BRITISH COLUMBIA

LABOUR RELATIONS BOARD

FAX TRANSMITTAL SHEET

Re: British Columbia Public School Employers' Association (on behalf of all Boards, as defined in the School Act) -and- British Columbia Teachers' Federation -and- Various Trade Unions
(Section 72(1) REPORT - Case No. 62037/11)
(Section 72(2) ORDER - Case No. 62039/11)

DATE: September 2, 2011

SENDER: LABOUR RELATIONS BOARD

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NUMBER OF PAGES: 21 (including this page)

SPECIAL INSTRUCTIONS:

Decision BCLRB No. B161/2011 is attached. A hard copy will follow by mail.

**NOTE: FACSIMILE OPERATOR, PLEASE CONTACT THE ABOVE INTENDED RECEIVER AS SOON AS POSSIBLE. THANK-YOU

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BRITISH COLUMBIA

LABOUR RELATIONS BOARD

September 2, 2011

To Interested Parties

Dear Sirs/Mesdames:

Re: British Columbia Public School Employers' Association (on behalf of all Boards, as defined in the School Act) -and- British Columbia Teachers' Federation -and- Various Trade Unions
(Section 72(1) REPORT - Case No. 62037/11)
(Section 72(2) ORDER - Case No. 62039/11)

Enclosed is a copy of the Board's decision (BCLRB No. B161/2011) rendered in connection with the above-noted matter.

Yours truly,

LABOUR RELATIONS BOARD

Susan Noble for
Mark J. Brown

Enclosure(s)

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BCLRB No. B161/2011

BRITISH COLUMBIA LABOUR RELATIONS BOARD

ALL BOARDS, AS DEFINED IN THE SCHOOL ACT, IN THE PROVINCE, REPRESENTED BY THE BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

("BCPSEA")

-and-

BRITISH COLUMBIA TEACHERS' FEDERATION

("BCTF")

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, REGIONAL OFFICE ON BEHALF OF CERTAIN LOCALS

("CUPE")

PANEL:	Mark J. Brown
APPEARANCES:	Delayne M. Sartison, on behalf of BCPSEA Carmela Allevato, on behalf of BCTF Linda M. Dennis, on behalf of CUPE
CASE NO.:	62039
DATE OF DECISION:	September 2, 2011

DECISION OF THE BOARD

I. INTRODUCTION

1 In 2001, BCPSEA and BCTF were engaged in a labour dispute which involved an application under Section 72 of the *Labour Relations Code* (the "Code").

2 The parties agreed to a process to designate essential services (see BCLRB No. B383/2001). Before the process evolved to the point of determining whether teachers could withdraw services from the classroom, terms for a new collective agreement were imposed.

3 In 2005, BCPSEA and BCTF were again engaged in a labour dispute. In the fall of 2005, the Board conducted a hearing addressing the issue of whether teachers may withdraw services from the classroom under Section 72 of the Code. The hearing concluded, but before a decision was issued the terms of the new collective agreement were imposed.

4 The same parties are once again in the midst of a labour dispute requiring the designation of essential services under the Code.

5 I was the Associate Chair, Mediation and Registrar at the Board until March of 2010. Since that time, I have been engaged in a private mediation/arbitration practice. Because I was the Board adjudicator assigned to the 2001 and 2005 disputes, the parties requested that I complete the task of determining whether teachers may withdraw services from the classroom under Section 72 of the Code. The parties were given an opportunity to file supplemental submissions given the passage of time.

6 This decision relates to the previous disputes. This decision, while it may be instructive for the current dispute, has no direct impact unless the Board adjudicator assigned to the current case adopts parts, or all of this decision.

7 I note at the outset that this decision raises a number of issues that will require further adjudication.

II. LEGISLATIVE FRAMEWORK

8 For many years, British Columbia was the only jurisdiction that included the designation of essential services in labour legislation.

9 The right of public service employees to strike, or employers to lockout, has been the subject of a great deal of debate. On the one hand, some will argue that public service employees who perform essential services should not be granted the right to strike, or employers the right to lockout. Those that take that point of view argue in part that the public cannot do without the public service without absorbing unacceptable

consequences and/or there is no alternative to source the service in question. On the other hand, others argue that public employees should be granted the right to strike, and employers the right to lockout, as exists for their private sector counterparts.

