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November 25, 2019

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RE: An application for determination brought by United Nurses of Alberta, Jessica Wakeford and Rochelle Young affecting Alberta Health Services - Board File No. GE-07762

Enclosed is a copy of the Board's Written Reasons for Decision dated November 25, 2019.

Marlene Leslie
for Tannis Brown
Director of Settlement

Enclosure

IN THE MATTER OF THE LABOUR RELATIONS CODE

UNITED NURSES OF ALBERTA, JESSICA WAKEFORD and ROCHELLE YOUNG

Applicants

- and -

ALBERTA HEALTH SERVICES

Respondent

- and -

COVENANT HEALTH, HEALTH SCIENCES ASSOCIATION OF ALBERTA, NURSE PRACTITIONER ASSOCIATION OF ALBERTA, THE ALBERTA UNION OF PROVINCIAL EMPLOYEES, THE DEANS OF NURSING OF THE UNIVERSITY OF ALBERTA, THE UNIVERSITY OF CALGARY AND ATHABASCA UNIVERSITY, ANTHONY FALVI, KEVIN HUNTLEY and DINA SOTIROPOULOS

Intervenors

FILE: GE-07762

BOARD MEMBERS

Nancy E. Schlesinger – Vice-Chair
Lynda Flannery – Member
Dianne Wyntjes – Member

APPEARANCES

For the Applicant United Nurses of Alberta, Jessica Wakeford and Rochelle Young: Kristan A. McLeod and Shasta Desbarats (Counsel), David Harrigan, Lee Coughlan (Advisors)

For the Respondent Alberta Health Services: Monica Bokenfohr (Counsel), Dennis Holliday (Advisor)

For the Intervenors:

- Health Sciences Association of Alberta: Dan Scott (Counsel)
- Nurse Practitioner Association of Alberta: Andrew Tarver (Counsel), Teddie Tanguay (Advisor)
- The Alberta Union of Provincial Employees: Patrick Nugent (Counsel), Cherie Langlois-Klassen, Larry Dawson (Advisors)

REASONS FOR DECISION

[1] This decision addresses a constitutional challenge to section 1(1)(l)(iii) of the *Labour Relations Code* (the "*Code*"). The section excludes nurse practitioners from employee status under the *Code*. At issue is whether the section violates the right to freedom of association as protected in section 2(d) of the *Charter*. The constitutional challenge arises in the context of a determination application brought by the United Nurses of Alberta ("UNA"), Jessica Wakeford, and Rochelle Young (jointly referred to as the "Applicants") under sections 12(2)(a), 16(3) and 12(3)(o) of the *Code*. The Applicants seek a declaration that Ms. Wakeford and Ms. Young (the "Individual Applicants") and other nurse practitioners working for Alberta Health Services ("AHS" or the "Employer") are included in UNA's bargaining unit under certificate 73-2013 for "*All employees when employed in direct nursing care or nursing instruction.*"

[2] The Attorney General of Canada and Attorney General of Alberta received notice of the application. Only the latter sought to participate, filing a submission with the Board opposing the Applicants' *Charter* challenge. Intervenor status was granted to: the Nurse Practitioner Association of Alberta ("NPAA"); Health Sciences Association of Alberta ("HSAA"); Alberta Union of Provincial Employees ("AUPE"); Covenant Health; the Deans of Nursing of the University of Alberta, the University of Calgary, and Athabasca University; Dina Sotiropoulos; Anthony Falvi; and Kevin Huntley.

[3] By way of a case management direction issued on October 19, 2018, the Board bifurcated the hearing, directing the *Charter* issue to be heard first. On October 26, 2018, the Attorney General of Alberta withdrew its intervention in the application. As a result, its written submissions in respect of the application have not been considered in deciding the issue before us. The only intervenors that participated in the *Charter* challenge portion of the hearing were: NPAA, HSAA, and AUPE. We refer to them jointly as the Intervenors for the purposes of this decision. The Intervenors supported the Applicants' position on the *Charter* issue; AHS took no position. As a result, no defence was presented to the Board regarding the constitutionality of section 1(1)(l)(iii) of the *Code*.

