

Form 39.08

2017

Court Administration

OCT 31 2017

Halifax, N.S.

No. 4 6 9 8 6 9

Supreme Court of Nova Scotia

Between:

Nova Scotia Teachers Union

Applicant

and

Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of
Nova Scotia

Respondent

AFFIDAVIT OF COUNSEL

I, **Gail L. Gatchalian**, of Halifax Regional Municipality, in the Province of Nova Scotia, make oath and say as follows:

1. I am counsel for the Applicant, the Nova Scotia Teachers Union, and have personal knowledge of the matters deposed to in this Affidavit.
2. I make this Affidavit to comply with Civil Procedure Rule 5.07(4), requiring a motion for directions to be supported by an affidavit.
3. The Applicant is applying to the court, in part, for a declaration that the *Teachers' Professional Agreement and Classroom Improvements (2017) Act*, S.N.S. 2017, c. 1 ("Bill 75"), and in particular ss.2, 3, 10(3), 13, 14, 15, 16 and Schedule A of the Act, violate the right to freedom of association guaranteed by s.2(d) of the *Canadian Charter of Rights and Freedoms* ("Charter"), and the right to freedom of expression guaranteed by s.2(b) of the Charter, and that the violations cannot be justified under s.1 of the Charter.

Notice

4. The Applicant provided notice to the Respondent, Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia, in accordance with s.18 of the *Proceedings Against the Crown Act*, R.S.N.S., c. 360, on May 17, 2017 and subsequently provided an amended notice to the Respondent on July 31, 2017. The amended Notice of Intended Action is attached hereto as Exhibit "A".

5. The Applicant is not aware of any other persons who are not parties but who may have an interest in the matters raised by the Application.

Witnesses

6. The Applicant intends to rely on two expert reports and seven affidavits.
7. The Applicant intends to file an expert report of Patrick Macklem, from the University of Toronto Faculty of Law. The Applicant expects that Professor Macklem will provide expert evidence on the significance of international and regional labour law and human rights law on the interpretation of s.2(d) of the *Charter*, the scope and content of the right to bargain collectively and the right to strike in international law, and whether Bill 75 violates freedom of association guaranteed by international and regional labour law and human rights law.
8. The Applicant intends to file an expert report of Robert Paul Hebdon of McGill University Faculty of Management. The Applicant expects that Professor Hebdon will provide expert evidence on free, fair, meaningful and good faith collective bargaining; the impact of government action and legislation, including the imposition of a collective agreement and removal of the right to strike, on collective bargaining; the impact of the Respondent's actions and Bill 75 on collective bargaining; and the significance of the lack in Bill 75 of any alternative method to resolve the matters in dispute.
9. The Applicant intends to file affidavits of Jack MacLeod (Executive Staff Officer of Nova Scotia Teachers Union) and Wallace Fiander (Executive Staff Officer of Nova Scotia Teachers Union, former Provincial Executive member and former First Vice-President of the Nova Scotia Teachers Union). The Applicant expects that they will provide evidence on the subject of the collective bargaining context and history between the parties, including the round of negotiations resulting in the proclamation of Bill 75, and the effect of the actions of the Respondent and the Employer on the collective bargaining process, right to strike and on the expressive activities associated with strike action.
10. The Applicant intends to file affidavits of Tammy Cox-Jardine, Tammy Landry and Rollie Hannem, three teachers who are members of the Applicant, and expects that they will provide evidence on the subject of the effect of the actions of the Respondent and the Employer on the collective bargaining process, right to strike and on the expressive activities associated with strike action.
11. The Applicant does not anticipate filing additional affidavits or expert reports unless the affidavits filed by the Respondent requires Reply Affidavits.

Disclosure

12. The Applicant has not disclosed documents and electronic information to the Respondent. The Applicant will take all reasonable steps to become knowledgeable of what relevant documents or electronic information exist and are in the control of the Applicant, and to preserve the documents and electronic information. The Applicant will use all reasonable efforts to complete full disclosure within sixty days after the day pleadings close, unless the Judge hearing the motion for directions orders otherwise.

Cross-Examination

13. The Applicant anticipates that the Respondent may wish to cross-examine the Applicant's witnesses. The Applicant anticipates that it may wish to cross-examine affiants tendered by the Respondent.

Hearing

14. The Applicant does not anticipate the Application will involve a series of hearings.

15. The Application does not concern events that are unfolding.

16. The Application does concern alleged rights that could be eroded over time. The imposition of Bill 75 has the effect of eroding the freedom of expression and freedom of association rights of teachers, protected under ss.2(b) and 2(d) of the *Charter*.

17. The Applicant is not aware of other information, in addition to what is stated above, that could significantly affect the estimate of time needed to prepare for the hearing and the length of the hearing itself.

Sworn to before me)
on the 31st day of October, 2017)
at Halifax, Nova Scotia)
)
)
)
)
)
)



BALRAJ KAUR DOSANJH
A Barrister of the Supreme
Court of Nova Scotia



Gail L. Gatchalian

2017
This is Exhibit "A" No. " referred to in
the Affidavit of Gail L. Gatchalian
sworn before me this
day of October 31st 2017.

