

August 30, 2017

Via Courier

Edward A. Gores, Q.C.  
Nova Scotia Department of Justice  
Legal Services, 8<sup>th</sup> Floor  
1690 Hollis Street  
Halifax, NS B3J 2L6

Dear Mr. Gores:

***Notice of Intended Action – Nova Scotia Government and General Employees Union v.  
Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province  
of Nova Scotia***

Please find enclosed a Notice of Intended Action pursuant to section 18 of the *Proceedings Against the Crown Act*, R.S.N.S., c. 360, and a draft Notice of Application in Court.

The Intended Plaintiff/Applicant requests that the Intended Defendant/Respondent take all necessary measures to preserve relevant evidence, including electronic information, pursuant to the Intended Defendant/Respondent's obligations under the Nova Scotia Civil Procedure Rules and in particular Rule 16.02(2). This would include immediate suspension of any automatic information technology processes that could lead to the inadvertent destruction of relevant electronic information.

Yours truly,



Gail L. Gatchalian  
[ggatchalian@pinklarkin.com](mailto:ggatchalian@pinklarkin.com)  
GG/km

Enclosures

CC: Client

**IN THE SUPREME COURT OF NOVA SCOTIA**

**IN THE MATTER OF:**           An Intended Action

**BETWEEN:**

**Nova Scotia Government and General Employees 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, 8<sup>th</sup> Floor  
          1690 Hollis Street  
          Halifax, NS B3J 2L6

Take notice that the Intended Plaintiff, the Nova Scotia Government and General Employees 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:

**Raymond F. Larkin, Q.C.  
& Gail L. Gatchalian  
Pink Larkin  
201-1463 South Park Street  
Halifax, NS B3J 3S9**

The cause of action is set out in the attached draft Notice of Application in Court attached as Appendix "A".

Signature

Signed August 30, 2017

  
for: Raymond F. Larkin, Q.C.

  
Gail L. Gatchalian

Counsel for the Applicant,  
Nova Scotia Government and  
General Employees Union

**APPENDIX "A"**

**Form 5.07**

2017

No.

Supreme Court of Nova Scotia

Between:

Nova Scotia Government and General Employees 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  
Province of Nova Scotia  
c/o Edward A. Gores, Q.C.  
Department of Justice (NS)  
1690 Hollis Street, 8<sup>th</sup> Floor  
Halifax, NS 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 *Public Services Sustainability (2015) Act*, S.N.S. 2015, c. 34 ("Act" or "Bill 148"), and all sections of Bill 148, 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 all section of the *Act*, 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 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:

<b>Name of Witness</b>	<b>Subject</b>
Expert on international and regional labour law and human rights law	The significance of international and regional labour law and human rights law to the interpretation of s.2(d) of the Charter.
Expert in industrial relations	The impact of government action and legislation on collective bargaining and on the fairness of interest arbitration.
Grant Vaughan	The collective bargaining context and history between the parties.
Shawn Fuller	The collective bargaining context and history between the parties.
Keiren Tompkins	The collective bargaining context and history between the parties.

#### **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 \_\_\_\_\_, 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:

Raymond F. Larkin, Q.C.  
& Gail L. Gatchalian  
Pink Larkin  
201-1463 South Park Street  
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.

\_\_\_\_\_  
Raymond F. Larkin, Q.C.

