU et al*, BCLRB No. B345/93:

Finally, Section 133(1)(a) permits the Board to order a "person to do anything for the purpose of complying with the *Code*". The Court of Appeal in *Beacon Hill* concluded that the Board's discretion to determine what orders, terms or conditions are necessary to ensure the objects of Section 72 are met is limited only by a requirement that a rational connection exist between the objects of the *Code* and the condition imposed.

The rational connection between compelling managers to work and limiting the length of the work stoppage is obvious. As discussed in *Beacon Hill*, *supra*, pressure on both parties is a critical element to the resolution of any labour dispute; it is particularly important that the Board preserve that pressure in a "controlled strike". If management's resources are not stretched, there will be less pressure on the employer to seek innovative solutions to outstanding issues. Equally important, as the number of managers that are scheduled to work decreases, the number of striking employees required to work increases. Obviously, if the majority of employees continue to receive full compensation, they have little incentive to make the necessary compromises to achieve a collective agreement.

[Emphasis added]

13. The Order currently requires that teachers must continue certain functions, such as student supervision or the invigilation of provincial exams, only subject to the deployment of excluded staff to the best extent possible. The Union has forcefully

pursued this aspect of the Order in several applications adjudicated during the strike in order to better assert pressure on employers and their administrative staff.

14. The above-noted reasoning in *Chantelle Management* confirms that this aspect of the Order flows from the Board's jurisdiction to ensure that pressure exists on both sides of the dispute with a view to "limiting the length of the work stoppage." The identity of playground supervisors clearly has nothing to do with the Board's protection of student welfare or educational programs under section 72 of the *Code*. Rather, that aspect of the Order concerns only the Board's well-established role in ensuring balance during a controlled strike. It is clearly inconsistent, therefore, for the Board to determine that it now lacks jurisdiction that it has already asserted within the Order, in answer to BCPSEA's Reimbursement Variance application.
15. The Board's order must achieve a 'perceived balance'. As stated in *Health Employers Association of BC*, BCLRB No. B78/99:

. . . within the context of the parties' conflicting labour relations objectives, the order has achieved a perceived balance – and it is recognized as "foster[ing] meaningful collective bargaining with a view to enabling the parties to achieve a realistic collective agreement while at the same time minimizing harm on the public".
16. An essential services dispute is said to be a "controlled strike". However, the Board's conclusion in the Decision that it has no role in balancing the bargaining power of the parties when considering an essential services order removes a fundamental element of its ability to exercise "control" over the dispute and is inconsistent with existing provisions of the Order.
17. The Board's ability, and indeed, obligation to take steps to achieve and maintain balance in the collective bargaining dynamic is consistent with many of the express Board duties set out in section 2 of the *Code*:
  - (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
  - (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
  - (f) minimizes the effects of labour disputes on persons who are not involved in those disputes,
  - (g) ensures that the public interest is protected during labour disputes.
18. In this case, the Board's conclusion that it had no role in attempting to balance the respective bargaining power of the parties resulted in its determination that the parties could seek to achieve a balance only through an escalation of the dispute by either expanding the strike or locking out teachers. Such a conclusion, that economic



pressure is to be exerted by expanding the strike, is plainly inconsistent with the elements of section 2 set out above. BCPSEA submits that the Board clearly has and must exercise its jurisdiction to take steps to maintain an appropriate bargaining dynamic so that an escalation of the strike is unnecessary to bring a resolution to the dispute.

19. BCPSEA submits that the Board's determination that it should not grant the Reimbursement Variance because it had no role in balancing the bargaining power of parties is inconsistent with the principles expressed and implied in the *Code*. As this determination was fundamental to the Board's rejection of the Reimbursement Variance, BCPSEA submits that leave for reconsideration should be granted and that the Board's decision on this point should be overturned.

#### **Application of Incorrect Test for Variance**

20. The Board's jurisdictional error with respect to its ability to take steps to achieve a bargaining balance between the parties was compounded by its error in articulating the test for when an essential services order will be varied. The Board set out the following test (at para. 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.

21. BCPSEA submits that the Board erred in articulating the test as such, on the basis that it inappropriately removes the focus from the language of section 72(2.1) and the Board's role in monitoring the bargaining balance between the parties. The result of the Board's test for variance is to inappropriately render essential services orders largely static in nature.
22. The test articulated by the Board requires, in the first instance, either materially changed circumstances or unexpected or unforeseen consequences. It is only on establishing such a material change that the Board will consider whether a variance is necessary in order to prevent the immediate and serious disruption to the provision of an educational program.
23. BCPSEA submits, however, that the test should be whether in light of current circumstances and consequences (whether or not they are changed or unforeseen), the Order continues to ensure that there is no immediate and serious disruption to the provision of educational programs, while at the same time maintaining an appropriate collective bargaining dynamic.