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF: An Intended Action

BETWEEN:

Nova Scotia Teachers Union

("Intended Plaintiff/Applicant")

-and-

The Attorney General of Nova Scotia representing Her Majesty the Queen, in right of the
Province of Nova Scotia

("Intended Defendant/Respondent")

AND IN THE MATTER OF: Notice pursuant to Section 18 of the *Proceedings Against the
Crown Act*, RSNS 1989, c. 360.

NOTICE OF INTENDED ACTION

To: Mr. Edward A. Gores, Q.C.
Nova Scotia Department of Justice
Legal Services, 8th Floor
1690 Hollis Street
PO Box 7
Halifax, Nova Scotia B3J 2L6

Take notice that the Intended Plaintiff, the Nova Scotia Teachers Union, intends to begin an
Application in Court in the Supreme Court of Nova Scotia against the Attorney General of Nova
Scotia representing Her Majesty in right of the Province of Nova Scotia.

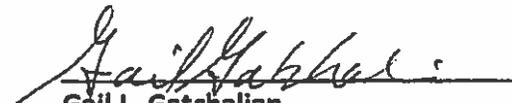
The Intended Plaintiff/Applicant is represented by:

Gail L. Gatchalian
Pink Larkin
1463 South Park Street, Suite 201
PO Box 36036
Halifax, NS B3J 3S9

The cause of action is set out in the attached draft Notice of Application in Court, including a
draft Affidavit of Counsel in support of the Motion for Directions, attached as Appendix A.

BALRAJ KAUR DOSANJH
A Barrister of the Supreme
Court of Nova Scotia

Signature
Signed July 31, 2017


Gail L. Gatchalian
Counsel for the Applicant,
Nova Scotia Teachers Union

APPENDIX "A"

Form 5.07

2017

No.

Supreme Court of Nova Scotia

Between:

Nova Scotia Teachers Union

Applicant

and

**Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of
Nova Scotia**

Respondent

Notice of Application in Court

Under Rule 5.07 of the Civil Procedure Rules, and ss. 2(b), 2(d) and 24 of the *Canadian Charter of Rights and Freedoms*, and s.52 of the *Constitution Act, 1982*

To: The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia
c/o Edward A. Gores, Q.C.
Department of Justice (NS)
1690 Hollis Street
PO Box 7
Halifax, Nova Scotia B3J 2L6
Tel: (902) 424-4030

The Applicant requests an order against you

The Applicant is applying to the court for:

1. A declaration that the *Teachers' Professional Agreement and Classroom Improvements (2017) Act*, S.N.S. 2017, c.1 ("Act" or "Bill 75"), and in particular ss.2, 3, 10(3), 13, 14, 15, 16 and Schedule A of the Act ("challenged provisions"), violate the right to freedom of association guaranteed by s.2(d) of the *Canadian Charter of Rights and Freedoms* (the "Charter") and that the violation cannot be justified under s.1 of the Charter;

2. A declaration that the *Act*, and in particular the challenged provisions, violate the right to freedom of expression guaranteed by s.2(b) of the *Charter*, and that the violation cannot be justified under s.1 of the *Charter*;
3. A declaration that the *Act* is unconstitutional and of no force or effect;
4. Such further and other relief under s.24 of the *Charter*, and s. 52 of the *Constitution Act* as counsel may request and that this Honourable Court may permit;
5. The Applicant's costs of this Application; and
6. Such further and other relief as counsel may request and that this Honourable Court may permit.

The Applicant started this Application by filing this notice on the date certified by the prothonotary.

Grounds for the order

The Applicant is applying for the order on the following grounds:

SEE APPENDIX "A": Grounds for the Order

Witnesses for Applicant

The Applicant expects to file affidavits from the following witnesses, dealing with the following subjects:

Name of Witness	Subject
Professor Patrick Macklem, University of Toronto Faculty of Law	Expert evidence on the significance of international and regional labour law and human rights law on the interpretation of s.2(d) of the <i>Charter</i> , the scope and content of the right to bargain collectively and the right to strike in international law, and whether Bill 75 violates freedom of association guaranteed by international and regional labour law and human rights law.
Professor Robert Paul Hebdon, McGill University Faculty of Management	Expert evidence on free, fair, meaningful and good faith collective bargaining; the impact of government action and legislation, including the imposition of a collective agreement and removal of the right to strike, on collective bargaining; the impact of Respondent's actions and Bill 75 on collective bargaining; and the significance of the lack in Bill 75 of any alternative method to resolve the matters in dispute.
Jack MacLeod, Executive Staff Officer, Nova Scotia Teachers Union	The collective bargaining context and history between the parties, including the round of negotiations resulting in the proclamation of Bill 75 and the effect of the actions of the Respondent and the Employer on the collective bargaining process and right to strike.

Wallace Fiander, member of the Nova Scotia Teachers Union, Provincial Executive member and First Vice- President of the Nova Scotia Teachers Union	The collective bargaining context and history between the parties, including the round of negotiations resulting in the proclamation of Bill 75 and the effect of the actions of the Respondent and the Employer on the collective bargaining process and right to strike.
Joan Ling, Executive Director, Nova Scotia Teachers Union	The collective bargaining context and history between the parties, including the round of negotiations resulting in the proclamation of Bill 75 and the effect of the actions of the Respondent and the Employer on the collective bargaining process and right to strike.
Two or Three Teacher members of the Nova Scotia Teachers Union	The effect of the actions of the Respondent and the Employer on the collective bargaining process and teachers' right to strike.