10 Regardless of where one stands on this debate, from a social policy perspective the Province's legislative framework has historically established that public service employees should be granted the right to strike, and employers the right to lockout, in a controlled environment where certain services are designated as essential in order to ensure the health, safety and welfare of the residents of the Province.

11 Some public sectors, such as health, have been continuously covered by the legislation. Other sectors, such as education, have fallen within the scope of the legislation at different times, and under different legislative terms.

12 The controlled strike principle was discussed in a major essential service policy decision, *Health Employers Association of B.C.*, BCLRB No. B73/96:

> This Province, along with other jurisdictions, has long ago determined that employees of government and public institutions should have access to meaningful collective bargaining with respect to the terms and conditions of their employment. One result of this policy decision is the tension created between the efforts of employees striving to advance their interests to a successful conclusion through collective bargaining means, including work disruption, the efforts of institutions to resist a strike, and the maintenance of essential services to protect the health, public safety and welfare of citizens during the course of such collective bargaining. In some jurisdictions the collective bargaining process for public servants and employees of public institutions has been limited by a total restriction on the right to strike and mandatory interest arbitration, while in others, legislatures have opted for the policy of a "controlled strike". In British Columbia, the legislature selected the latter option.
>
> In this jurisdiction, a strike is controlled by the designation of certain services as essential to preserve the health, safety and welfare of the residents of British Columbia and by the allocation of employee resources to the levels required to maintain those services. This device serves two goals: it protects the citizens by ensuring the continuation of essential services and, coincidentally, protects the meaningful nature of collective bargaining. As Paul Weiler commented in his book *Reconcilable Differences*, (Toronto: Carswell Company Limited, 1980), at 235:
>
> > This legal device performs not only its manifest function of protecting public safety in the community, but also the latent function of protecting the collective bargaining process as well. The absolute and unrestricted right of hospital workers to shut down the hospitals in a community (or of police

> officers to cut off police protection) is actually incompatible with the logic of free collective bargaining. When there is no police force in a large urban area, or the hospitals are shut down, panic spreads in the community. Irresistible pressure mounts for the government to do something immediately: either to settle the dispute at any cost or at least to legislate an end to the strike and force the parties before a third party for a binding decision. Since everyone knows this will happen, then whatever may appear in the face of the statute, the legal prospect of a strike cannot play its intended role in real-life negotiations. Knowing full well that any strike would be allowed to last only a few hours, why should the police board and the police union make economically painful and politically touchy compromises at the bargaining table in order to avoid the even more unpleasant consequences of a protracted work stoppage?
>
> While Weiler, as Chair of this Board, considered his experience with essential service designations, particularly the strike at the Vancouver General Hospital in 1976, to have been a successful exercise, the community at large recognizes that the process can nevertheless be painful and can generate anxiety and tension for the parties, the Board and the public whose safety it is designed to preserve. (paras. 2-4)

13 In *The Board of School Trustees of School District No. 54 (Bulkley Valley)*, BCLRB No. B147/93, the Board set out a brief history of essential service provisions as it related to education. At pages 5 and 6, the Board stated:

> The Teachers set out the legislative history of essential service provisions in this province. They begin with the *Labour Code of British Columbia*, S.B.C. 1973, c.122, which covered specific trade unions such as firefighters, police and hospital unions.
>
> The term "welfare" was not included in essential service legislation until 1977 when the *Essential Service Disputes Act*, S.B.C. 1977, c.83, was enacted (the "ESDA"). The ESDA included the term "welfare" in Section 8 as part of the phrase "immediate and substantial threat to the economy and welfare of the province and its citizens".
>
> Educational services were dealt with for the first time in the *West Kootenay Schools Collective Bargaining Assistance Act*, S.B.C. 1978, c.42, which amended the ESDA to include the following words: "a substantial disruption in the delivery of educational services in the province" (Section 8(b)). In 1987, Bill 20, incorporated into the *School Act*, R.S.B.C. 1979, c.375, gave