24. The Board, in focusing solely on whether the circumstances have changed or whether the consequences are unforeseen, lost focus on the purpose of an essential services order and on its ongoing role in monitoring the bargaining balance between the parties.
25. This loss of focus is demonstrated in the Decision. The focus is entirely on whether there has been a change in circumstances or whether the consequences are unforeseen, with no analysis of whether maintaining the current Order, without variance, continues to adequately protect against an immediate and serious disruption to the provision of an educational program and whether there remains an appropriate collective bargaining dynamic; one that will facilitate the resolution of collective bargaining.
26. The requirement of a material change in circumstances also has the likely effect of rendering an essential services order static, which is contrary to the Board's established jurisprudence confirming that an essential services order is intended to be fluid and responsive to present circumstances, including a consideration of whether the current order continues to strike the appropriate balance in bargaining power and whether there is an incentive for the parties to settle.
27. In *Emergency and Health Services Commission (British Columbia Ambulance Services)*, BCLRB No. B92/2009, application for reconsideration dismissed, BCLRB No. B116/2009, the Board affirmed that essential services orders can be varied to take into account the balance of bargaining power and the parties' incentives to settle (at para. 85):
- ... there is ample authority under Section 72 for the Board to ensure that essential service levels are set and implemented in a manner that maximizes the pressure placed on both parties to settle the dispute. The Board has jurisdiction throughout the course of the dispute to fine tune its order on an ongoing basis to ensure that the express and implied objectives of Section 72 are being met.
28. The effect of the test set out by the Board in the Decision is that the mere passage of time, without more, would be unlikely to be sufficient to support a variance. However, when the bargaining dynamic is properly considered, it becomes apparent that the passage of time may result in a variance becoming necessary.
29. Here, the essential services dispute has been ongoing for several months, with no progress in bargaining between the parties, despite 60 days of bargaining. BCPSEA submits that one reason for the lack of progress is the lack of any economic pressure on the Union and its members. At present, teachers are performing less than 100% of their former duties, but are continuing to receive 100% of their pay. For teachers, there is little incentive to change the status quo, as the economic balance is at present tilted strongly in their favour.



30. The Board also repeatedly notes and relies upon the fact that the parties agreed to most terms of the Essential Services Order in reaching the Decision. It appears, therefore, that where the parties agree to the terms of an essential services order, the Board will be particularly reluctant to vary the order. Such an approach serves as a disincentive to parties reaching agreement upon essential services orders, which will thereafter be treated as static. BCPSEA agrees that the parties' prior agreement may be a relevant consideration, but submits that the Board's reliance on such agreement to avoid adjudicating the extent to which the Order continues to meet *Code* requirements over time is contrary to the principles of the *Code* in section 2, which, *inter alia*, encourage the resolution of disputes between parties.
31. BCPSEA also submits that the Decision's reliance upon alleged agreement with respect to the Reimbursement Variance is further flawed in that the Order makes no reference to the form of reimbursement now sought. The Order is silent on such matters and there clearly was no prior adjudication on that point.
32. Further, in the Decision, the Board failed to consider whether, even in the absence of changed circumstances, there nonetheless existed a compelling basis for varying the Essential Services Order by granting the Reimbursement Variance. BCPSEA submits that such a compelling basis does exist in that the passage of time has resulted in the Order no longer striking an appropriate bargaining dynamic between the parties. The labour dispute continues to drag on, with no progress in bargaining, which must be taken as an indication that the current Order does not exert sufficient economic pressure on the parties to reach a collective agreement.
33. BCPSEA submits that the Board's articulation and application of its test for variance resulted in a determination with respect to the Reimbursement Variance that is inconsistent with the principles set out in section 2 of the *Code*. In particular, the Decision fails to encourage "the practice and procedures of collective bargaining" (s. 2(c)) and fails to promote "conditions favourable to the orderly, constructive and expeditious settlement of disputes" (s. 2(e)).
34. On the contrary, the refusal to grant the Reimbursement Variance has had the opposite effect. As noted, without the Reimbursement Variance, there is no economic incentive for teachers to agree to the terms of a collective agreement. At present, they are performing less than 100% of their duties, but are receiving full pay. Any collective agreement will necessarily end the strike, which will once again result in teachers performing their full set of duties. In refusing to grant the Reimbursement Variance, the Board has ensured that teachers participating in strike are in a more favourable economic position than they will be in at the conclusion of that strike. BCPSEA submits that such a result is perverse and completely inconsistent with the principles expressed and implied in the *Code*, including those set out in section 2.
35. Again, BCPSEA submits that the Decision should be overturned as a result.