Background

[4] The application as it related to the *Charter* issue proceeded to hearing over the course of two days in February and April 2019. The Board heard evidence from the Individual Applicants, along with David Harrigan, UNA's Director of Labour Relations. AHS presented no evidence other than the *Salary Restraint Regulation*, AR 6/2018 and part of the current collective agreement between UNA and AHS for the period of April 1, 2017 to March 31, 2020. The relevant background in relation to the *Charter* issue can be summarized as follows.

[5] Nurse practitioners have not always been excluded from the *Code*. Their exclusion resulted from changes to the *Code* in 2003 by way of the *Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003*, S.A. 2003, c. 6, commonly referred to as "Bill 27".

[6] Prior to Bill 27, the definition of "employee" under the *Code* read as follows:

> *1 In this Act,*
>
> ...
>
> *(l) "employee' means a person employed to do work who is in receipt of or entitled to wages, but does not include*
>
> *(i) a person who in the opinion of the Board performs managerial functions or is employed in a confidential capacity in matters relating to labour relations, or*
>
> *(ii) a person who is a member of the medical, dental, architectural, engineering or legal profession qualified to practise under the laws of Alberta and is employed in the person's professional capacity;*

[7] Bill 27 added the following after subsection (ii):

> *(iii) a nurse practitioner who is employed in his or her professional capacity as a nurse practitioner in*

> *accordance with the Public Health Act and the regulations under that Act;*

[8] The Bill also added a definition of "nurse practitioner" to the *Code* that has remained unchanged over the years:

> *(s.1) "nurse practitioner" means a registered nurse within the meaning of the Nursing Profession Act who is entered on the Nursing Profession Extended Practice Roster under that Act;*

[9] Further amendments to the definition of employee were made under the *Fair and Family-friendly Workplaces Act,* S.A. 2017 c.9, although the wording related to nurse practitioners remained unchanged. For the purposes of the present application, the definition of "employee" reads as follows:

> *1(1) In this Act,*
>
> ...
>
> *(l) "employee" means a person employed to do work who is in receipt of or entitled to wages and includes a dependent contractor, but does not include*
>
> *(i) a person who in the opinion of the Board performs managerial functions or is employed in a confidential capacity in matters relating to labour relations,*
>
> *(ii) a person who is a member of the medical, dental, architectural, engineering or legal profession qualified to practise under the laws of Alberta and is employed in the person's professional capacity,*
>
> *(iii) a nurse practitioner who is employed in his or her professional capacity as a nurse practitioner in accordance with the Public Health Act and the regulations under that Act, or*
>
> *(iv) a person employed on a farm or ranch who is a family member of the farm or ranch employer as determined under subsections (2) and (3);*

[10] Mr. Harrigan testified about UNA's representation of nurse practitioners prior to the passing of Bill 27. According to his evidence, UNA bargained and negotiated agreements on

behalf of nurse practitioners in Alberta's northern communities. The relevant employer at the time was the Keeweetinok Lakes Regional Health Authority #15, a predecessor employer to AHS. Mr. Harrigan referenced letters of understanding ("LoUs") entered into by UNA on behalf of nurse practitioners in 1998, 2000, and 2002 relating to compensation and hours of work. He said, at the time, the workers in question were referred to as "advanced practice nurses" in the particular communities at issue. While the LoUs contain no specific reference to advanced practice nurses, there was nothing to undermine Mr. Harrigan's evidence these agreements applied to them.

[11] At the time Bill 27 came into force, UNA was also in the process of bargaining with the Calgary Regional Health Authority ("CRHA"), another predecessor employer to AHS, in relation to nurse practitioners. As explained by Mr. Harrigan, relevant issues at the bargaining table were hours of work and compensation. UNA also proposed that nurse practitioners have their own classification under the relevant collective agreement.

