



No. L021662
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRITISH COLUMBIA TEACHERS' FEDERATION
AND DAVID CHUDNOVSKY, ON HIS OWN BEHALF,
AND ON BEHALF OF ALL MEMBERS OF THE BRITISH
COLUMBIA TEACHERS' FEDERATION

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF BRITISH COLUMBIA

DEFENDANT

NOTICE OF APPLICATION

Name(s) of applicants: British Columbia Teachers' Federation and David Chudnovsky, on his own behalf and on behalf of all members of the British Columbia Teachers' Federation (the "BCTF")

To: The Defendant, Her Majesty the Queen in Right of the Province of British Columbia (the "government")

TAKE NOTICE that an application will be made by the applicants to Madam Justice Griffin (seized) at the courthouse at 800 Smithe Street, Vancouver, British Columbia, set for four days, commencing on December 3, 2012 at 10:00 a.m., for the orders set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. A declaration that the Order of Madam Justice Griffin dated April 13, 2011 declaring section 18 and 15 of the *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3 (*PEFCA*) and section 5 of the *Education Services Collective Agreement Amendment Act, 2004*, S.B.C. 2004, c. 16 (the "*Amendment Act*") (collectively, the "Unconstitutional Legislation") unconstitutional and invalid be made effective the date of the passage of the legislation, on January 28, 2002 and April 22, 2004, respectively.

2. Alternatively, an order that the declaration of invalidity is effective such date as the Court deems appropriate.
3. An order that, as a result, the collective agreement terms and conditions unconstitutionally deleted from the collective agreement be considered part of the collective agreement after July 1, 2002, despite section 24 of the *Education Improvement Act*, S.B.C. 2012, c 3 ("Bill 22" or the "Act").
4. A declaration that the government failed to address the repercussions of the Decision, through the passage of Bill 22 or otherwise.
5. An order for damages for the loss suffered by the Plaintiff and its member teachers as a result of the elimination of the freely bargained collective agreement provisions.

Part 2: FACTUAL BASIS

1. On April 13, 2011, the Court issued a decision which held that various legislative provisions were constitutionally invalid (the "Decision"). The Court suspended the declaration of invalidity for a period of twelve months to allow the government time to address the repercussions of its decision.
2. On February 4, 2011, the BCTF had provided written notice to BCPSEA pursuant to section 46 of the *Labour Relations Code*, R.S.B.C. 1996, c 244 (the "Code") of its intent to commence collective bargaining on March 1, 2011.
3. At all times, teachers' collective bargaining was governed by the Code.
4. At the bargaining table, the BCTF presented a package of proposals which was developed as a result of input from its members throughout the province.
5. BCPSEA also presented proposals. BCPSEA's proposals, and bargaining, were required by government to be conducted in compliance with a Public Service Employer Council ("PSEC") document entitled "Employer's Guide to Mandate 2010" (the "Mandate").
6. The Mandate established that before it could engage in collective bargaining, BCPSEA was required to obtain approval for both its bargaining plan and collective bargaining proposals from government.
7. The Mandate prohibited BCPSEA from agreeing to any increase in total compensation paid to teachers unless that increase was offset by equivalent savings generated by changes to the collective agreement.