### **Misinterpretation of Job of Teachers**

36. BCPSEA submits that the Decision is based on a patently unreasonable interpretation of the job of teachers. As that fundamental misunderstanding formed the factual basis upon which the Board made the Decision, BCPSEA submits that the entire Decision is rendered patently unreasonable and therefore inconsistent with the principles expressed and implied in the *Code*.
37. BCPSEA's application for the Reimbursement Variance was premised on the factual foundation that teachers are paid to perform the duties that are set out in the collective agreement and are otherwise directed by management. Since teachers are performing only a portion of those duties during the Phase 1 strike, BCPSEA sought the Reimbursement Variance to ensure that teachers' pay was commensurate with the percentage of duties being performed by them.
38. In response to BCPSEA's application, BCTF argued, in part, that teachers were continuing to work full time hours and so there was no basis for any reduction in pay. BCTF did not dispute that teachers had withdrawn duties they normally perform.
39. BCPSEA did not join issue with respect to the hours that teachers are working during the Phase 1 strike because the issue of hours worked is irrelevant to teachers' remuneration and thus to BCPSEA's application for the Reimbursement Variance.
40. BCTF members are clearly engaged in a strike. BCPSEA submits that there can be no dispute about this fact, or there would be no need for the Essential Service Order. The Essential Services Order expressly lists the following long list of activities that teachers need not perform during the Phase 1 strike, as follows (at para. 6):

... During Phase 1 job action BCTF members need not:

- \* Participate in meetings or interviews with parents/guardians and/or district teaching staff outside of instructional time, or during instructional time unless coverage is provided.
- \* Participate in meet the teacher activities outside of instructional time, or during instructional time unless coverage is provided.
- \* Prepare or distribute report cards.
- \* Provide any student assessment data to Administrative Officers or the school office, except Grade 12 marks required for graduation, post-secondary applications and scholarship purposes.
- \* Complete and submit student referral forms outside of instructional time.
- \* Attend staff meetings.

- \* Attend staff committee meetings.
- \* Attend any meeting called by School District management.
- \* Participate in any standing or ad hoc District committees.
- \* Attend school based meetings called by an Administrative Officer, unless the meetings are related to an emergency.
- \* Provide Administrative Officers with any routine printed, written or electronic communications.
- \* Accept any printed, written or electronic communication from an Administrative Officer, unless it relates to an emergency.
- \* Participate in the preparation or organization of assemblies outside of instructional time, or during instruction time unless coverage is provided.
- \* Participate in any accreditation activity.
- \* Participate in any School District or Ministry in-service.
- \* Participate in any professional development that is not teacher directed.
- \* Participate in any school photo organization.
- \* Provide coverage for a teacher who is absent, except for a Teacher On Call hired specifically for that purpose (consistent with principles in B421/2001 and B444/2001).
- \* Administer or supervise FSA or any District or Ministry test (consistent with principle in B418/2001).
- \* Collect money from students or participate in fund raising.
- \* Order supplies, textbooks, etc., unless needed immediately to effectively maintain ongoing instruction.
- \* Assist the Administrative Officer in administrative tasks like building timetables or computer organization.
- \* Do inventory.
- \* Organize textbooks.
- \* Answer school office phones.



- \* Supervise detentions before, during or after instructional time.
- \* Prepare overviews or previews for the Administrative Officer, except when associated with a teacher evaluation process.
- \* Distribute School District or administrative letters, newsletters, memos or announcements to students, unless it is health and safety related.
- \* Pack up classrooms to facilitate painting, renovations or maintenance.
- \* Perform department head/position of responsibility duties except during allocated time in the timetable.