> Teachers the legislative authority to join trade unions and engage in collective bargaining with the School Boards. At the same time, the essential service provisions which were contained in the ESDA were repealed and incorporated in the *Industrial Relations Act*, R.S.B.C. 1979, c.212. Section 137.8(1) of that Act contained the following words: "...the dispute poses a threat to the economy of the province or to the health, safety or welfare of its residents or to the provision of educational services in the province,...".
>
> Finally, in 1993, the Legislature passed Bill 84, the *Labour Relations Code*. Section 72 of this Code deleted the following words from the corresponding provision of the *Industrial Relations Act*: "...the provision of educational services". This provision now reads as follows: "...health, safety or welfare of the residents of British Columbia".
>
> The Teachers argue that the deletion of the words "...provision of educational services" was intended by the Legislature to remove education from the essential service provisions of the Code. Indeed, if one turns to the *Recommendations for Labour Law Reform* submitted by the Sub-committee of Special Advisors, in its Report dated September 1992, it is clear that the recommendation of that Sub-committee was that "essential services be more narrowly defined as those necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia". Therefore, the School Board submits that the Board ought not to imply educational services into the definition of "welfare" when it has been expressly removed by the Legislature: *Bathhurst Paper Ltd. v. Municipal Affairs of the Province of New Brunswick*, [1972] S.C.R. 471.

14 The Board went on to determine whether "education" was included in the concept of "welfare" as it concluded that the removal of educational services in Section 72 gave the teachers the right to strike. At pages 21-22, the Board stated:

> Is education therefore capable of falling within the concept of welfare, notwithstanding the removal of "educational services" from Section 72? There may be exceptional circumstances in which education falls within the concept of welfare?
>
> It is our view education falls within the concept of a profound social and human need, and we draw support for this conclusion from the Supreme Court of Canada decision in *Jones v. The Queen*, *supra*, where Mr. Justice LaForest stated, at p. 299, the following:
>
> > No proof is required to show the importance of education in our society or its significance to government. The legitimate, indeed compelling,

> interests of the state in the education of the young is known and understood by all informed citizens.

And again at pages 296 and 297, the court stated the following:

> ...Whether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society. From an early period, the provinces have responded to this interest by developing schemes for compulsory education. Education is today a matter of prime concern to government everywhere. Activities in this area account for a very significant part of every provincial budget. Indeed, in modern society, education has far-reaching implications beyond the province, not only at the national, but at the international level. Much of what was said by the Supreme Court of the United States in the following passages in *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954) at p. 493, has application here.
>
> > Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument is [sic] awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. (p. 296-297)
>
> If education therefore, can, under certain exceptional circumstances, fit within the concept of "welfare", do the circumstances of the affected Grade 12 students fit within this exception? We believe the potential impact of this dispute on Grade 12 students does fall within the concept of "welfare".

15 There were a number of job actions in the period 1987 to 1993 under the *Industrial Relations Act* (the "Act"). The only one that triggered an application for essential services was in the Abbotsford School District where the teachers engaged in escalating job action, similar to what was planned in the case at hand, over a two and one half month period. The application was dismissed as the dispute was resolved, however, in dismissing the application (taken from Industrial Relations Council letter re: *The Board of School Trustees of School District No. 34 (Abbotsford))* dated June 17, 1991), the Commissioner stated in part:

> In dismissing your application, however, I consider it appropriate to make the following observations:
>
> The language of Section 137.8(1) is disjunctive in that it speaks of a dispute which poses a threat to (a) the economy, or (b) the health, safety or welfare of its residents, or (c) the provision of educational services in the Province.
>
> You may have confused the intent of the section in submitting that the dispute posed a threat to the health, safety and welfare of "(y)our students and to the provision of requisite educational services in this District" (emphasis added). In any event, based on the evidence, including a report of a Council officer in the matter, I am not satisfied that the threat to educational services in this case was either of such dimensions or had endured for such a period as to justify a recommendation from this office triggering a direction from the Minister to designate essential services.

16 In the 2001 dispute, the Board had to interpret the then recent amendments to the Code with respect to the designation of essential services in the education sector, the same legislation that exists today. In particular the Board had to interpret the phrase "provision of educational programs".

17 It is instructive to quote extensively from BCLRB No. B455/2001 in this regard:

> All the parties agreed that the term "educational program" in Section 72 of the Code is as defined in Section 1 of the *School Act* (the "Act"):
>
> > "educational program" means an organized set of learning activities that, in the opinion of
> >
> > (a) the board, in the case of learning activities provided by the board...
> >
> > is designed to enable learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and prosperous and sustainable economy.
>
> Where the parties differ, is on what is encompassed by that definition and also on the meaning to be attributed to the phrase "*provision of* educational programs" (emphasis added). BCPSEA argues that both should be given a wide interpretation and the Unions argue that they should be interpreted narrowly. (paras. 5 and 6)
>
> In this instance, the parties have agreed that the definition of "educational program" is that found in Section 1(1) of the Act.

