

**BRITISH COLUMBIA
LABOUR RELATIONS BOARD**

FAX TRANSMITTAL SHEET

Re: Attorney General of British Columbia and the Ministry of Justice -
and- British Columbia Teachers' Federation
(Section 133 - Case No. 63367/12)

DATE: May 2, 2012

SENDER: LABOUR RELATIONS BOARD

OPERATOR SENDING: Susan Noble, Senior Executive Assistant to
Michael Fleming, Associate Chair

TELEPHONE NO: (604) 660-1329

INTENDED RECEIVER:

FAX NUMBER:

**To: Govt. of British Columbia, Attorney General
of British Columbia c/o Ministry of
Justice Legal Services Branch
Attention: Karen Horsman**

604.660.6797

**To: BCTF
Attention: Diane MacDonald**

604.871.2288

**To: Victory Square Law Office LLP
Attention: John D. Rogers, Q.C.**

604.684.8427

**To: BCPSEA
Attention: Jacquie Griffiths**

604.730.0787

NUMBER OF PAGES: 10 (including this page)

SPECIAL INSTRUCTIONS:

Decision BCLRB No. B92/2012 dated May 2, 2012.

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

BRITISH COLUMBIA
LABOUR RELATIONS BOARD

May 2, 2012

To Interested Parties

Dear Sirs/Mesdames:

Re: Attorney General of British Columbia and the Ministry of Justice
-and- British Columbia Teachers' Federation
(Section 133 - Case No. 63367/12)

Enclosed is a copy of the Board's decision (BCLRB No. B92/2012) rendered in connection with the above-noted matter with respect to the issue of jurisdiction.

Yours truly,

LABOUR RELATIONS BOARD



Susan Noble, Sr. Exec. Asst. to
Michael Fleming, Associate Chair, Adjudication

Enclosure(s)

Interested Parties:

The Government of the Province of British Columbia
Attorney General of British Columbia
c/o Ministry of Justice Legal Services Branch
1301 - 865 Hornby Street
Vancouver BC V6Z 1S4
ATTENTION: Karen Horsman

British Columbia Teachers' Federation
100 - 550 West 6th Avenue
Vancouver BC V5Z 4P2
ATTENTION: Diane MacDonald

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

cc: British Columbia Public School Employers' Association
400 - 1333 West Broadway
Vancouver BC V7H 4C1
ATTENTION: Jacquie Griffiths

BCLRB No. B92/2012

BRITISH COLUMBIA LABOUR RELATIONS BOARD**ATTORNEY GENERAL OF BRITISH COLUMBIA AND THE
MINISTRY OF JUSTICE****("AGBC")****-and-****BRITISH COLUMBIA TEACHERS' FEDERATION****(the "BCTF")****PANEL: Michael Fleming, Associate Chair,
Adjudication****APPEARANCES: Karen Horsman, for AGBC
John D. Rogers, Q.C., for BCTF****CASE NO.: 63367****DATE OF DECISION: May 2, 2012**

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 BCTF applies pursuant to Sections 2 and 6 of the *Education Improvement Act* (the "Act") seeking to have the Board "declare" that the Minister of Education's appointment of Dr. Charles Jago ("Jago") as mediator pursuant to Section 6(1) of the Act "be quashed".

2 BCTF subsequently amended its application to "seek an alternative order requesting a declaration". The alternative remedy sought is that the Board issue a declaration pursuant to section 2(2) of the Act and/or issue a declaratory opinion pursuant to Section 143 of the *Code* that:

- (a) the appointment of the mediator in this particular case raises a reasonable apprehension of bias on the part of the applicant the BCTF;
- (b) the appointment is contrary to the reasonable expectation of parties governed by the *Code* that an appointed mediator will be a qualified mediator; and
- (c) the appointment has the effect of discouraging the use of mediation as a dispute resolution mechanism.

3 AGBC raises a preliminary objection to BCTF's application on the basis that the Board lacks jurisdiction to provide the relief sought. The parties agreed that the jurisdictional issue should be dealt with as a preliminary matter. Submissions have now been provided by the parties and I find I am able to decide the jurisdictional issue without the need for a hearing.

II. BACKGROUND

4 Pursuant to a direction given by the Minister of Labour, Citizens' Services and Open Government on June 7, 2011 (the "Minister of Labour") under Section 72 of the *Code* that the Board designate essential services in education, the Board in *British Columbia Public School Employers' Association*, BCLRB No. B132/2011 provided an essential services order which set out the activities BCTF members need not perform during Phase 1 of BCTF's job action.