Motion for directions and date

At _____ a.m./p.m. on _____, 2017, the Applicant will appear before a judge at the Law Courts, 1815 Upper Water Street, Halifax, Nova Scotia to make a motion for an order giving directions and appointing a time, date, and place for the hearing. The judge may provide directions in your absence, if you or your counsel fail to attend.

Affidavit on motion for direction

The Applicant files the affidavit of Gail L. Gatchalian, sworn on _____, 2017, as evidence on the motion for directions. A copy of the affidavit is delivered to you with this notice.

You may participate

You may file with the court a notice of contest, and any affidavit for the motion for directions, no more than fifteen days after this notice is delivered to you or you are otherwise notified of the Application. Filing the notice of contest entitles you to notice of further steps in the Application.

Possible final order against you

The court may grant a final order on the Application without further notice to you if you fail to file a notice of contest, or if you or your counsel fail to appear at the time, date, and place for the motion for directions.

Filing and delivering documents

Any documents you file with the court must be filed at the office of the prothonotary 1815 Upper Water Street, Halifax, Nova Scotia (telephone: 902-424-8962).

When you file a document you must immediately deliver a copy of it to the Applicant and each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact information

The Applicant designates the following address:

Gail L. Gatchalian
Pink Larkin
1463 South Park Street
Suite 201
Halifax, NS B3J 3S9
Tel: (902) 423-7777
Fax: (902) 423-9588

Documents delivered to this address are considered received by the Applicant on delivery. Further contact information is available from the prothonotary.

Signature

Signed _____, 2017

Gail L. Gatchalian
Counsel for the Applicant,
Nova Scotia Teachers Union

Prothonotary's certificate

I certify that this notice of Application was filed with the court on _____, 2017.

Prothonotary

Appendix "A"
Grounds for the Order

A. Factual Background

1. The Applicant, the Nova Scotia Teachers Union ("Union"), a body corporate under the *Teaching Profession Act*, R.S.N.S. 1989, c.462, is the exclusive bargaining agent for approximately 9,300 teachers employed by school boards in Nova Scotia ("teachers"), including principals, vice-principals and other school board administrators, pursuant to ss.2(a), 2(u), 12 and 13(1) of the *Teachers' Collective Bargaining Act*, R.S.N.S. 1989, c.460.
2. "Teacher" is defined in s.2(u) of the *Teachers' Collective Bargaining Act* as a person holding a teacher's certificate or a vocational teacher's certificate or a vocational teacher's permit pursuant to the *Education Act*, S.N.S. 1995-1996, c.1, but not including a person in charge of a school system appointed by a school board.
3. The Minister of Education and Early Childhood Development of the Province of Nova Scotia ("Minister" or "Employer") is the employer of teachers in respect of the terms and conditions of work set out in ss.2(h)(i), 13(1) and 13(2) of the *Teachers' Collective Bargaining Act*, including matters of central importance to teachers such as: salary; allowances for supervisory personnel such as principals, vice-principals and other school board administrators; service awards; the length of the school day and the definition of the school year; and other subjects affecting the working conditions of teachers.
4. On May 14, 2013, the Union and the Minister entered into a collective agreement governing the terms and conditions of work of teachers, called the Teachers' Provincial Agreement, with a term from August 1, 2012 to July 31, 2015 ("Collective Agreement").
5. On January 29, 2015, the Minister released a document entitled "Nova Scotia's Action Plan for Education 2015 - The 3 Rs: Renew, Refocus, Rebuild," in which she set out on page 17 the government's intention to amend the following long-standing collective agreement rights that are of central importance to teachers ("Action Plan Roll-Backs"):

- (a) The definition of the school year, as well as the scheduling of teacher professional development, protected by Article 25 of the Collective Agreement.
- (b) The allocation of professional development funding, protected by Article 60 of the Collective Agreement.
- (c) Teacher performance management, protected by Article 45 of the Collective Agreement.
- (d) Requirements for teacher certification, protected by Articles 15 and 16 of the Collective Agreement.
- (e) The inclusion of principals and other administrators in the bargaining unit, protected by Articles 1, 2, and 44 of the Collective Agreement.

6. In order for the Minister to accomplish her stated intention to remove principals and school board administrators from the bargaining unit, the government would have to amend both the Collective Agreement and the *Teachers' Collective Bargaining Act*.

7. On June 18, 2015, the Union gave the Minister notice to bargain a new collective agreement, pursuant to s.18 of the *Teachers' Collective Bargaining Act*.

8. The Minister, by committing to pursue the Action Plan Roll-Backs, failed to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), bargained in bad faith and substantially interfered with the ensuing collective bargaining process.

