

**BRITISH COLUMBIA
LABOUR RELATIONS BOARD**

MULTIPLE FAX TRANSMITTAL SHEET

Re: British Columbia Public School Employers' Association -and-
British Columbia Teachers' Federation
(Section 72(2) - Case No. 62789/11 (Report Cards))
(Application for Reconsideration - Case No. 62962/11T)

DATE: December 20, 2011

SENDER: LABOUR RELATIONS BOARD

OPERATOR SENDING: Dylen Dennis, Senior Executive Assistant to
Brent Mullin, Chair

TELEPHONE NO: (604) 660-1311

INTENDED RECEIVER:

FAX NUMBER:

British Columbia Public School Employers' Association
ATTENTION: Karen Jewell

604.730.0787

Roper Greyell LLP
ATTENTION: Thomas A. Roper Q.C./
Delayne M. Sartison

604.806.0933

British Columbia Teachers' Federation
Legal Department
ATTENTION: Carmela Allevato

604.871.2288

Victory Square Law Office LLP
ATTENTION: John D. Rogers, Q.C.

604.684.8427

NUMBER OF PAGES: 9 (including this page)

SPECIAL INSTRUCTIONS:

Decision BCLRB No. B236/2011 dated December 20, 2011 enclosed.

Hard copies will follow by mail.

**BRITISH COLUMBIA
LABOUR RELATIONS BOARD**

December 20, 2011

To Interested Parties

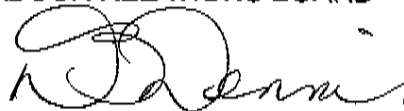
Dear Sirs/Mesdames:

Re: British Columbia Public School Employers' Association -and-
British Columbia Teachers' Federation
(Section 72(2) - Case No. 62789/11 (Report Cards))
(Application for Reconsideration - Case No. 62962/11T)

Enclosed is a copy of the Board's decision (BCLRB No. B236/2011) rendered in connection with the above-noted matter.

Yours truly,

LABOUR RELATIONS BOARD



Dylen Dennis, Senior Executive Assistant to
Brent Mullin, Chair

Enclosure(s)

Interested Parties:

British Columbia Public School Employers'
Association
400 - 1333 West Broadway
Vancouver BC
V6H 4C1
ATTENTION: Karen Jewell
Fax: 604.730.0787

Roper Greyell LLP
800 Park Place - 666 Burrard Street
Vancouver BC
V6C 3P3
ATTENTION: Thomas A. Roper Q.C./Delayne M.
Sartison
Fax: 604.806.0933

Re: Case No. 62962
Page 2

British Columbia Teachers' Federation
Legal Department
100 - 550 West 6th Avenue
Vancouver, BC
V5Z 4P2
ATTENTION: Carmela Allevato
Fax: 604.871.2288

Victory Square Law Office LLP
500 - 128 West Pender Street
Vancouver, BC
V6B 1R8
ATTENTION: John D. Rogers, Q.C.
Fax: 604.684.8427

BCLRB No. B236/2011
(Leave for Reconsideration of BCLRB No. B214/2011)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS'
ASSOCIATION

("BCPSEA")

-and-

BRITISH COLUMBIA TEACHERS' FEDERATION

("BCTF")

PANEL: Brent Mullin, Chair
Ken Saunders, Vice-Chair
Bruce R. Wilkins, Vice-Chair

APPEARANCES: Delayne M. Sartison and Thomas A.
Roper, Q.C., for BCPSEA

CASE NO.: 62962

DATE OF DECISION: December 20, 2011

DECISION OF THE BOARD

1 BCPSEA applies under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of BCLRB No. B214/2011 (the "Original Decision"). The Original Decision dismissed BCPSEA's application to vary the Essential Services Order in BCLRB No. B132/2011:

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

(Original Decision, para. 1)

In the present application, BCPSEA seeks leave and reconsideration only in respect to its monetary claim, which it refers to as the "Reimbursement Variance".

2 BCPSEA says that the Original Decision erred in dismissing BCPSEA's application for the Reimbursement Variance on the following bases:

- 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.

3 An application under Section 141 must meet the Board's established test before leave for reconsideration will be granted. An applicant must establish 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 C.L.R.B.R. (2d) 44 ("*Brinco*").

4 In its first argument, BCPSEA says that the Original Decision erred in rejecting BCPSEA's position that it is the role and responsibility of the Board in an essential services

dispute to attempt to balance the respective bargaining power of the parties: Original Decision, para. 67.

5 We do not find there to be an error in the Original Decision in that regard. The respective bargaining power of the parties is the product of any number of factors, including many which are beyond the scope of the Board in respect to the designation of essential services. In contrast, the task of the Board in respect to essential services designations "is to exert as much pressure on both sides without [in the context of this case] having a serious and immediate disruption on the provision of education programs": *British Columbia Public School Employers' Association*, BCLRB No. B161/2011 ("B161/2011"), para. 61. The distinction between bargaining power and pressure is clear and critical. In fact, all of the passages cited by BCPSEA on this point from the Board's decisions deal with pressure, not bargaining power. We thus dismiss this basis for seeking leave and reconsideration of the Original Decision.