\_\_\_\_\_  
Gail L. Gatchalian

Counsel for the Applicant,  
Nova Scotia Government and  
General Employees 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 Government and General Employees Union ("Union"), makes this application on behalf of the employees of Her Majesty the Queen in right of the Province of Nova Scotia ("Nova Scotia" or "the Employer") who are governed by the *Civil Service Collective Bargaining Act*, R.S.N.S. 1989, c.71 ("Civil Servants").
2. Pursuant to the *Civil Service Collective Bargaining Act*, the Union is the exclusive bargaining agent for Civil Servants.
3. The Union and Nova Scotia are parties to a collective agreement governing the terms and conditions of work of Civil Servants effective from April 1, 2012 to March 31, 2015 ("collective agreement" or "Civil Service Master Agreement"), the terms of which were continued after March 31, 2015 pursuant to the *Civil Service Collective Bargaining Act*.
4. The *Civil Service Collective Bargaining Act* prohibits Civil Servants from taking strike action to conclude a collective agreement. If the parties cannot agree to a new collective agreement, the only way for the Union to conclude a collective agreement is to refer the matters in dispute to binding interest arbitration under the *Act*.
5. In December of 2014, the Premier announced that Nova Scotia intended to end the Public Service Award, a long-standing collective agreement provision of central importance to Civil Servants that gives retiring Civil Servants a retirement allowance based on their years of service.
6. On February 23, 2015, the Union gave notice to the Employer to commence collective bargaining for the renewal of the collective agreement.
7. In August of 2015, Nova Scotia announced its "Public Service Sustainability Mandate" for the upcoming round of public sector bargaining, including bargaining with the Union for Civil Servants. Nova Scotia's Mandate set out the Province's negotiating position with respect to the term of the agreement and wages:
  - a five-year term
  - wage freezes in the first three years of the collective agreement
  - a wage increase of one percent in the fourth year of the collective agreement
  - a wage increase of one percent in the fifth year of the collective agreement
8. The Union and the Employer met on October 21, 2015 to begin collective bargaining.
9. On October 21, 2015, the Employer proposed significant changes to provisions of the collective agreement that are of central importance to Civil Servants, including the elimination of a Memorandum of Agreement that enhanced the job security of employees and the deletion of language that gave bargaining unit members preferential access to vacant positions in order of seniority.



10. The Employer proposals included Nova Scotia's Public Services Sustainability Mandate and a proposal to end the accrual of the Public Service Award effective April 1, 2015, and to calculate the Public Service Award upon retirement using the salary of the employee effective April 1, 2015 rather than the employee's salary upon retirement.

11. In her opening statement on October 21, 2015, the Lead Negotiator for the Employer said that the Employer was bound by the Public Services Sustainability Mandate and Nova Scotia's position on the Public Service Award.

12. The parties met for five days during the first phase of bargaining. They agreed on a number of minor issues but made no progress on the key issues of wages and the Public Service Award.

13. On November 13, 2015, a "tentative agreement" reached away from the bargaining table was presented to the Union negotiators. Pursuant to the tentative agreement, the Employer would drop its proposals for significant concessions on job security language and the language governing the filling of vacant positions in the bargaining unit, and would modify somewhat its demands on wages and the Public Service Award. The Employer proposed a four-year collective agreement with a wage freeze in the first two years of the agreement, a wage increase of one percent in the third year, an increase of 1.5% in the fourth year and an increase of 0.5% on the last day of the agreement. The Employer proposed that the Public Service Award that had accrued up to April 1, 2015 would be paid out at an employee's salary upon retirement as opposed to the employee's salary at April 1, 2015.

14. Because of their concern that Nova Scotia could legislate the concessions that the Employer originally sought in bargaining, the Union negotiators accepted the tentative agreement and prepared to recommend its ratification to union members.

15. On December 14, 2015, Nova Scotia introduced the *Public Services Sustainability (2015) Act* (Bill 148), which received Royal Assent on December 18, 2015 but which was not proclaimed into law at that time.

16. Bill 148 applies to the Civil Service Master Agreement as well as collective agreements in the public sector that expire before or after the coming into force of the Bill.