8. The Mandate also prohibited BCPSEA from bargaining any reduction in material management rights, which was defined as including the right to set staffing levels, scheduling, promotion, contracting out, or any other significant aspects of directing the workforce.
9. Before BCPSEA could make any changes to the bargaining plan, Cabinet had to approve those changes. In addition, BCPSEA was prohibited from making any offer of settlement to BCTF without having approval of that offer by Cabinet.
10. Following the Decision, BCTF sought to have BCPSEA negotiate the matters previously prohibited from collective bargaining by the Unconstitutional Legislation. BCPSEA took the position that it was not permitted to bargain such matters while the suspension of the declaration of invalidity was in effect.
11. However, both BCTF and BCPSEA included what were described as “place holder” proposals regarding these issues, in the expectation that government would act to repeal the unconstitutional legislation.
12. In May, 2011, government advised that it intended to meet with BCTF to enter into discussions regarding the repercussions of the Decision. Government advised that it intended to model the discussions after what it described as the successful resolution reached with the health sector unions following the decision of the Supreme Court of Canada in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391.
13. The settlement agreements in the health sector contained the following elements:
 - (a) the constitutionally invalid legislation was repealed;
 - (b) the right to negotiate language regarding contracting out was restored; and
 - (c) language was negotiated for the existing collective agreement, expanding the rights of employees with respect to contracting out.
14. The health sector settlement agreements also provided compensation for harm caused by the legislation. In the Facilities Bargaining Agreement, the government paid \$75 million in compensation, of which \$68 million was for payment to individuals impacted by the legislation.
15. In contrast, at no time did the government indicate to the BCTF that it was prepared to agree to repeal the Unconstitutional Legislation, restore negotiation rights prohibited by the Unconstitutional Legislation or compensate teachers harmed by the Unconstitutional Legislation.
16. Instead, government took the position that all that was required to address the repercussions of the Decision was to “consult” with the BCTF.
17. The BCTF disagreed with this position and applied to Court for directions as to the interpretation of the Decision. The Court dismissed this application on October 11, 2011.

18. In September 2011, government advised the BCTF that it intended to create a class organization fund which would be utilized to address what it described as "high priority challenges to student learning resulting from class organizations" and that any funds would be distributed to school boards which would utilize them after discussions with local union representatives.
19. In December 2011, government utilized monies from what it identified as the class organization fund to enter into a number of negotiated collective agreements with the Canadian Union of Public Employees and other unions representing support staff in schools.
20. Beginning on or around February 8, 2012, the government began a campaign of radio advertisements announcing the intended introduction of a "Learning Improvement Fund."
21. On February 21, 2012, the Minister of Finance, Kevin Falcon, introduced the government's 2012 Budget. In his introductory speech, Minister Falcon announced that the government would "establish a fund to deal directly with the issues of class composition".
22. On March 15, 2012, the government passed Bill 22, which became the *Act*. Government claimed that Bill 22 was its response to the Decision.
23. Section 8 of the *Act* purports to repeal the provisions of the *School Act* enacted by the constitutionally invalid section 8 of *PEFCA*, which resulted in the deletion of hundreds of freely negotiated provisions from the collective agreement. However, the language of the constitutionally invalid wording was immediately reinstated by section 8 of *Act*. This provision was commenced effective April 14, 2012.
24. The unconstitutional amendments to section 27 of the *School Act*, R.S.B.C. 1996, c 412, contained in section 27(3)(d) to (j) were also purportedly repealed but continued in identical terms under section 13 of the *Act*. This section commenced effective April 14, 2012.
25. These identical provisions continue in force in section 27(3)(d) to (j) of the *School Act* until, pursuant to section 13(7) of the *Act*, they are repealed effective June 30, 2013. That date was selected to ensure that no collective bargaining on these matters could be conducted during this round of teachers' collective bargaining or during the term of the collective agreement imposed by section 6(2)(a) of the *Act*.
26. Section 17 of the *Act* repeals the unconstitutional section 78.1 of the *School Act*, effective April 14, 2012.
27. Section 18 of the *Act* adds section 115.2 to the *School Act* which provides the Minister of Education (the "Minister") with the authority to provide grants "from the learning improvement fund to boards for the purpose of enabling the boards to address learning improvement issues." This section commenced effective April 14, 2012.

28. Section 21 of the *Act* provides the Minister with the authority to make regulations respecting the provision of grants including consultations a board must ensure are carried out before requesting a grant. This section commenced effective April 14, 2012.

29. On March 27, 2012, the Minister issued a regulation entitled the "Learning Improvement Fund Regulation" effective April 14, 2012 (*School Act*, Ministerial Order No. M077).

30. This regulation requires that a superintendent must consult with various bodies, including the local teachers union, prior to seeking a grant which may provide, at the discretion of the superintendent, for the allocation of funds as prescribed. This can include the provision of additional teaching staff, an increase in teaching time and services to students, and professional development training of teaching staff to address challenging learning conditions.

31. None of these matters were raised by BCPSEA with the BCTF in collective bargaining and, apart from its reference to the potential for a "class organization fund", none of these matters were raised by representatives of government when discussing the repercussions of the Decision.