41. By virtue of that Order, the Board has permitted teachers to withdraw these duties that they would otherwise be required to perform. In the absence of that Order, management could remedy teachers' refusal to perform those duties by directing that they perform the duties and/or imposing discipline. The Board's Order has removed management's ability to engage in those remedies.
42. BCTF must acknowledge that the duties not being performed have value to BCPSEA and the School Districts. If those duties had no value, there would be no potential benefit to BCTF and no potential leverage to be gained by BCTF as a result of withdrawing those duties.
43. Therefore, the status quo is that BCTF members have withdrawn duties that have acknowledged value to BCPSEA, but have given up nothing in return.
44. Teaching is not a business about hours of work. Under the terms of the applicable collective agreements, there is no such concept as hours of work as that term is understood in other workplaces and other sectors. Teachers do not work shifts. They are not paid an hourly wage. Their remuneration is not based on the hours that they work. While there are designated instructional hours, there are necessarily duties that ordinarily fall outside of those hours. Teachers are paid for completing their duties, not for working a set number of hours.
45. School Districts do not keep records of teachers' working hours, as teachers are not required to report those hours. While all teachers must work a designated number of instructional hours, the amount of time that they work in addition to those instructional hours likely varies to a great extent from teacher to teacher, depending on the number of hours that each teacher must work to complete any additional duties. Despite a potential variation in working hours, teachers with the same seniority, education, and experience may be paid the same.
46. This is because, simply put, teaching is not about working a set number of hours; it is about performing the duties required of a teacher. Full remuneration is based on full

performance of duties. The application for the Reimbursement Variance was based on the uncontroverted fact that teachers are not performing a percentage of the duties that they are ordinarily required to perform.

47. The distinction between working hours and duties has already been recognized by the Board, along with the imbalance that has resulted from the fact that teachers are receiving full pay while not performing the full range of duties.

48. In BCLRB No. B161/2011, the Board held that "This does not result in a balance of pressure in a controlled strike environment because while students and the public are impacted, and the Employers are impacted, the bargaining unit members continue to receive full salary" (at para. 61).

49. Despite that recognition of the unfairness that results from the current Essential Services Order, the Decision makes no mention of this recent comment by the Board.

50. The distinction between working full hours and a full range of duties has also been confirmed in other jurisdictions. In *Grand Erie District School Board*, [1999] OLRD No. 135 (Ont. LRB), the Ontario Labour Relations Board acknowledged that a withdrawal of administrative duties was a strike, and that a reduction in salary commensurate with the withdrawn duties would be an appropriate response. Although BCPSEA relied on this case in support of its application for the Reimbursement Variance, the Decision makes no mention of it.

51. BCPSEA submits that an analogous situation to teachers' withdrawal of certain duties would be where an employee, who was paid by the hour, worked fewer hours. In such a circumstance, there would likely be no controversy that the employee was entitled to receive pay commensurate with the hours worked. BCPSEA submits that there should similarly be little controversy here.

52. However, by conflating the concepts of remuneration for working hours and remuneration for working duties, at the urging of BCTF, the Board reached the patently unreasonable determination that teachers, although not paid for hourly work, were working full time and so entitled to full pay.

53. In paragraph 46, the Board stated:

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.

[Emphasis added]



54. In paragraph 60, the Board said similarly:

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 that 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.

[Emphasis added]

55. It was based on this patently unreasonable interpretation of the work of teachers that the Board refused to grant the Reimbursement Variance.
56. There are no "scheduled hours" for teachers, outside of instructional time. There is no concept of "regular or normal hours" outside of instructional time, as the amount worked varies from teacher-to-teacher and is not set by or reported to School Districts.
57. While the Decision states that "there is no dispute that teachers are continuing to work their regular or normal hours", there was no dispute as to that issue because the hours worked are irrelevant. Since hours of work are not set by or reported to School Districts, BCPSEA has no means of determining the hours that teachers are working and whether those hours have changed during the Phase 1 strike. It need not ever inquire into those hours of work since they are irrelevant to the manner in which teachers presently work and are compensated.
58. BCPSEA submits that the Board ought to have noted that there also was no dispute that teachers are performing less than 100% of their regular duties (or that duties withdrawn constitute roughly 15% of teachers' normal duties), as this was the relevant factor for the Board to consider. The Board based its decision on an irrelevant consideration and thus the Decision is patently unreasonable.
59. BCPSEA submits that, insofar as the Reimbursement Variance was refused based on a patently unreasonable factual foundation, the Decision in that respect is inconsistent with the principles expressed or implied in the *Code* and should be overturned.

#### **Failure to Provide Adequate Reasons**

60. BCPSEA submits that the Board's Decision fails to provide adequate reasons in several respects. The failure to do so was a breach of natural justice and renders the Decision patently unreasonable. As such, it is inconsistent with the principles expressed or implied in the *Code*, within the meaning of section 141 of the *Code*.