17. Sections 11, 13 and 14 of Bill 148 ("Wage Restraint Provisions") extend the wage provisions of expired collective agreements for four years and restrict wage increases as follows:

- no wage increases in the first two years of the collective agreement
- a maximum wage increase of one percent in the third year of the collective agreement
- a maximum wage increase of one and one-half percent in the fourth year of the collective agreement
- a maximum wage increase of one-half of one percent on the last day of the collective agreement

18. Sections 20 and 22 of Bill 148 amend the Public Service Award in the collective agreement by providing that the calculation of the Public Service Award must be made using the compensation rate of, and the amount of service accrued by, the employee immediately before April 1, 2015; forever prohibit the negotiation of a Public Service Award that applies to employment on or after April 1, 2015; and provide that these provisions apply notwithstanding any enactment, collective agreement or arbitral award or decision.

19. Section 20 and 22 of Bill 148 impose a lesser benefit than that agreed to by the Employer in the tentative agreement by requiring the calculation of the Public Service Award to be based on an employee's salary on April 1, 2015 rather than the employee's salary at retirement.
20. Sections 18 and 19 of Bill 148 prohibit an interest arbitrator or interest arbitration board from making an award that results in wage increases that contravene Sections 13 or 14.
21. Section 28 of Bill 148 prohibits an interest arbitrator or interest arbitration board from determining the constitutional validity or constitutional applicability of Bill 148 or any regulations made under Bill 148.
22. Nova Scotia and the Premier made statements in the Legislature and in public that one of main purposes of Bill 148 was to prevent interest arbitrators, in situations where employees do not have the right to strike but instead must resort to binding interest arbitration to settle their collective agreement, from awarding wage increases or terms of the Public Service Award that are inconsistent with Nova Scotia's position on those matters. This purpose is reflected in s.2(c) of Bill 148.
23. The passage of Bill 148 significantly impaired collective bargaining across the public sector, resulting in the failure of Nova Scotia to date to conclude a collective agreement for any major public sector bargaining unit.
24. On January 22, 2016, because of Nova Scotia's action in passing Bill 148 and because of Bill 148's interference in collective bargaining, the Union decided to recommend that the membership reject the tentative agreement.
25. The vote on the tentative agreement was concluded on December 14, 2016, and the tentative agreement was rejected by 94% of the Union members who voted.
26. Negotiations took place on December 19 and 20, 2016. The Employer would not alter its position on wages and the Public Service Award, as set out in the unproclaimed Bill 148.
27. On January 6, 2017, the Union requested that the Minister of Labour, appoint a conciliation officer pursuant to the *Civil Service Collective Bargaining Act*.
28. The parties met in conciliation on April 19, 2017.
29. At the start of conciliation process, the Employer stated that it would not agree to any terms that differed from Bill 148, and that it would pursue its original proposals for concessions on job security and the filling of vacant positions in conciliation.
30. During negotiations and conciliation, the Employer did not agree to a single Union proposal.
31. Because of the Employer's refusal to negotiate terms that differed from Bill 148 and because of its intention to pursue significant concessions to collective agreement provisions that are of central importance to Civil Servants, the Union concluded that it would not be able to conclude a collective agreement and therefore there was no point in continuing the conciliation process.

32. The Union decided that the only way to obtain a fair conclusion to the current round of collective bargaining with the Employer would be through the interest arbitration provisions of the *Civil Service Collective Bargaining Act*.

33. On May 16, 2017, Civil Servants voted 97% in favor of referring their contract dispute with the Employer to binding arbitration under the *Civil Service Collective Bargaining Act*.

34. On May 19, 2017, the Union requested that the Labour Board appoint a three-person interest arbitration board to settle the terms of a new collective agreement, pursuant to the *Civil Service Collective Bargaining Act*.

35. Initially, the Employer objected to the appointment of an interest arbitration board by the Labour Board. The Employer and the Union then agreed that the parties would make one more attempt at conciliation, and failing agreement, the Employer would not object to the constitution of an interest arbitration board.

36. The parties met in conciliation again on August 8, 2017. The parties failed to conclude a collective agreement. Again, the Employer refused to negotiate anything inconsistent with the provisions of Bill 148, and continued to pursue its proposals for concessions on matters of significant importance to Civil Servants.