However, this definition does not provide a complete answer to the definition of the phrase "*provision of* educational programs". We find that the phrase "provision of educational programs" must be broader than the definition of "educational program", as the *provision of* an organized set of learning activities must encompass something more than the activities themselves. (para. 48)

This then leaves us with the parties' arguments based on the language in the Act and the School Regulation. Relying on certain sections of the Act and the School Regulation, the BCTF argues that "provision of educational programs" only includes instruction, and does not include "services" provided by a School Board. We do not agree.

We reach this conclusion based on the definitions of "instruction in an educational program", "educational resource materials" and "goods and services" found in Regulations 1(2) and (3) of the School Regulation. The School Regulation defines these terms for the purposes of the Act. These definitions demonstrate that the line between "services" and the "provision of educational programs" in the Act is not as clear-cut as the BCTF argues.

For ease of reference, the "services" BCTF says are not included in "provision of educational programs" include: "evaluation and assessment services" (Regulation 3 of the School Regulation); "educational resource materials" (Regulation 3 of the School Regulation); "education services" (Section 86(1) of the Act); "health and support services, including bussing and educational resources" (Section 86(1.1) of the Act); "determining the general requirements for graduation from an educational program" (Section 168(2)(b) of the Act); "determining the general nature of educational programs for use in schools and francophone schools and specifying educational program guides" (Section 168(2)(c) of the Act); "preparing a process for the assessment of the effectiveness of educational programs..." (Section 168(2)(d) of the Act); and "preparing a process for measuring individual student performance" (Section 168(2)(d.1) of the Act).

First, we point out that the definition of "instruction in an educational program" in Regulation 1(2) of the School Regulation indicates that "instruction", which BCTF concedes is encompassed by the phrase "provision of educational programs", includes concepts like supervision and assessment. Regulation 1(2) defines "instruction in an educational program" as meaning "the communication of information or knowledge to students, who are in attendance and under supervision, sufficient to meet the learning outcomes or assessment requirements of an educational program provided by a board".

In addition, further clarification of the definition of "instruction in an educational program" in Regulation 1(3) indicates

that "learning activities by a board" might include work study and work experience programs. Regulation 1(3) indicates "[n]othing in the definition of 'instruction in an educational program' in subsection (2) is to be construed as excluding the provision of work study and work experience programs, examinations or other learning activities by the board".

Finally, based on the definitions of "educational resource materials" and "goods and services" in Regulation 1(2), it is apparent that there may be goods and services and educational materials which are necessary to meet the learning outcomes and assessment requirements of an educational program provided by a school board. These terms are defined as follows:

> "educational resource materials" means
>
> ...
>
> (b) materials and equipment necessary to meet the learning outcomes or assessment requirements of an educational program provided by the board...
>
> "goods and services" includes, but is not limited to,
>
> (a) materials and equipment of a nature, or of a quality or quantity, beyond that which is necessary to meet the required learning outcomes or assessment requirements of an educational program provided by the board...

On the other hand, not all services or activities provided by a school board are necessarily part of the "provision of educational programs". In this respect we agree with the Court in *McDonald* v. *Greater Victoria School District No. 61, supra,* that there has to be some limit to an "educational program" and therefore also to what is involved in the "provision of educational programs". It may be that this limit is reached when certain activities or services provided by a school board are optional or voluntary and outside the curriculum set by the school board.

This view is also consistent with the Board's decision in *West Vancouver School Board District No. 45, supra,* in which the Board held that Regulation 4 of the School Regulation takes a broad approach to teachers' duties and includes the use of the term "program" rather than "educational program". The distinction between "program" and "educational program" implies that there may be some duties performed by teachers which fall outside of the "provision of educational programs". As a result, not all services or activities carried on by a school board will necessarily fall within the definition of "provision of educational programs".