61. The adequacy of reasons by an administrative tribunal was recently considered by the Court of Appeal in *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122 (at paras. 43-46):

... It is now well-established in Canadian law that where a tribunal has a duty to give reasons, a failure to provide adequate reasons constitutes a breach of the rules of procedural fairness.

The adequacy of a tribunal's reasons was discussed by the Ontario Court of Appeal in *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670, 98 O.R. (3d) 210, 312 D.L.R. (4th) 70:

[29] [*R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3] emphasizes that where reasons are legally required, their sufficiency must be assessed functionally. In the context of administrative law, reasons must be sufficient to fulfill the purposes required of them, particularly to let the individual whose rights, privileges or interests are affected know why the decision was made and to permit effective judicial review. As *R.E.M.* held at para. 17, this is accomplished if the reasons, read in context, show why the tribunal decided as it did. The basis of the decision must be explained and this explanation must be logically linked to the decision made. This does not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. To paraphrase for the administrative law context what the court says in *R.E.M.* at para. 24, the "path" taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way.

[30] *R.E.M.* also emphasizes that the assessment of whether reasons are sufficient to meet the legal obligation must pay careful attention to the circumstances of the particular case. That is, read in the context of the record and the live issues in the proceeding, the fundamental question is whether the reasons show that the tribunal grappled with the substance of the matter: see *R.E.M.* at para. 43.

[31] In addition, in my view, it is important to differentiate the task of assessing the adequacy of reasons given by an administrative tribunal from the task of assessing the substantive decision made. A challenge on judicial review to the sufficiency of reasons is a challenge to an aspect of the procedure used by the tribunal. The court must assess the reasons from a functional perspective to see if the basis for the decision is intelligible.

[32] This is to be distinguished from a challenge on judicial review to the outcome reached by the tribunal. That may require the court to examine not only the decision but the reasoning offered in support of it from a substantive perspective. Depending on the applicable standard of review, the court must determine whether the outcome and the



reasoning supporting it are reasonable or correct. That is a very different task from assessing the sufficiency of the reasons in a functional sense.

[Emphasis in original.]

A tribunal's reasons need not address every issue raised before it. Where an issue is trivial, moot, or of merely academic interest, a tribunal's reasons will not be deficient merely because they fail to address it. Equally, if the determination of an issue is patently obvious from the record, discussion of the issue in the reasons may be seen as otiose. I do not intend this to be a comprehensive list of situations where reasons are not necessary.

Where a serious and consequential issue has been raised before a tribunal, however, the tribunal will normally be expected to resolve the issue and to provide at least some indication of its reasons for deciding it in the way that it does.

62. BCPSEA submits that there were a number of "serious and consequential" issues before the Board that are not addressed in the Decision.
63. First, the Board failed to expressly consider whether, despite the absence of a change in circumstances, there was nonetheless a compelling basis on which to grant the variance sought.
64. As noted above, the Board held that the test for variance required a material change in circumstances or unforeseen consequences. However, the Board also held that even if such a material change could not be made out, a variance may nonetheless be granted if there is "some other compelling basis" for varying the Order.
65. While BCPSEA disagrees that the test is as set out by the Board for the reasons set out above, the Board was nonetheless required to apply the test that it had set out and provide a reasoned analysis with respect to the test. The Decision, however, proceeds entirely on the basis that there has been no material change in circumstances or unforeseen consequences. The Board appears to treat the fact that the parties agreed to the terms of the Essential Services Order as a sufficient basis alone on which to reject the application for variance.
66. Despite having stated that a variance may be granted in the presence of compelling circumstances, the Decision fails to provide any reasons or analysis as to whether such compelling circumstances exist here. BCPSEA submits that the failure to provide reasons on such a key issue is a breach of natural justice.
67. Further, BCPSEA submits that such compelling circumstances do exist here. The parties have engaged in 60 days of collective bargaining, with no progress. While BCPSEA submits that this passage of time and fruitless bargaining would properly constitute a "material change" as contemplated in the Board's test for variance, it is also a compelling circumstance based on which the Order should be varied.