9. On September 29, 2015, the Union and the Minister exchanged bargaining proposals ("Asking Packages").

10. The Minister's Asking Package included the following proposals:

(a) roll-backs to longstanding collective agreement provisions of central importance to teachers, including the Action Plan Roll-Backs;

(b) a five-year collective agreement with the following wage freezes and subsequent limited increases:

0% effective August 1, 2015

0% effective August 1, 2016

0% effective August 1, 2017

1% effective August 1, 2018

1% effective August 1, 2019; and

(c) cessation of service award accrual as of July 31, 2015 and payment of the service award at retirement to be based on the teacher's salary as at July 31, 2015, thereby significantly amending the service award provisions for current teachers and nullifying the service award provisions for new teachers.

11. In November of 2015, the government indicated to the Union its willingness to forego its desired roll-backs to the Collective Agreement, including the Action Plan Roll-Backs, if the Union would agree to the following fiscal parameters ("Government's Fiscal Parameters"):

(a) a four-year collective agreement with the following wage freezes and subsequent limited increases:

0% effective August 1, 2015,

0% effective August 1, 2016,

1% effective August 1, 2017,

1.5% percent effective August 1, 2018,

0.5% on the last day of the fourth year (July 31, 2019); and

(b) cessation of service award accrual as of July 31, 2015, with payment of the service award on retirement based on the teacher's salary at retirement.

12. The government informed the Union that if the Union did not agree to the Government's Fiscal Parameters by November 12, 2015, the government intended to introduce legislation that same day to impose a collective agreement on teachers that would impose its original wage and service award proposal, as well as roll-backs to collective agreement language, including the Action Plan Roll-Backs. By threatening to legislate unfavourable collective agreement provisions, the government failed to respect a process of collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), bargained in bad faith and substantially interfered with the collective bargaining process.

13. In order to avoid the imposition by legislation of a collective agreement with less favourable wage and service award provisions and with significant negative repercussions for teachers on matters of central importance to teachers, the bargaining committee of the Union entered into a tentative collective agreement with the Minister on November 12, 2015 ("Tentative Agreement 1") that included the Government's Fiscal Parameters. For the same reasons, the Provincial Executive, the governing body of the Union, recommended that teachers vote in favour of the tentative agreement.

14. After the announcement of Tentative Agreement 1, but before teachers voted on the tentative agreement, the Minister publicly announced her intention to pursue the Action Plan Roll-Backs despite the fact that she had not achieved them in the tentative agreement. The Minister thereby failed to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), bargained in bad faith and substantially interfered with the collective bargaining process.

15. At the same time, the Premier of Nova Scotia publicly suggested that the government had not drafted legislation and that the government did not intend to legislate collective agreement provisions for teachers. The Premier thereby failed to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), acted in bad faith and substantially interfered with the collective bargaining process.

16. On December 1, 2015, a majority of teachers voted to reject Tentative Agreement 1. Ninety-four percent of teachers voted. Of those who voted, 61% rejected the tentative agreement.

17. On December 14, 2015, after teachers voted to reject Tentative Agreement 1, the government introduced Bill 148, *The Public Services Sustainability (2015) Act*, which received third reading and royal assent on December 18, 2015, but which has not, to date, been proclaimed into force.

18. The threat of Bill 148 hung over the rest of the collective bargaining process between the Union and the Minister, a further instance of the failure of the government and the Employer to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), bargaining in bad faith and substantially interfering with the collective bargaining process.

19. Bill 148, if it had been proclaimed in respect of teachers, would have limited compensation increases to those in Tentative Agreement 1, and would have ceased the accrual of service awards for teachers effective March 31, 2015, with payment of service award on retirement based on the teacher's salary as at March 31, 2015.

20. The parties resumed negotiations; however, the Minister would not discuss amendments to the Government's Fiscal Parameters, thereby failing to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), bargaining in bad faith and substantially interfering with the collective bargaining process.

21. The Minister of Labour and Advanced Education, at the request of the Employer, appointed a Conciliation Officer on June 2, 2016, pursuant to s.23 of the *Teachers' Collective Bargaining Act*.

22. The Union bargaining committee, during conciliation and under the threat of Bill 148, reached a second tentative collective agreement with the Minister on September 6, 2016 ("Tentative Agreement 2"). The voting members of the Union bargaining committee were not in favour of Tentative Agreement 2, but wanted the Provincial Executive to make the decision whether to recommend the agreement to the members. The Provincial Executive members knew and were reminded of the likelihood that Bill 148 would be proclaimed to impose the government's wage pattern and service award provisions on teachers if the tentative agreement were rejected. The Provincial Executive, under the threat of Bill 148,

agreed by a margin of one vote to recommend that members vote in favour of the tentative agreement. There was no change to the Government's Fiscal Parameters in Tentative Agreement 2.

23. On October 4, 2016, a majority of teachers voted to reject Tentative Agreement 2. Ninety-four percent of teachers voted. Of those who voted, 70% voted to reject the tentative agreement.

24. On October 18, 2016, the Conciliation Officer delivered his report pursuant to s.24 of the *Teachers' Collective Bargaining Act*.

25. On October 25, 2016, teachers voted to authorize the Union to conduct a strike, pursuant to s.34 of the *Teachers' Collective Bargaining Act*. More than 100% of teachers voted. Substitute teachers working on the day of the vote were eligible to vote, bringing the percentage of union members who voted to over 100% of the membership. Of those who voted, 96% voted in favour of a strike.