> We conclude that the phrase "provision of educational programs" for the purposes of Section 72 of the Code, includes more than just instruction as BCTF argues, but does not encompass all activities carried out by the School Board as argued by BCPSEA.
>
> As we noted earlier, the Board is taking a cautious approach in this dispute as this is a case of first instance. Therefore, it would be more appropriate to refine the definition further during the adjudication of extra-curricular activities and Phase II job action when the Panel can consider the matter within the proper context. Also, the key issue at the later stages will be whether the dispute creates a "serious and immediate disruption to the provision of educational programs". There may well be activities on the periphery of the definition of "provision of educational programs" which, irrespective of whether they fall within the definition, will not meet the "serious and immediate disruption" test in any event.
>
> IV. CONCLUSION
>
> We conclude that for the purpose of Section 72 of the Code, "provision of educational programs" includes concepts like supervision and assessment, and might include work study and work experience programs. Further, there may be goods and services and educational materials which are necessary to meet the learning outcomes and assessment requirements of an educational program, and are therefore part of the "provision of educational programs".
>
> On the other hand, not all services or activities provided by a school board are necessarily part of the "provision of educational programs". There must be some limit to an "educational program" and therefore also to what is involved in the "provision of educational programs". For example, activities or services provided by a school board which are optional or voluntary and outside the curriculum set by the school board may well fall outside of the "provision of educational programs".
>
> Any further narrowing of the definition will take place within the context of the next stages in the adjudication process. (paras. 63 – 75)

18 Subsequent to that decision, many Board decisions on the designation of essential services were issued; but none dealing with the withdrawal of teachers from classes. The decisions are all a matter of Board record and will not be referenced further.

19 In the 2001 and 2005 disputes, because of the phased in approach planned by BCTF, the parties agreed that the Board's essential services orders would set out the

duties that teachers would *not* perform. My understanding is that Board orders to date in the current dispute follow the same format.

20 In all other essential service orders in other sectors, essential service orders set out what duties bargaining unit members *will* perform, not duties that they will *not* perform. Furthermore, essential service orders are normally constructed on the basis of a full withdrawal of services, not a partial strike or lockout.

III. ARGUMENT

21 The parties' supplemental arguments are consistent with the arguments presented in 2005, with the exception of highlighting developments since then.

22 BCTF argues that it is only when teachers have withdrawn instructional services for a lengthy period of time should the Board consider establishing essential service levels. In 2005, BCTF argued that instructional services could be withdrawn for up to three months.

23 BCPSEA argues that teachers may withdraw instruction for one day out of five days of instruction.

24 Formal arguments from 2005 are a matter of Board record. Therefore, I only intend to briefly set out arguments based on developments since the 2005 proceedings.

25 BCTF argues that there are five important developments that occurred after the 2005 proceedings that support its position.

26 First, during an illegal strike in 2005 schools were closed for two weeks. There is no evidence that there was a serious and immediate disruption to the provision of educational programs.

27 Second, there is no evidence that an extended spring school break, adopted by many School Districts, is detrimental to learning.

28 Third, the Ministry of Education has designated all provincial Grade 12 exams as optional except for Language Arts 12 and BC First Nations Studies 12. Post secondary institutions no longer require provincial exams for admission. Therefore, the concern for Grade 12 is mitigated.

29 Fourth, BCTF argues that the Supreme Court in *Health Services and Support – Facilities Subsector Bargaining Association* v *British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 confirmed that the use of international law and obligations is an appropriate tool for statutory interpretation where Charter values are involved. BCTF argues that international law supports providing the teachers with an opportunity to withdraw classroom services.

30 Fifth, in *British Columbia Teachers' Federation* v. *British Columbia,* 2011 BCSC 469, where the Court concluded that banning certain topics from negotiations is unconstitutional, BCTF argues:

> Teachers' working conditions are inextricably connected with the learning conditions of students and the quality of our public education system. It has always been the case that, through bargaining, teachers have advanced not only their own interests as professionals and employees, but also the broader public interest by advocating for measures to improve public education and the learning conditions of their students. Even when the content of collective bargaining was severely restricted, teachers steadfastly and vigorously pursued these goals. In 2005 teachers withdrew from classrooms and stayed out, even in the face of contempt proceedings, to achieve classroom improvements. As stated above, that strike eventually led to improved class size and composition provisions in the School Act.
>
> We submit that this is an appropriate factor to consider in the interpretation of s. 72 of the Code. In our view, allowing teachers a more appropriate scope of pressure that they can bring to bear on the employer serves the public interest. It creates a more balanced bargaining power that often results in improvements to public education. Such an appropriate scope of pressure involves a lengthier rather than shorter period during which teachers may withdraw their services from the classroom.