5 BCTF then engaged in a limited job action until a Board order dated February 28, 2012, which authorized BCTF to expand its strike, within certain parameters, beyond Phase 1.

6 On March 17, 2012, the Act was passed by the Legislature. The Act ended BCTF's strike and imposed a cooling off period and a statutory mediation process set out in Section 6 of the Act.

7 On March 28, 2012, the Minister of Education appointed Jago pursuant to Section 6(1) of the Act, which provides:

The Minister of Education must appoint a mediator to assist the parties in settling the terms and conditions of a new collective agreement in accordance with this section.

8 On April 2, 2012, BCTF wrote to Jago requesting that he withdraw as the mediator appointed under the Act. On April 3, 2012, Jago responded, indicating that he would continue with the appointment. BCTF filed its application to the Board for an order quashing Jago's appointment, or alternatively for certain declarations regarding his appointment, on April 6, 2012.

9 III. POSITIONS OF THE PARTIES

In its initial application, BCTF notes that Section 2(2) of the Act states the Board "has exclusive jurisdiction to decide a question arising under Division 2 or 3, including any question of a conflict or an inconsistency referred to in subsection (1)". It further notes that Section 6(1) is included in Division 3, and it submits that consequently it is clear that the Board has exclusive jurisdiction to decide its application.

10 In its preliminary objection, AGBC submits that the Board does not have jurisdiction under either the Code or the Act to grant the relief sought by the BCTF, that is, relief in the nature of *certiorari* quashing the Minister of Education's appointment of a mediator under statutory authority. It submits such relief is traditionally available by way of an application for judicial review. It submits that while the Board does exercise broad remedial jurisdiction with respect to matters assigned to it under the Code, review of the exercise of a Ministerial appointment power under statute is not one of those matters.

11 AGBC further submits the Board does not have jurisdiction under Section 143 of the Code to make the declarations sought by BCTF. It submits that if the declaratory relief sought is available (which it submits is doubtful given the limited nature of Jago's powers under the statute), it could only be sought from the British Columbia Supreme Court by way of an application for judicial review.

12 AGBC notes that, as a creature of statute, the Board has only those remedial powers that are expressly or impliedly conferred upon it by statute. The Board's remedial powers may be liberally construed, but ultimately any remedial jurisdiction must be grounded in the legislation. Unlike superior courts, the Board has no inherent jurisdiction.

13 AGBC submits that none of the provisions of the Act or the Code relied upon by BCTF gives the Board jurisdiction to grant the relief sought. It submits that Section 2 of

the Act does not assign any express remedial jurisdiction to the Board, and in particular does not purport to assign the Board jurisdiction to quash a decision of the Minister of Education under Section 6(1). With respect to the Board's remedial jurisdiction under the Code, AGBC notes that Section 133 provides the Board with jurisdiction to remedy breaches of the Code, a collective agreement or the regulations. However, BCTF does not allege any such breach in this case.

14 With respect to Section 136 of the Code, AGBC submits that the Board's exclusive jurisdiction to "hear and determine an application or complaint under this Code and to make an order permitted to be made" does not give it jurisdiction to review and quash Ministerial exercises of statutory powers merely because they are assigned in provisions of the Code. AGBC notes that there are a number of provisions in the Code which assign statutory powers to the Minister of Labour. For example, under Section 72, the Minister may direct the Board to designate essential services; under Section 74(3) the Minister may appoint a mediation officer during the course of collective bargaining; under Section 79(3) the Minister may appoint an industrial inquiry commission; and under Section 80 the Minister may establish industry advisory councils.

15 AGBC submits that the assignment of these powers to the Minister of Labour in the Code does not give the Board jurisdiction to review or quash the Minister's exercises of these statutory powers. It submits that, to the extent the point has been tested in the case law, the uniform procedure has been to challenge the Minister's exercise of powers under the Code by way of judicial review.

16 AGBC submits that, in this case, it is even less likely the Board has jurisdiction because BCTF is seeking review and quashing of a statutory power exercised not by the Minister of Labour but by the Minister of Education. It submits that, while courts give a high degree of deference to decisions of the Board on matters within its exclusive jurisdiction under the Code, a legal challenge to a Ministerial appointment under statute is traditionally within the core jurisdiction of the superior courts, and not the expertise (or jurisdiction) of the Board.