26. After the strike vote, the Premier and the Minister of Education failed to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), acted in bad faith and substantially interfered with the collective bargaining process by publicly expressing anti-union views, disparaging the Union and its ability to represent its members, and appealing to individual teachers, thereby bypassing the Union. The comments included but were not limited to statements indicating that the Union did not speak for teachers, that the Union did not effectively represent teachers in negotiations, that the Union suppressed the voice of teachers, and that the government and the Minister of Education therefore wished to speak directly to teachers about their working conditions. These comments were calculated to damage or had the effect of damaging the Union in the eyes of its members and interfered with the Union's representation of its members.

27. On October 31, 2016, the Union requested that the Minister of Labour and Advanced Education appoint a conciliation board pursuant to s.25 of the *Teachers' Collective Bargaining Act*.

28. On October 31, 2016, the Minister of Education and Early Childhood Development notified the Union that the Employer would agree to the appointment of a conciliation board on the condition that wage increases would be set in accordance with the government's mandate, that service award accrual

would cease as negotiated in Tentative Agreement 2, and that no other benefit issues could be referred to the conciliation board. By placing such conditions on the appointment of a conciliation board, the Minister failed to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), bargained in bad faith and substantially interfered with the collective bargaining process.

29. The Union did not agree to the conditions imposed by the Employer and therefore, a conciliation board was not appointed.

30. On November 28, 2016, the Premier unilaterally released to the public a list of what the government characterized as the Union's demands in bargaining, along with the government's estimated cost of those demands, which the Premier characterized as unaffordable. The information contained inaccuracies and was intended to place the Union in a negative light. This conduct failed to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), constituted bargaining in bad faith and substantial interference with the collective bargaining process.

31. On November 28, 2016, the Union notified the Minister of Labour and Advanced Education that teachers would be exercising their right to strike and that they would commence a strike on December 5, 2016, pursuant to s.34 of the *Teachers' Collective Bargaining Act*.

32. Pursuant to the strike directives issued by the Union, commencing on December 5, 2016, teachers were to attend work and instruct students, but to engage in a partial withdrawal of services. For example, during the strike, teachers were to refrain from:

- (a) attending any meetings;
- (b) arriving at school earlier than 20 minutes before instructional time began or leaving later than 20 minutes after instructional time ended;
- (c) communicating on school matters except during the instructional day;
- (d) administering Department of Education and Early Childhood Development or school board mandated assessments;
- (e) planning, participating in, supervising or facilitating extracurricular activities;

- (f) planning, organizing, or participating in field trips; or
- (g) accepting or supervising student teachers.

33. The Union's strike directives directed teachers to continue to focus exclusively on teaching students and keeping students safe, and directed school-based administrators to ensure the health and safety of the school community. School-based administrators were permitted to provide temporary supervision of students if there was a health and safety concern for students.

34. The purpose of members engaging in this form of strike action was to bring pressure to bear on the government to engage in free and fair collective bargaining, including on the issues of working conditions, wages and service award, without the threat of legislation, while ensuring that the Union maintained the support of teachers, parents and students for the teachers' demands. The ability to engage in a partial withdrawal of services, whereby students continued to receive instruction, was particularly important to teachers, given the commitment of teachers to the cause of public education in the Province.

35. The threat of strike action did in fact bring pressure to bear on the government.

36. On Saturday, December 3, 2016, the Minister publicly announced that schools would be closed to students on Monday, December 5, 2016 ("Student Lock-Out"), and that the government would introduce legislation on December 5, 2016 to impose a collective agreement on teachers and to end teachers' strike action. The Minister falsely stated that the planned strike action would place student safety at risk, and that the Union refused to amend its strike directives to provide for student safety, thereby justifying the imposition of a collective agreement and the elimination of teachers' right to strike. The Minister failed to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), bargained in bad faith and substantially interfered with the collective bargaining process by imposing the Student Lock-Out, threatening to legislate a collective agreement and end teachers' strike action, and falsely asserting that the strike action would place student safety at risk.

37. On December 5, 2016, teachers attended work and commenced strike action, but no students attended school.

38. The government drafted legislation that would have imposed Tentative Agreement 2 on teachers and ended teachers' strike action. The government's Student Lock-Out and its intention to impose a collective agreement on teachers received a great deal of negative publicity. The government opened and then adjourned the legislature on December 5, 2016, without introducing the draft legislation.

39. Students were permitted to attend school on Tuesday, December 6, 2016, and teachers continued their strike action. There was no change in the planned strike activity between the Union's notice of strike on November 28, 2016 and its strike activity of December 6, 2016. Teachers' strike activity did not place student safety at risk.

40. The parties resumed negotiations. The threat of legislation, by the proclamation of Bill 148 or the imposition of legislation such as the legislation the government intended to introduce on December 5, 2015, continued to hang over negotiations, failed to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), constituted bad faith and substantial interference with collective bargaining.

41. During the resumed negotiations, the Union informed the Employer repeatedly that teachers were unlikely to ratify a collective agreement that did not preserve service awards. The Employer refused to discuss any amendments to its position on service awards. The Employer thereby failed to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), bargained in bad faith and substantially interfered with the collective bargaining process.