31 CUPE adopts BCTF submissions.

32 In addressing the five issues raised by BCTF, BCPSEA argues as follows.

33 First, the nine day illegal strike in October of 2005 was early enough in the school year that School Districts could adapt by compacting curriculum, offering voluntary tutorials, offering packages of make-up work and adjusting the timing of first and second semesters for secondary students.

34 Second, the longer spring break has been implemented without any loss to instructional time by adding minutes to each instructional day, or adding instructional days before Labour Day, or scheduling Pro D days before the start of the school year.

35 Third, the Ministry of Education has implemented a series of changes to the provincial graduation program. Students must complete compulsory provincial exams in Grades 10, 11 and 12 with a set number of credits. BCPSEA argues that for secondary students the risk of serious and immediate disruption to educational programs is at least, if not more, pressing than before.

36 Lastly, BCPSEA argues that recent Charter cases cited by BCTF do not assist the Board in any way whatsoever. Specifically, BCPSEA argues:

Finally, the BCTF refers to the recent decision concerning the constitutionality of certain legislation affecting former collective agreement class size provisions *(BCTF* v *British Columbia,* 2011 BCSC 469) to support an argument that this Panel should allow BCTF members to engage in a total withdrawal of instructional services in order to achieve improvements to public education. BCPSEA submits that this Panel must interpret and apply section 72 based upon the potential impacts of job action on public welfare and educational programs. The Board must not determine essential service levels based upon its assessment of the relative merits of any parties' positions taken in collective bargaining or to assist either party in attaining those objectives.

IV. DECISION

37 The Code provisions at play in this decision are as follows:

> 2. The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that
>
> (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.
>
> 72. (2.1) If the minister
>
> (a) after receiving a report of the chair respecting a dispute, or
>
> (b) on the minister's own initiative
>
> considers that a dispute poses a threat to the provision of educational programs to students and eligible children under the *School Act*, the minister may direct the board to designate as essential services those facilities, productions and services that the board considers necessary or essential to prevent immediate and serious disruption to the provision of educational programs.

38 At the outset, I acknowledge that this decision determines some issues with respect to the application of Section 72 and the designation of essential services in the education sector; but it also raises other questions that the parties, and the Board, will have to turn their minds to for purposes of the current dispute.

39 The purpose of essential service designations must also be put into context, as described in many previous Board decisions. In some jurisdictions, public service employees have an unfettered right to strike. In other jurisdictions there is no right to strike and terms of collective agreements are arbitrated. However, in British Columbia the policy framework that the Legislature has chosen for many years is the essential service "controlled strike" model.

40 Strikes/lockouts in an essential public service are inconvenient and problematic for the public. With respect to education, if teachers are not in the classroom due to a strike or lockout, families' lives will be impacted as families cope to care for children at times when the children are normally in school. I acknowledge that this impact may be overwhelming for some families; however, that is not the test in the statutory framework that is before me. My jurisdiction, for public policy reasons as set out above and in previous Board cases and codified in the legislation, is limited to determining what actions fall within the scope of "serious and immediate disruption to the provision of educational programs".

41 I do not intend to set out the evidence that was put before me in 2001 and 2005. Much of it related to a statistical analysis of graduation rates during years where previous strikes occurred compared to normal school years. I do not find such an analysis helpful in the case at hand for several reasons. Graduation rates are influenced by many factors such as the actual student population, effectiveness of the system in that particular year, socio-economic factors, time away from the classroom due to normal absence issues, etc. Legislation was also different at the time and expectations from the stakeholders may have also been different.

42 For the case at hand, it is more instructive to assess the application of the current legislation within the context of the current education system, rather than focusing on what happened within a completely different context.

43 In argument before me, the parties compared the current legislation to the provisions of the Act where the test was "serious danger . . . to the provision of educational services" as opposed to the current Code test of "serious and immediate disruption to the provision of educational programs".

44 There were no essential service designations under the Act. I do not consider the letter from the Commissioner with respect to the Abbotsford dispute to be a decision under the Act. In that case the dispute was resolved and the Commissioner's comments are *obiter*. Even if the letter is considered a decision, it is not persuasive in the case at hand as the statute provisions were different.