32. Section 22 of the *Act* repeals section 168.01 of the *School Act* which is introduced by section 21 of the *Act*. That repeal is to commence effective July 1, 2012. Section 22 provides the Minister with the power to make regulations concerning compensation provided to teachers when class sizes exceed 30 students in certain circumstances.

33. On March 27, 2012 the Minister issued a regulation which purports to be authorized pursuant to section 168.01 (*School Act*, Ministerial Order No. M078). This regulation will become effective July 1, 2012.

34. The regulation provides for the potential for compensation for some teachers of some classes in excess of 30 students. This regulation, which provides for compensation for teachers for work performed, was not raised with the BCTF at the bargaining table or at any other time.

35. Section 9 of the *Act* purportedly repealed the constitutionally invalid section 5 of the *Amendment Act*, but continued this provision in virtually identical terms under section 24 of the *Act*.

Damages incurred by Teachers

36. One of the primary purposes identified by the Defendant for introducing the Unconstitutional Legislation was to reduce spending on teachers' wages and benefits.

37. On November 30, 2001, the Treasury Board prepared a confidential analysis of the projected impact of the Unconstitutional Legislation, which concluded that the legislation would result in an annualized savings of \$275 million largely as the result of the projected elimination of teaching positions.

Affidavit #2 of B. Porter, at para 48; Exhibit "KK"

38. On December 8, 2001, an internal draft document was produced by the Ministry of Education which estimated anticipated savings of some \$352 million over a three year period, to be achieved through the loss of some 5,569 teaching positions.

Affidavit #2 of B. Porter, at para 51; Exhibit "NN"

39. In regular classroom teacher positions, the anticipated reduction was 3,516 FTE (full time equivalent) positions or 16% of the BCTF membership in this category.

Affidavit #2 of B. Porter, at para 52; Exhibit "NN"

40. In non-enrolling teacher positions, the anticipated reduction was estimated at 2,053 FTE or 30% of the BCTF membership in this category.

Affidavit #2 of B. Porter, at para 53; Exhibit "NN"

41. In that same December 8, 2001 draft document, the Ministry of Education anticipated that additional savings of \$41 million over three years would be achieved as a result of "school boards taking advantage of the opportunity to increase class sizes and reduce non enrolling ratios."

Affidavit #2 of B. Porter, at para 54; Exhibit "NN"

42. The Defendant's projections for cost savings through the elimination of teaching positions proved to be largely accurate in the years following the introduction of the Unconstitutional Legislation.

43. Following the introduction of the unconstitutional legislation in 2002, there was a 7.7% decline in the number of full-time teaching positions over the next two school years. Special Education teachers on staff in the B.C. public system fell by 17.5% during that same period, while the number of ESL teachers employed in the public system declined by almost 20%.

Affidavit #1 of C. Hawkey, at paras 6-7; and Exhibit "A"

44. The number of teacher-librarians declined at an even sharper rate, with a 23.4% drop in full-time teacher-librarians employed in the public system across the province.

Affidavit #1 of C. Hawkey, at paras 8-9; Exhibits "A" and "B"

45. Between 2001 and 2005, over 2600 full-time teaching positions were eliminated in the B.C. public system, representing a nearly 8% reduction in teaching positions province-wide during that period. This significantly exceeds the 3.2% drop in student numbers during that same period.

Affidavit #1 of C. Hawkey, at para 11; and Exhibit "D"

46. As a result of the Unconstitutional Legislation, teachers in B.C. have also been required to work longer hours in a more demanding workplace, without a corresponding increase in compensation. In the two years following the passage of the Unconstitutional Legislation, student-teacher ratios increased by 5.9%.