42. On January 20, 2017, the bargaining committee of the Union, and then the Provincial Executive of the Union, concluded a third tentative agreement with the Minister (Tentative Agreement 3), under the continued threat of legislation, which provided for the following:

(a) an amendment to the timing of the wage increases as follows:

0% effective August 1, 2015

0% effective August 1, 2016

2% effective April 1, 2017

1% effective April 1, 2018;

(b) a new article granting each teacher one paid day of personal leave in the current year of the collective agreement, and two paid days of personal leave per year in each subsequent year of the collective agreement, as compensation for cessation of the service award;

(c) a Partnership on Systemic Working Conditions:

- (i) to make recommendations to address systemic demands on teachers' time that may limit teachers' ability to facilitate student learning and success;
- (ii) to consist of a maximum of 3 representatives of the Union, a maximum of 3 representatives of the Department of Education and Early Childhood Development, and a maximum of 1 representative of each school board;
- (iii) to be co-chaired by one representative of the Department and one representative of the Union;
- (iv) in the absence of consensus, to allow recommendations to be made with the agreement of both Co-Chairs; and
- (v) in the event of disagreement between the Co-Chairs, to allow either Co-Chair to request that the dispute be forwarded to arbitration.

43. Teachers' strike action was suspended as a condition of the Employer's agreement to Tentative Agreement 3; however, that strike action recommenced on January 30, 2016 as a result of public statements of the Premier of Nova Scotia, in which he falsely stated that the government had not agreed to provide teachers with paid days of personal leave in the tentative agreement. The Premier's misrepresentation of what had been agreed to in Tentative Agreement 3 failed to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), bargained in bad faith and substantially interfered with the collective bargaining process.

44. On January 30, 2017, a group of Nova Scotia universities applied to the Nova Scotia Supreme Court for an injunction to force teachers to accept student teachers into their classrooms pursuant to s.31 of the *Education Act*. The injunction would have infringed teachers' right to strike. The application was adjourned at the request of the universities and was never recommenced.

45. On February 8, 2017, a majority of teachers voted to reject Tentative Agreement 3. Again, more than 100% of teachers voted. Of those who voted, 78.5% voted to reject the tentative agreement.

I. **Bill 75: The *Teachers' Professional Agreement and Classroom Improvements (2017) Act***

46. On February 14, 2017, the government introduced the *Teachers' Professional Agreement and Classroom Improvements (2017) Act* (Bill 75).

47. Teachers engaged in a one-day Province-wide full withdrawal of services on February 17, 2017, the first in the history of the Union, to protest the government's intention to pass Bill 75. Teachers resumed their partial withdrawal of services on February 20, 2017.

48. Throughout the debate in the legislature on Bill 75 and after the passage of Bill 75, the government, including the Premier and the Minister of Education, publicly expressed anti-union views, disparaged the Union and its ability to represent its members, and appealed to individual teachers, thereby bypassing the Union. The comments included but were not limited to statements indicating that the Union did not speak for teachers, that the Union did not effectively represent teachers in negotiations, that the Union suppressed the voice of teachers, and that the government and the Minister of Education therefore wished to speak directly to teachers about their working conditions between the Union and teachers. These comments were calculated to damage or had the effect of damaging the Union in the eyes of its members and interfered with the Union's representation of its members. The government thereby failed to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), bargained in bad faith and substantially interfered with the collective bargaining process.

49. On February 21, 2017, Bill 75 was proclaimed into force. Bill 75 substantially interfered with teachers' freedom of association, their right to a meaningful process of collective bargaining and good faith consultation and their right to strike protected by s.2(d) of the *Charter*.

50. Throughout the debate in the legislature on Bill 75, the government, including the Premier and the Minister of Education, repeatedly stated that the purpose of Bill 75 was to end teachers' partial withdrawal of services.

51. Sections 2, 3, 10(3), 13, 14, 15, 16 and Schedule A of the Bill 75 ("challenged provisions") imposed a collective agreement on teachers that:

- (a) imposed the same wages increases as in Tentative Agreements 1 and 2;
- (b) imposed the cessation of service award accrual and payout of service award as contained in Tentative Agreements 1 and 2;
- (c) did not provide teachers with paid days of personal leave per year agreed to by the Minister in Tentative Agreement 3; and
- (d) created a Council to Improve Classroom Conditions, instead of a Partnership on Systemic Working Conditions, which:
 - (i) consists of one Co-Chair appointed by the Department, one Co-Chair appointed by the Union, 3 other members appointed by the Department, and 9 teachers appointed by the superintendents of the school boards;
 - (ii) allows the 14-member Council, only one of whom is appointed by the Union, to, by majority vote, request that a dispute be forwarded to an arbitrator.

52. Throughout the debate in the legislature, the government, including the Premier and the Minister of Education, repeatedly indicated that the purpose of the Council to Improve Classroom Conditions in Bill 75 was to enable government and the Minister of Education to speak directly to

teachers about teachers' working conditions because the Union did not effectively represent the voice or interests of teachers.

53. Bill 75, by imposing a collective agreement on teachers, ended teachers' strike action and eliminated their right to strike for the term of the collective agreement.

54. Bill 75 did not provide for an alternative method of resolving the collective bargaining dispute between the Union and the Employer, such as interest arbitration.