45 As noted above, the test under the Act was "serious danger ... to the provision of educational services". Under the Code provisions the test is "serious and immediate disruption to the provision of educational programs". There are two differences in the wording. First, I conclude that the Legislature intended essential services to be designated sooner under the Code provisions due to the use of the word "disruption" rather than "danger" as used under the Act. It is clear that a disruption to education

programs is a lower threshold than a danger to educational services. A student's learning is impacted sooner by a serious and immediate disruption as opposed to when the student learning is in serious danger. In addition, the Code also uses the word "immediate" which may raise the threshold somewhat.

46 The second difference between the Code and the Act is the difference between "educational programs" and "educational services". As noted above in the extensive quote of B455/2001, "the provision of educational programs" includes more than just instruction, but does not encompass all activities carried out by a School District. Therefore, even though educational services may encompass a broader spectrum than educational programs, on balance I conclude that the Code provisions trigger the designation of essential services sooner than the Act.

47 In *British Columbia Public School Employers' Association,* BCLRB No. B455/2001 at paragraph 50, the Board discussed the use of Hansard as an aid to statutory interpretation:

> With respect to the use of Hansard as an aid to statutory interpretation, we note that even according to the cases referred to by BCPSEA, the Board will use Hansard only to determine the mischief that the legislation was intended to address: *White Spot, supra*, at p.20; *Community Social Services Employers' Association*; *supra*, at para. 46. The Board will not use Hansard for interpreting the meaning or intent of a section or provision: *V.I. Care Management Ltd.*, BCLRB No. B112/93, at p.13, relying on *Wall & Redekop Corporation* v. *United Brotherhood of Carpenters & Joiners of America, 27 locals and British Columbia Labour Relations Board*, [1986] 6 WWR 153 (BCSC); (1988), 30 BCLR (2d) 74 (BCCA). [see also *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27].

48 In looking at the mischief the legislation was intended to address it is clear the Legislature did not intend to remove the teachers' right to strike or the employers' right to lockout. It is important to emphasize that both parties acknowledge in their respective positions that teachers can be absent from the classroom and not run afoul of the legislation.

49 Without quoting from Hansard, a review of the debates when the legislation was introduced shows that the mischief the legislation was intended to address was to ensure that a student's learning would not be impacted to the extent that a school year would be lost and that continuous learning would occur to ensure that any student in any grade would achieve the necessary results to progress further.

50 I am faced with the difficult task of determining when the teachers' absence from the classroom would result in a "serious and immediate disruption to the provision of educational programs".

51 The parties argue that their positions apply to any grade and at any time of year. To put that proposition into context by using an example, a student missing classroom time at the beginning of September in Kindergarten has the same impact for essential service purposes as a Grade 12 student preparing for exams in May or June. With all due respect to the parties, I do not find the positions on this point persuasive.

52 I acknowledge that a young student's first exposure to school at Kindergarten as they embark on years of valuable learning is just as important as a Grade 12 student preparing to leave the secondary school system to embark on a career or post - secondary education.

53 Having said that, an absence from the classroom for the Kindergarten student in September compared to the Grade 12 student in May or June considering the application of the test of "serious and immediate disruption to the educational program" does not result in the same conclusion.

54 Given the above example, the result is different in part because the educational program can be adapted more easily at the younger ages, and also in part, based on the time of the school year. Another factor that causes me to adopt a different view from that reflected in the parties' positions, is the linear versus semester school calendar model. In that regard, time away from the classroom in a semester model is harder to compensate for as there is less time in the semester to adjust for any absence.

55 This leads me to the conclusion that the test in Section 72 cannot be applied in a broad sweeping way to every grade and regardless of the time of year. I acknowledge that the parties do not agree with this approach. Their positions posit the proposition that "a teacher is a teacher is a teacher". I wish to emphasize that my conclusion in no way minimizes the value of all teachers' efforts in all grades to provide excellent education opportunities in the public education system. However, when faced with the test of "serious and immediate disruption to the provision of educational programs", I am not persuaded by the parties' broad brush approach.

56 On this point, the parties did not want to compare education to other sectors covered under Section 72 of the Code. However, the Board has considerable expertise in the designation of essential services in other sectors. For example, the application of essential services in health care is instructive. When essential services are designated in health care, a broad brush approach using the same formula for every institution or area of an institution is not utilized. Not all nurses or other health care professionals are designated essential in the same way in all institutions. Each institution, and area within an institution, is considered separately resulting in one institution having higher or lower essential service levels compared to another depending on their own unique circumstances.