[12] The inclusion of nurse practitioners in UNA's bargaining unit of "*All employees when employed in direct nursing care or nursing instruction*" was not without controversy. The bargaining described in the preceding paragraph took place a few years after a dispute between the CRHA and UNA about whether a nurse practitioner working at the Foothills Hospital fell within UNA's bargaining unit. UNA brought an application to the Board for a determination that an employee described as a "Clinical Assistant - Neonatal Nurse Practitioner" was in its bargaining unit. The Board ruled the individual in question belonged in UNA's unit and granted its application: *UNA v. Calgary Regional Health Authority*, [1999] Alta. L.R.B.R. 458.

[13] According to Mr. Harrigan's evidence, the enactment of what was then section 1(l)(iii) of the *Code* meant nurse practitioners could no longer be in UNA's bargaining unit and all bargaining with the CRHA in relation to them came to a halt. In addition, the relevant LoU with the Keeweetinok Lakes Regional Health Authority #15 was rendered meaningless. UNA was not consulted about the exclusion.

[14] AHS, the successor employer to the relevant regional health authorities, did not present evidence to contradict Mr. Harrigan's testimony. We accept Mr. Harrigan's evidence that UNA bargained LoUs on behalf of nurse practitioners in northern communities and it was negotiating terms and conditions of employment in relation to nurse practitioners working for the CRHA at the time Bill 27 came into force. The exclusion of nurse practitioners from the *Code* brought UNA's representation to a halt.

[15] Mr. Harrigan also testified that, more recently, UNA asked the NDP government to remove the exclusion of nurse practitioners from the *Code*. Despite a number of amendments made to the *Code*, the exclusion remained. No reasons were provided regarding why no change was made.

[16] The only evidence the Board received relating to the legislative intent for the statutory exclusion came from the Bill's second reading as recorded in *Alberta Hansard*. Bill 27 did more than exclude nurse practitioners from employee status under the *Code*. It addressed labour relations issues flowing from a reduction in the number of regional health authorities and the transfer of some health care workers from a labour relations regime permitting strike and lockout action to one that did not. The Bill gave Cabinet the authority to craft regulations establishing region-wide functional bargaining units in respect of the regional health authorities and a process for determining the bargaining agents and collective agreements for the relevant units. This was the context in which the following debate took place (as recorded in *Alberta Hansard,* March 17, 2003).

[17] Clint Dunford, then Minister of Human Resources and Employment, said the following about the Bill's purpose:

> Now, the purpose and the reason for this bill is for the health authorities to streamline the collective bargaining process by making rules governing health care bargaining simpler, more straightforward, and easier to understand and administer for both employers and unions. It is time to bring the rules governing health care bargaining in line with the changes to the health system. It is time to streamline the collective bargaining process by reducing the number of collective agreements from over 400 to 36. The legislation enables government to establish four functional bargaining units to represent employees in the regional health

> authorities. These will consist of nursing; auxiliary nursing; paramedical, technical, and professional; and the fourth, general support services. Bargaining will be regionwide. Simply put, this means that the nine health authorities will each bargain with four functional bargaining units. This means that employees at different sites doing the same job would be subject to the same collective agreements, and this will bring certainty and clarity to their terms of employment.
>
> Bill 27 considers health care in the regional authorities to be essential. Strikes or lockouts compromise patient safety and patient care. This is true no matter where you are working in the health authority. Removing the right to strike from community health and mental health authorities' employees in the health regions means that they will be subject to the same provisions in the Labour Relations Code as police officers, firefighters, and close to 90 percent of health workers that currently do not have the right to strike.
>
> The government still believes in the collective bargaining process, where parties negotiating arrive at solutions, and in the rights of employees to be represented by unions.
>
> ...
>
> The scope of practice of nurse practitioners has grown in the last couple of years. Removing nurse practitioners from the bargaining unit will give health authorities the flexibility they need to proceed with primary health care reform. Under changes in Bill 27 these employees will not be entitled to severance, neither the stability or the existence of their employment is threatened, and their terms and conditions remain substantially the same. Legislation will ensure that severance is not used for purposes it was never intended for.
>
> ...
>
> This legislation is important for health reform, treats workers fairly and consistently, reduces the burden of administration.
>
> ...
>
> So it's very, very important, I think, on that particular matter, but also of course there have been public documents that talk about wanting nurses at the bedside and also at the operating table rather than at the negotiating table, and I think this is something to really keep in mind [comments about the time to be saved by reducing the number of regions and the number of functional bargaining units]. (At page 534.)