55. Section 13 of Bill 75, which provides that "[n]otwithstanding any right in the *Teachers' Collective Bargaining Act*, Sections 26 and 31 of the *Education Act* apply when schools are in session while teachers are present," forever restricts teachers' ability under the *Teachers' Collective Bargaining Act* to engage in or threaten strike activity that maintains student instruction in order to press their demands with the Employer. The strike activity engaged in by teachers from December, 2016 to February, 2017, which did in fact bring pressure to bear on the Employer and on government while maintaining the support of teachers, parents and students, would be prohibited in the future by s.13 of Bill 75.

56. Subsequent to the passage of Bill 75, and immediately prior to calling a provincial election, the government accepted the recommendations of the mostly employer-appointed Council to Improve Classroom Conditions, most of which had been raised by the Union in bargaining and were rejected by the Employer in bargaining. The government thereby failed to respect a process of meaningful collective bargaining and good faith consultation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), bargained in bad faith and substantially interfered with the collective bargaining process.

B. Violations of s.2(d) of the *Canadian Charter of Rights and Freedoms: Freedom of Association*

57. Bill 75, and in particular the challenged provisions, violate s.2(d) of the *Canadian Charter of Rights and Freedoms*, which provides as follows:

2. Everyone has the following fundamental freedoms:

...

(d) freedom of association.

58. Section 2(d) guarantees the right of employees to associate in pursuit of workplace goals and to a meaningful process within which to achieve those goals, the right to independent representation selected by the employees, and the right to strike in order to protect an approximate equal bargaining position with the employer. At the centre of s.2(d) is the protection of balance of power between employees and the employer. Section 2(d) is infringed where the purpose or effect of legislation or government action is to substantially interfere with the ability of employees to engage with their employer in a process of meaningful and good faith collective bargaining, with the freely negotiated terms of collective agreements arrived at through a process of good faith bargaining, or with the right of employees to collectively engage in strike activity.

59. The challenged provisions, in both purpose and effect, infringe teachers' freedom of association, their right to a meaningful process of collective bargaining and their right to strike under s.2(d) of the *Charter*.

60. The purpose of government in enacting Bill 75 was to end teachers' strike action. Bill 75, in both its purpose and effect, therefore violates teachers' freedom of association under s.2(d) of the *Charter*.

61. The purpose of Article 68C of Schedule A to Bill 75, the provision governing the Council to Improve Classroom Conditions, was to enable government and the Minister of Education to bargain directly with teachers chosen by the Employer about teachers' terms and conditions of work, thereby bypassing the Union and indicating to teachers that the Union does not effectively represent them. Article 68C of Schedule A to Bill 75, in both its purpose and effect, therefore violates teachers' freedom of association under s.2(d) of the *Charter*.

62. The challenged provisions further infringe s.2(d) by:

(a) imposing a collective agreement on teachers and thereby imposing critical terms and conditions of employment on teachers, including:

- (i) freezing wages for two years and imposing wage increases previously rejected by teachers;
 - (ii) ending the accrual of service awards for current teachers thereby eliminating service awards for new teachers, previously rejected by teachers, thereby significantly amending longstanding and important service award provisions for current teachers and nullifying them for new teachers;
- (b) imposing, in a punitive manner, less favourable terms on teachers than offered by and agreed to by the Employer in Tentative Agreement 3;
- (c) imposing a process to purportedly address teachers' working conditions, which are of fundamental importance to teachers, that disrupts the balance of power between teachers and the Employer, deprives teachers of the choice and independence sufficient to enable them to determine their collective interest and meaningfully pursue them, prevents teachers from identify and advancing their workplace concerns free from management's influence, and fails to preserve a process of good faith consultation;
- (d) ending teachers' strike action and eliminating their right to strike for the term of the imposed collective agreement;
- (e) failing to provide for any dispute resolution process to settle the issues remaining in dispute between the parties; and
- (f) forever restricting teachers' ability to engage in or threaten a partial withdrawal of services while attending work and providing for the instruction of students.

63. The conduct of the government and of the Employer prior to bargaining, during bargaining, during the debate on Bill 75 and after the passage of Bill 75, demonstrated that the government and the Employer failed to respect a process of meaningful and good faith consultation and negotiation as required under s.2(d) of the *Charter* and instead, contrary to s.2(d), bargained in bad faith, undermined the confidence of teachers in the Union and in the collective bargaining process, interfered with the Union's representation of its members, tilted the balance of power impermissibly in favour of the

Employer, reduced teachers' negotiating power, and substantially interfered with the collective bargaining process and infringed the right to strike in violation of s.2(d).

64. The provisions of Bill 75 infringe s.2(d) of the *Charter* and are not saved by s.1 of the *Charter*, which provides as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

C. Violation of s.2(b) of the *Canadian Charter of Rights and Freedoms: Freedom of Expression*

65. Bill 75, and in particular the challenged provisions, including s.13, infringe the right to freedom of expression in s.2(b) of the *Charter*, which provides as follows:

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression ...

...

66. Section 2(b) protects the right of employees to express themselves on matters concerning the terms and conditions governing their workplace. It also protects the right of employees to collectively withdraw their services as a fundamental means of peacefully expressing and conveying meaning about their beliefs and opinions concerning the terms and conditions of their work. These kinds of expression lie at the core of the values protected by the s.2(b) guarantee.