6 The Board's decisions do, however, as noted, explain that essential service designations should put pressure on both of the parties in the dispute in order to thereby assist in bringing the bargaining to a conclusion. Inherent in BCPSEA seeking the Reimbursement Variance is its position that the current essential service designations are not effective in that regard. In support of its position, BCPSEA references the following comments of the Board in B161/2011:

As it stands now, bargaining unit members are receiving full pay while not performing 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. (para. 61)

7 In BCPSEA's view, the Reimbursement Variance would address this issue. As well, in BCPSEA's view the Original Decision took too restrictive an approach to its seeking of a variance in these circumstances (the second argument above) and misinterpreted the nature of teachers' work in finding there should be no reduction of teachers' pay because they "are continuing to work their regular or normal hours during Phase 1 of the BCTF job action" (Original Decision, para. 60). In respect to this third argument, BCPSEA submits:

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.

8 The Board's decisions in B161/2011 and B214/2011 both note the inefficacy of the current Phase 1 essential service designations agreed to by the parties: paras. 61, point 5, and 62-63 in the respective decisions. We too accept that there are fundamental problems with the parties' approach to essential services designations in the current Phase 1 of the job action. What we do not agree with, however, is that the Original Decision erred in its response to the proposed Reimbursement Variance or that the Reimbursement Variance would in fact constitute an appropriate remedy for these problems.

9 It is a fundamental premise of the workplace that it is an employer's responsibility to pay employees for work which has been performed. In our view, it is not appropriate to attempt to shift the responsibility for determining the amount of that pay from the employer to the Board, as would be the case if the Reimbursement Variance was granted. Nor is the mechanism for doing so in the form of the Reimbursement Variance appropriate. In our view, asking the Board to make the determinations in the Reimbursement Variance seeks to have the Board directly intervene in the dispute between the parties in a manner well beyond the Board's established approach to essential services designations.

10 The reality is the remedy lies elsewhere. The approach the parties have insisted upon in respect to essential services designations within their bargaining dispute is fundamentally flawed. The clear explanation of this lies in paragraphs 51-61 of B161/2011. While that entire passage is worthy of careful review, including the explanation of the Board's usual approach to the designation of essential services in health care (para. 56), the heart of the problem is captured by the panel in B161/2011 as follows:

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.

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. (paras. 57-58, emphasis added)

11 It is perhaps understandable that the parties would attempt a different and less disruptive approach to the designation of essential services in respect to their dispute. There is no doubt that education is critically important and that the withdrawal of education services is a contentious and serious matter. But those sorts of concerns are certainly present as well in disputes in the health industry, in which the parties take a now well established, effective approach to the designation of essential services.

12 The reality though is that taking that proper approach does lead to hardship. For instance, in the health industry, the number of surgeries is reduced as a result of restrictions on operating rooms. These are difficult matters. Taking an effective approach in the educational context would also very likely require taking hard-nosed decisions with their concomitant serious impact: see, for instance, B161/2011, para. 61.

13 In accepting the parties' agreement in respect to Phase 1, the Board deferred to the parties' experience with education. It was also likely felt that supporting the parties' agreement may be of assistance in bettering the parties' relations and possibly of being some help at the bargaining table itself. Nonetheless, as noted, the approach adopted by the parties in Phase 1 simply has not worked. It has not been balanced or effective in putting pressure on both parties.

14 In our view, the remedy for this problem is not to be found in the suggested Reimbursement Variance. The remedy lies in addressing the root of the problem, which is the unusual approach the parties have taken to the designation of essential services in their area, as most clearly explained in B161/2011.

15 In the result, we do not find that the Original Decision erred in either adopting an incorrect test for variance of the current essential service designations or, even if we were to accept there has been a misinterpretation of the nature of teachers' work as BCPSEA has submitted, that it would result in a more favourable response to its Reimbursement Variance application.

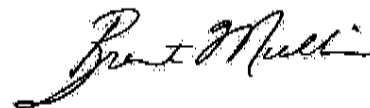
16 We also do not find that there was in the Original Decision a failure to provide
adequate reasons. As well, even if we were to accept that there was, we do not find
that it would change either our decision or the outcome in the Original Decision, with
any such failure also having been cured by the process before us.

17 The result in respect to the application before us is that leave is denied and the
application for reconsideration is dismissed.

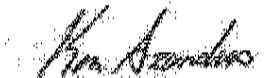
18 The larger result, however, is that the ineffective essential service designations
which were agreed to by the parties in the form of what is called Phase 1, have now
three times been recognized by the Board to be ineffective (B161/2011, B214/2011, and
the present decision). If the parties are interested in having effective essential services
designations, they will need to readdress the current situation and very likely their
fundamental approach to those designations: in that regard, see B161/2011, in
particular paras 51-61.

19 In summary, the Board has long had an established and proven approach to
essential services designations which has been applied in many sectors, including the
critical services in the health care sector. The present parties chose not to follow that
approach in reaching their Phase I agreement in respect to essential services
designations. The Board allowed that, given the parties' experience in education. The
approach the parties have taken has now proven beyond any doubt to be ineffective. In
our view, the remedy for that lies in the parties adopting the Board's established
approach to essential services designations, not the Reimbursement Variance
requested by BCPSEA.

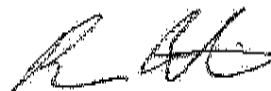
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