68. The Board acknowledged that teachers "are not facing financial pressure during the limited job action" (at para. 60). BCPSEA submits that the absence of that financial pressure is likely having the effect of prolonging the strike. The Reimbursement Variance is the tool that the Board can use to shorten the strike, by ensuring that both parties have sufficient incentive to bargain a collective agreement. The Board should use that tool before inviting the parties to escalate the strike, particularly because this is an essential services strike.
69. BCPSEA submits that these are compelling circumstances that are sufficient to support the Reimbursement Variance. The Board's failure to even provide reasons as to whether compelling circumstances for a variation exist was a breach of natural justice that should be remedied through granting BCPSEA's application for reconsideration.
70. Second, the Board failed to provide reasons addressing whether the collective agreement should be amended to effect a reduction in salary commensurate with the reduction in duties being performed. As noted in the Board's description of BCPSEA's final reply, although BCPSEA took the position that it was not making an application to amend the collective agreement (and that an amendment of the collective agreement was not required), BCPSEA submitted that the Board had the jurisdiction to do so if required.
71. In its analysis, the Board noted only that BCPSEA's application was not an application to amend the collective agreement, without considering whether it should be amended. To the extent that the Board may now require BCPSEA to make an application to amend the collective agreement on the basis of the same arguments in the face of likely the same responses from BCTF, the Board has put form over substance, which BCPSEA submits is also contrary to section 2 in that it fails to promote "conditions favourable to the orderly, constructive and expeditious settlement of disputes" (s. 2(e)).
72. BCPSEA remains of the view that an amendment to the collective agreement is not required, since the collective agreement contemplates salary in exchange for the performance of duties, and not the completion of hours. Therefore, properly understood, the collective agreement requires no amendments for employers to reduce pay to match the reduction in duties that have been unilaterally withdrawn by teachers.
73. However, as BCPSEA argued that the collective agreement could be amended if necessary to effect the reduction in salary, the Board was obliged, as a matter of fairness, to consider that argument and to provide reasons as to its decision. Its failure to consider that argument and provide reasons was a breach of natural justice.
74. Third, the Board failed to provide any reasoned analysis as to section 2 of the *Code*, and in particular whether those principles and duties would support the granting of the Reimbursement Variance, although it was relied on by BCPSEA as supporting its



application and was relied on by the Board in support of its decision to refuse the variance.

75. The Board is obliged to perform its duties in a manner that is consistent with section 2 of the *Code*, but it failed to provide any reasons as to how the Decision is consistent with section 2. BCPSEA continues to submit that the Decision is *inconsistent* with section 2 for the reasons set out herein, but in any event the Board failed to provide any reasoned analysis of section 2 in the Decision.
76. Fourth and finally, the Board failed to address the issue of whether BCTF was entitled to file its sur-reply and whether the Board relied on that sur-reply.
77. In the ordinary course, an applicant would have the final right of reply during the submission process. Following BCPSEA's "final reply" on November 16, 2011 (as amended on November 17, 2011), the BCTF wrote to the Board advising of its intent to file a further reply submission. On November 17, BCPSEA responded that it objected to any such sur-reply and that BCTF was not entitled "as a matter of right" to file a sur-reply, as BCTF alleged.
78. On November 18, 2011, BCTF replied further regarding its alleged right to file a sur-reply. That correspondence to the Board also commented upon the merits of the applications and attached further documentation said to support its position in the applications.
79. Also on that date, BCTF filed its sur-reply, which contained further argument and attached further documentation related to the merits of the applications.
80. The parties' various submissions are appended to the enclosed statutory declaration.
81. The Decision makes no comment or findings with respect to BCTF's sur-reply, including no comment as to whether the Board has relied on it or whether BCTF was entitled to file a sur-reply. In the recitation of the parties' positions, BCTF's sur-reply is not included. However, it is not readily apparent from the Decision as to whether the Board has relied on that submission.
82. In light of the evident conflict between the parties as to whether BCTF was entitled to file a sur-reply, the Board should have rendered a decision as to that issue. Its failure to do so was an error, and one that affected the parties' right to a fair hearing.

### **Conclusion**

BCPSEA submits that the Decision with respect to BCPSEA's application for the Reimbursement Variance contains significant errors that render it patently unreasonable and inconsistent with the principles expressed or implied in the *Code*. As such, BCPSEA

submits that this application for reconsideration should be granted pursuant to section 141(2)(b) of the *Code*.

Given that the BCTF strike is ongoing, BCPSEA respectfully requests that the reconsideration panel address this matter as expeditiously as possible.

**Parties**

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Yours very truly,

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Per:



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Per:



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Encl.

cc. BCPSEA, Attn. Karen Jewell  
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