57 Furthermore, during the supplemental process, I questioned whether the prescribed learning outcomes for a grade could be assessed against the minimum amount of time required to meet those core learning outcomes. Both parties suggested

that such an approach was not possible for various reasons related to how each individual student's progress is monitored.

58 Given the broad brush approach that the parties have argued, it is not surprising that the parties were not prepared to embark on such a task. However, I am not persuaded that such an approach is not more conducive to the application of the statutory requirements under the Code, given that I conclude that the application of "serious and immediate disruption to the provisions of educational programs" may not be the same for every grade, and may not be the same for any time of year. If the parties determined the minimum number of days of instruction necessary to meet the core learning outcomes, the balance of instructional days may be the number of days that a teacher may be absent from the classroom given the test under Section 72 of the Code.

59 One aspect of events that occurred after the hearings concluded in 2005 that is instructive is the two week dispute that occurred in October of that year. I have no evidence that the event had a "serious and immediate disruption to the provision of educational programs".

60 Because the broad brush approach argued by the parties is not persuasive, if I was to make a decision under the 2005 case, or in the current dispute if I was the original panel, I would issue an interim decision while other issues continued to be adjudicated. I note that the Board has issued interim essential service decisions in the past: see *Health Employers Association of British Columbia,* BCLRB Nos. B118/2001 and B143/2004.

61 Because I am not issuing a formal decision that would have immediate application, but I consider it useful for the parties and future original panel to have some guidance, I will make recommendations as to the approach I would take if I had an active case to determine. In view of the fact that any decision would be at first instance, my recommendations err on the side of caution. I recommend the following:

1. Given that the current dispute is at the beginning of the school year, and given that the parties experienced a two week withdrawal of services in October of 2005 without any evidence of "serious and immediate disruption to the provision of education programs", I conclude that teachers can withdraw from the classroom for at least two weeks without any services designated as essential.

2. Before that can occur the Board needs to consider whether any services provided by the support staff unions fall within the scope of Section 72. Because students would not be in class, the likelihood of any essential service designation for the support staft unions would be minimal, possibly physical plant issues.

3. After the two week or longer period referenced in #1, I conclude that any further withdrawal of services may be impacted by grade and time of year,

factors which the parties refused to contemplate in the case before me. A process needs to be developed to give the parties the opportunity to specifically address those issues.

4. While the process in #3 is being conducted, in order to continue some pressure on the parties to encourage a resolution to the collective bargaining dispute while at the same time erring on the side of caution while further arguments are fully considered, I would impose a further interim order establishing BCPSEA's position of one day withdrawal in five days of instruction (i.e. 20% weekly). I note that I do not accept that a weekly reduction of 20 percent meets the test under the Code as a long term order under Section 72. Such a reduction could see the dispute last a lengthy period of time as the pressure exerted is limited and does not meet the test under Section 72 of the Code. However, it does result in some pressure on an interim basis while the adjudication continues. The purpose of the controlled strike is to exert as much pressure on both sides without having a serious and immediate disruption on the provision of education programs.

5. Furthermore, I would amend the structure of the Board order to be consistent with essential service orders in other sectors. The order should set out the days of work for the bargaining unit members. The employer would continue to direct the workforce as per current collective agreement terms. In this way the order would establish what the bargaining unit members are doing, not what they are not doing (see, for example, *Health Labour Reletions Association*, IRC No. C42/92 and numerous cases since then citing the same case). In addition, compensation should be based on the percentage of days worked compared to the norm. As it stands now, bargaining unit members are receiving full pay while not pertorming the full range of duties. 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.

62 As I noted at the beginning of this decision, this decision raises more issues to be adjudicated.

63 I have attempted to set out a path where a controlled strike or lockout could occur while further adjudication is scheduled. However, the new original panel, as an independent adjudicator, can adopt this decision in whole or in part or not at all.

64 However, more importantly, the parties should concentrate on a process to reach a collective agreement within the context of free collective bargaining without a work stoppage or imposed settlement - something that has eluded this sector for many years. Educators from both sides, and those responsible for developing education policy, should ensure that they are demonstrating a collaborative and positive example for the student population that they are leading. If the parties do so, they will have taken

advantage of an opportunity in this round of collective bargaining to establish confidence and trust in the public education system by achieving a collective agreement that benefits students first, as well as teachers and families.

LABOUR RELATIONS BOARD

MARK J. BROWN