Part 3: LEGAL BASIS

1. In the decision of April 13, 2011, this Honourable Court declared that:
 - (a) Sections 8 and 15 of the *Public Education and Flexibility and Choice Act, supra* ("PEFCA") and section 5 of the *Education Services Collective Agreement Amendment Act, supra* ("ESCAA") were invalid;
 - (b) The declaration of invalidity was suspended for a period of 12 months to allow the government time to address the repercussions of the decision; and
 - (c) The right of the Plaintiffs to argue any additional remedies was reserved.
2. The consequence of a postponement or suspension of the operation of a declaration of invalidity is that the statute remains in force until the expiry of the period of postponement.
3. If the legislative body does not take corrective action during the period of suspension, the declaration of invalidity will operate with the normal retroactive effect.
4. The suspension of the declaration of invalidity declared by this Court expired at 12 midnight on April 12, 2012. As a consequence of the government's failure to act on the unconstitutional legislation, the declaration of invalidity is effective the date the invalid legislation was passed.
5. The consequence is that the collective agreement language eliminated by the invalid legislation is restored and effective January 28, 2002. As a consequence, the Plaintiff and its members are entitled to damages pursuant to section 24 of the *Constitution Act* at least in the same magnitude as agreed to by the government as compensation for the breach of the *Charter* in the healthcare sector.
6. Alternatively, the declaration of invalidity is effective June 8, 2007, which is the date the Supreme Court of Canada issued its decision in *Health Services and Support-Facilities Subsector*, 2007 SCC 27, [2007] 2 S.C.R. 391.
7. It is also submitted that the government did not address the repercussions of the Decision. The government responded to the suspension of invalidity not by correcting or amending the invalid legislation, but continuing it with precisely the same language as was found to be constitutionally invalid.
8. The government's response to the finding of unconstitutionality was to further breach the section 2(d) rights of teachers. In addition to continuing the legislation in force which had been declared invalid, government extended the prohibition on the right of teachers to engage in collective bargaining.

9. The government failed to address the repercussions of the Decision, through the passage of Bill 22 or otherwise, and, as a result, the purported continuation of the invalid legislation perpetuates the constitutional invalidity.
10. The government has provided no compensation for damages incurred by teachers flowing from the passage of the unconstitutional provisions of *PEFCA* and the *Amendment Act*.
11. The government also established terms and conditions of employment of teachers without entering into collective bargaining with BCTF on these terms and conditions.
12. Lastly, the government also unconstitutionally purported, pursuant to section 24 of the *Act*, to restrict the power of any court, including this Court, to provide a constitutional remedy.
13. The Plaintiffs/Applicants will rely upon:
 - (a) the *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3;
 - (b) the *Education Services Collective Agreement Amendment Act, 2004*, S.B.C. 2004, c. 16;
 - (c) the *Education Improvement Act*, S.B.C. 2012, c. 3;
 - (d) the *Labour Relations Code*, R.S.B.C. 1996, c. 244;
 - (e) the *School Act*, R.S.B.C. 1996, c. 412 and its Regulations and Ministerial Orders;
 - (f) the *Supreme Court Civil Rules*, B.C. Reg. 168/2009;
 - (g) the inherent jurisdiction of the Court.
14. The Plaintiffs/Applicants will also rely upon common law authorities, including, but not limited to the following:
 - (a) *Canada v. Hislop*, 2007 SCC 10; [2007] 1 S.C.R. 429;
 - (b) *Doucet-Boudreau v. Nova Scotia*, 2003 SCC 62, [2003] 3 S.C.R. 3;
 - (c) *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391;
 - (d) *Miron v. Trudel*, [1995] 2 S.C.R. 418;
 - (e) *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #2 of Brian Porter, sworn May 5, 2010
2. Affidavit #1 of Colleen Hawkey, sworn February 5, 2010
3. Affidavit #1 of John Wadge, sworn June 15, 2012
4. Debates of the Legislative Assembly (*Hansard*)

The applicant(s) estimate(s) that the application will take: Four days

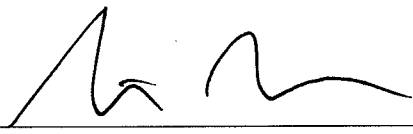
☐ This matter is within the jurisdiction of the master.

☒ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: June 15, 2012



Signature of Steven Rogers
Solicitor for the Applicants

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs of Part 1 of this notice of application

☐ with the following variations and additional terms:

Date: _____
[dd/mm/yyyy] Signature of ☐ Judge ☐ Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

☒ _____ (not listed)