37. On August 9, 2017, the Union again requested that the Labour Board appoint an interest arbitration board to settle the new collective agreement.

38. On or about August 22, 2017, Nova Scotia proclaimed Bill 148 into force, thereby prohibiting the interest arbitration board from making any award inconsistent with the provisions of Bill 148, and prohibiting the interest arbitration board from determining the constitutionality of Bill 148.

39. In the matters it has referred to the interest arbitration board, the Employer has continued to pursue significant changes to collective agreement provisions that are of central importance to Civil Servants.

#### **B. Violation of s.2(d) of the *Charter*: Freedom of Association**

40. Bill 148 violates 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.

41. 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, and the right to strike in order to protect an approximately 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.

42. Section 2(d) and Section 1 of the *Charter* also guarantee the right of employees, whose right to strike is substantially limited by government, to a meaningful alternative mechanism for resolving bargaining impasses, such as fair and impartial interest arbitration. Sections 2(d) and 1 of the *Charter* require that the employer and the employees be on an equal footing in interest arbitration where there is no right to strike.

43. Section 1 of the *Charter* 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.

44. Nova Scotia, by enacting Bill 148 on December 15, 2015 and by refusing to bargain terms inconsistent with the provisions of Bill 148, failed to respect a process of meaningful and good faith collective bargaining and consultation as required under s.2(d) of the *Charter*, undermined the confidence of Civil Servants 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 Civil Servants' negotiating power, and substantially interfered with collective bargaining in violation of s.2(d) of the *Charter*.

45. The *Civil Service Collective Bargaining Act* provides Civil Servants with the right to fair and impartial interest arbitration, a meaningful alternative mechanism for resolving bargaining impasses that is necessary for the government to justify its infringement of these employees' right to strike.

46. Bill 148, once it was proclaimed into force on August 22, 2017, further infringed Civil Servants' freedom of association, their right to a meaningful process of collective bargaining and their right to strike under s.2(d) of the *Charter* by:

- (a) restricting wage increases, which are matters of critical importance to Civil Servants, in the renewed collective agreement;
- (b) ending the accrual of the Public Service Award in the renewed collective agreement, a long-standing collective agreement provision of critical importance to Civil Servants;
- (c) punitively imposing a term of the Public Service Award that is less than that agreed to by the Employer in the tentative agreement, i.e. requiring that the Public Service Award be calculated using an employee's salary effective April 1, 2015 rather than the employee's salary at retirement;
- (d) forever prohibiting the Union from negotiating a Public Service Award that applies to employment after April 1, 2015; and
- (e) prohibiting the interest arbitration board under the *Civil Service Collective Bargaining Act* from making an award that is inconsistent with the provisions of Bill 148, when Civil Servants are statutory deprived of the right to strike, while retaining the right of the Employer to pursue significant and detrimental changes to matters of critical importance to Civil Servants.

47. One of the main purposes of Bill 148 was to prohibit the interest arbitration board under the *Civil Service Collective Bargaining Act* from making an award inconsistent with the wage restraint and Public Service Award provisions of Bill 148. Bill 148 therefore infringes ss.2(d) and 1 of the *Charter* both in purpose and effect.

48. Bill 148 infringes s.2(d) of the *Charter* and is not saved by s.1 of the *Charter*.

### C. Violation of s.2(b) of the *Charter*: Freedom of Expression

49. Bill 148 infringes Civil Servants' 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 ...

...

50. Section 2(b) protects the right of employees to express themselves on matters concerning the terms and conditions governing their work. These kinds of expression lie at the core of the values protected by the s.2(b) guarantee.

51. Bill 148 violates s.2(b) of the *Charter* by denying the Union and Civil Servants an essential means by which to convey information about their dispute with the Employer and their terms and conditions of their work.

52. Bill 148 cannot be saved by s.1 of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of August, 2017.

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Raymond F. Larkin, Q.C.

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Gail L. Gatchalian

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