67. The challenged provisions violate s.2(b) of the *Charter* by denying the Union and its members an essential means by which to convey information about their dispute with the Employer and their terms

and conditions of their work, and this denial of rights and freedoms continues into the future under s.13 of Bill 75.

68. The challenged provisions, including s.13, cannot be saved by s.1 of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this _____ day of _____, 2017.

Gail L. Gatchalian

Pink Larkin
1463 South Park Street
Suite 201
Halifax, NS B3J 3S9
Tel: (902) 423-7777
Fax: (902) 423-9588

Form 39.08

2017

No.

Supreme Court of Nova Scotia

Between:

Nova Scotia Teachers Union

Applicant

and

Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of
Nova Scotia

Respondent

AFFIDAVIT OF COUNSEL

I, **Gail L. Gatchalian**, of Halifax Regional Municipality, in the Province of Nova Scotia, make oath and say as follows:

1. I am counsel for the Applicant, the Nova Scotia Teachers Union, and have personal knowledge of the matters deposed to in this Affidavit.
2. I make this Affidavit to comply with Civil Procedure Rule 5.07(4), requiring a motion for directions to be supported by an affidavit.
3. The Applicant is applying to the court, in part, for a declaration that the *Teachers' Professional Agreement and Classroom Improvements (2017) Act*, S.N.S. 2017, c. 1 ("Bill 75"), and in particular ss.2, 3, 10(3), 13, 14, 15, 16 and Schedule A of the Act, violate the right to freedom of association guaranteed by s.2(d) of the *Canadian Charter of Rights and Freedoms* ("Charter"), and the right to freedom of expression guaranteed by s.2(b) of the *Charter*, and that the violations cannot be justified under s.1 of the *Charter*.

Notice

4. The Applicant provided notice to the Respondent, Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia, in accordance with s.18 of the *Proceedings Against the Crown Act*, R.S.N.S., c. 360, on May 17, 2017. The Notice of Intended Action is attached hereto as Exhibit "A".

5. The Applicant is not aware of any other persons who are not parties but who may have an interest in the matters raised by the Application.

Witnesses

6. The Applicant intends to rely on two expert reports and six affidavits.
7. The Applicant intends to file an expert report of Patrick Macklem, from the University of Toronto Faculty of Law. The Applicant expects that Professor Macklem will provide expert evidence on the significance of international and regional labour law and human rights law on the interpretation of s.2(d) of the *Charter*, the scope and content of the right to bargain collectively and the right to strike in international law, and whether Bill 75 violates freedom of association guaranteed by international and regional labour law and human rights law.
8. The Applicant intends to file an expert report of Robert Paul Hebdon of McGill University Faculty of Management. The Applicant expects that Professor Hebdon will provide expert evidence on free, fair, meaningful and good faith collective bargaining; the impact of government action and legislation, including the imposition of a collective agreement and removal of the right to strike, on collective bargaining; the impact of the Respondent's actions and Bill 75 on collective bargaining; and the significance of the lack in Bill 75 of any alternative method to resolve the matters in dispute.
9. The Applicant intends to file affidavits of Jack MacLeod (Executive Staff Officer of Nova Scotia Teachers Union), Wallace Fiander (member of the Nova Scotia Teachers Union, Provincial Executive member and First Vice-President of the Nova Scotia Teachers Union) and Joan Ling (Executive Director, Nova Scotia Teachers Union). The Applicant expects that they will provide evidence on the subject of the collective bargaining context and history between the parties, including the round of negotiations resulting in the proclamation of Bill 75, and the effect of the actions of the Respondent and the Employer on the collective bargaining process and right to strike.
10. The Applicant intends to file affidavits of two to three teachers who are members of the Applicant, and expects that they will provide evidence on the subject of the effect of the actions of the Respondent and the Employer on the collective bargaining process and right to strike.
11. The Applicant does not anticipate filing additional affidavits or expert reports.

Disclosure

12. The Applicant has not disclosed documents and electronic information to the Respondent. The Applicant will take all reasonable steps to become knowledgeable of what relevant documents or electronic information exist and are in the control of the Applicant, and to preserve the documents and electronic information. The Applicant will

use all reasonable efforts to complete full disclosure within forty-five days after the day pleadings close, unless the Judge hearing the motion for directions orders otherwise.

Cross-Examination

13. The Applicant anticipates that the Respondent may wish to cross-examine the Applicant's witnesses. The Applicant anticipates that it may wish to cross-examine affiants tendered by the Respondent, as well as file reply affidavits.

Hearing

14. The Applicant does not anticipate the Application will involve a series of hearings.
15. The Application does not concern events that are unfolding.
16. The Application does concern alleged rights that could be eroded over time. The imposition of Bill 75 has the effect of eroding the freedom of expression and freedom of association rights of teachers, protected under ss.2(b) and 2(d) of the *Charter*.
17. The Applicant is not aware of other information, in addition to what is stated above, that could significantly affect the estimate of time needed to prepare for the hearing and the length of the hearing itself.

Sworn to before me)
on the ___ day of _____, 2017)
at _____, Nova Scotia)
_____)

Gail L. Gatchalian