17 With respect to BCTF's reliance on the Board's power to issue declaratory opinions under Section 143 of the Code, AGBC submits that the Board's jurisdiction under Section 143 is only with respect to matters "arising under this Code". AGBC submits Section 143 cannot be relied on to give the Board jurisdiction to supervise the Minister of Education's exercise of statutory power under Section 6(1) of the Act because such supervisory jurisdiction lies with the courts, not the Board.

18 In its response to AGBC's jurisdictional objection, BCTF submits the issue of jurisdiction turns on the interpretation of Section 2 of the Act, which is headed "Application of *Labour Relations Code*". Section 2(1) states that the Code and the regulations made under it "apply in respect of a matter to which Division 2 or 3 applies", and Section 2(2) states that the Board has "exclusive jurisdiction to decide a question arising under Division 2 or 3". BCTF submits that the Minister of Education's appointment of the mediator under Section 6(1), which is part of Division 3, is therefore

a "matter to which Division 2 or 3 applies", and accordingly the Board has exclusive jurisdiction to decide any challenge to that appointment under Section 2(2).

19 In response to AGBC's argument that the courts, not the Board, have jurisdiction to decide its challenge to the Minister's appointment of Jago under Section 6(1) of the Act, BCTF submits the Board does have powers in the nature of *mandamus*, *certiorari*, and prohibition under Section 133 of the Code. It further submits that the Board does have, and has exercised, jurisdiction over statutory powers of decision exercised by a Minister of the Crown, noting that the Board has held that a Minister can contravene the unfair labour practice provisions of the Code: *ACTE and McGeer et al.*, BCLRB No. 81/77 ("*McGeer*").

20 BCTF further submits that the matter of mediation is a core feature of the comprehensive labour relations scheme under the Code and therefore a matter falling within the jurisdiction of the Board under the Code. It notes that the Court of Appeal has held that, in determining the Board's jurisdiction under the Code, "an appreciation of the legislative scheme is an essential starting point in the analysis": *Northstar Lumber v. United Steelworkers of America, Local No. 1-424*, 2009 BCCA 173 ("*Northstar*"), at para. 23.

21 Given the central importance of mediation to labour relations under the Code, BCTF submits the broad and unrestricted language of Section 2(2) of the Act regarding the Board's jurisdiction to decide "a question arising under Division 2 or 3" should be interpreted as including a question as to the appointment of the mediator by the Minister of Education under Section 6(1) of the Act.

22 BCTF submits the court cases relied on by AGBC to argue that jurisdiction to review the Minister's exercise of statutory power of appointment under Section 6(1) properly lies with the courts, not the Board, do not expressly address the issue of jurisdiction except in one case, and it submits even that case does not support AGBC's position.

23 With respect to the argument that the Board's jurisdiction under Section 133 is dependent on a finding of a breach of the Code, the regulations or a collective agreement, BCTF submits the Board has not interpreted that provision as restricted in that way, and has on occasion granted remedies without first finding a contravention of the Code. It submits in the alternative that the Board has jurisdiction to issue the declarations sought under Section 143 of the Code.

24 With respect to the argument that the Board does not have jurisdiction under the Code to review statutory exercises of discretion by the Minister of Labour, BCTF submits that the Board would have jurisdiction at first instance to decide any such challenges. The Board's decisions would then be subject to judicial review, much in the way that *Charter* challenges to Code provisions must first be raised at the Board before proceeding to judicial review: *BCTF v. British Columbia (Attorney General)*, 2003 BCSC 534 ("*BCTF*").

25 In its final reply, AGBC submits that it does not take the position that the Minister of Education's exercise of statutory power under Section 6(1) of the Act to appoint a mediator is immune from review. Rather, it submits that review of a ministerial appointment power under statute is within the core reviewing function of the superior courts. It submits that none of the cases relied on by BCTF support the proposition that the Board has jurisdiction to review and quash the exercise of statutory discretion by a Minister of the Crown. It emphasizes that it does not take the position that BCTF is without an avenue of review, but submits that, in seeking relief from the Board, BCTF has chosen to bring its challenge in the wrong forum.

IV. ANALYSIS AND DECISION

26 The issue in this case is whether the Board has jurisdiction under the Act and/or the Code to either quash the Minister of Education's appointment of Jago as the mediator under Section 6(1) of the Act, or to make the declarations sought by BCTF in respect to that appointment.

27 In asserting that the Board has jurisdiction to quash the appointment or make the declarations sought regarding the appointment, BCTF relies primarily on the language of Section 2 of the Act, which provides:

- (1) The Code and the regulations made under it apply in respect of a matter to which Division 2 or 3 applies, but if there is a conflict or an inconsistency between Division 2 or 3 and those enactments, Divisions 2 and 3 apply.
- (2) The Labour Relations Board has exclusive jurisdiction to decide a question arising under Division 2 or 3, including any question of a conflict or an inconsistency referred to in subsection (1).

28 BCTF submits that the Minister's exercise of statutory power to appoint a mediator under Section 6(1) of the Act is a "matter" within the meaning of Section 2(1), and that therefore any challenge to that exercise of statutory power must be a "question arising under Division 2 or 3" which the Board has been given exclusive jurisdiction to decide under Section 2(2). It submits that this is a proper interpretation of this provision given the central importance of mediation to the labour relations scheme under the Code. Given the importance of mediation, and the Board's expertise with respect to labour relations matters and concomitant broad jurisdiction under the Code, the legislature must have intended that BCTF's challenge to the Minister's appointment of Jago would fall to be decided by the Board, not the courts.

29 I accept that mediation is a very important aspect of the labour relations scheme under the Code. Having said that, I note that Jago was appointed as mediator not under the Code but by the Minister of Education under a particular statutory framework set out in Section 6 of the Act.

30 That framework includes extensive and highly specific terms of reference for the mediator set out in Section 6(2). These include that the term of the new collective agreement be July 2, 2011 to June 30, 2012 (Section 6(2)(a)); that the new agreement must not create new costs that would result in a net increase in the total annual cost of the collective agreement (Section 6(2)(b)); that the new agreement "enable high-quality teaching and learning" in a specified manner (Section 6(2)(c)); and other very specific terms of reference regarding the new collective agreement.

31 Section 6(4) provides that, on or before June 30, 2012, the mediator must advise the Minister of Education of matters that have been agreed on by the parties and make recommendations, consistent with the terms of reference referred to in subsection (2), on any outstanding issues that remain in dispute between the parties. Section 6(5) provides that a question as to whether the terms and conditions of the new collective agreement or recommendations of the mediator comply with subsection 2(b) must be determined by the chief executive officer of the Public Sector Employers' Council.

32 Thus, the statutory mediation process contemplated by Section 6 of the Act is distinct in a number of significant ways from the collective agreement mediation process under the Code.

33 In these circumstances, I am not persuaded that the legislature intended, by the language of Section 2 of the Act, to give the Board exclusive jurisdiction to hear and decide a challenge to the appointment of the mediator under Section 6(1) of the Act. The Board's expertise is with respect to the labour relations scheme under the Code, including mediation. Here, however, the legislature has clearly chosen to establish a statutory mediation process which differs in significant respects from mediation as it would occur under the Code. I find it is not clear the Board's expertise in labour relations, including mediation, as it would be conducted under the Code, is engaged by BCTF's challenge to the Minister of Education's appointment of Jago to fulfil the role of mediator as contemplated under Section 6.

34 I am further not persuaded the Board has a general jurisdiction to review ministerial exercises of statutory powers of appointment under either the Code or the Act. The Board undoubtedly has a broad power, as BCTF points out, to address allegations of unfair labour practices or other breaches of the Code, including against the provincial government and even Ministers. However, in my view, that jurisdiction is entirely distinct from jurisdiction to review a statutory exercise of power such as that of the Minister of Labour to appoint a mediation officer under Section 74 of the Code or an industrial inquiry commission under Section 79 of the Code.

35 BCTF has pointed to no examples of the Board reviewing or quashing ministerial exercises of statutory discretion of this nature, and I am not persuaded it has such authority, even on the broad wording of Sections 136 and 139 of the Code. Similarly, I am not persuaded the legislative intent of Section 2 of the Act was to give the Board jurisdiction to review or quash the Minister of Education's exercise of his statutory power of appointment under Section 6(1) of the Act.

36 For the reasons given, I am not persuaded the Board has been given jurisdiction by Section 2 of the Act to decide BCTF's challenge to the Minister of Education's appointment of Jago.

37 Accordingly, I find AGBC's preliminary jurisdictional objection succeeds, and BCTF's application is dismissed on the basis that the Board does not have jurisdiction to grant the relief sought.

LABOUR RELATIONS BOARD



MICHAEL FLEMING
ASSOCIATE CHAIR, ADJUDICATION