[18] Gary Mar, Minister of Health and Wellness at the time, made the following statement about Bill 27:

> As we move forward with health reform, we need to be flexible in how and where our health professionals provide service. Health reform is all about being responsive to the needs of Albertans and to the needs of health care providers. Now, we have already done much to make the health care system more efficient and more responsive, but more remains to be done, and we need to pick up the pace.
>
> When we first created health regions in 1994, we streamlined 200 separate hospital boards into 17 regional health authorities. Those 200 boards came with 400 separate collective agreements, all of which were transferred straight over to the new health authorities. Last November we contracted those original 17 regions to nine so that they could move forward with efficiencies in health service delivery. Now we need to bring the labour structure in step with the rest of the health reform process, and Bill 27, the Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003, does that.
>
> ...
>
> Mr. Speaker, we cannot ask health authorities to continue moving forward with health reform and then tie their hands when it comes to the effective use of their workforce. Bill 27 is the right legislation at the right time. It creates a system for health bargaining that makes sense. It simplifies the labour environment and creates a level playing field for healthcare employees. It protects healthcare workers from the unfairness of inconsistent labour agreements. It ensures patients receive the healthcare they need when and where they need it. It gives regional health authorities the flexibility to build a team of health professionals who can deliver new and innovative models of care, and that is the reason why I ask for the support of this Assembly for second reading of this bill. (At page 537.)

[19] Among the concerns raised by MLAs about the Bill, was this comment by Dr. Ken Nicol, leader of the opposition:

> ... they're trying to amalgamate a number of them [bargaining units], yet they're going to break out nurse practitioners. What we need to do is make sure that there is an option in there for them to develop an association or develop some kind of a group so that they can deal with working conditions and their relationship to the regional health authorities. You know, this is the kind of thing that has to come out of this when we have other groups that are being singled out of the system. We have to give them an option to organize as well. If that means that we'll have the nurse practitioners trying to form a professional association like the Alberta Medical Association for the doctors, that's the kind of thing that we need to be looking at. What options will be available for those nurse practitioners? The implications of the minister's comments at the start were that we expect to see a lot more of those career opportunities develop for the nurse practitioners in the future as they play a different role and a more unique role in delivering our health care systems. We have to kind of make sure that all of those options are really

> handled and dealt with in the context of where this kind of a system will take us as we go through the process. (At pages 535-536.)

[20] *Hansard* also records this exchange between Brian Mason, MLA for Edmonton-Highlands, and Minister Mar:

> **Mr. Mason:** Thank you very much, Mr. Speaker. To the Minister of Health and Wellness: can the minister tell the Assembly what specific health reforms he has in mind when he says that the labour relations arrangements envisioned in this act are necessary in order to proceed to the next stages with health reforms? What specifically are the health reforms he has in mind, and how does this act facilitate them?
>
> **Mr. Mar:** Well, one example might be our intention, as stated and set out in the Mazankowski report, to give health care workers the ability to work within the full scopes of their practice. One example of that, of course, Mr. Speaker, addressed in this particular legislation is the subject matter of nurse practitioners. We think that it would be most appropriate given the independent clinical decision-making type of role that nurse practitioners have that their role is much more like that of a physician than that of a nurse. I think that most people would find it a surprise if they were meeting with their physician but had to change when there was a shift change. So the consequence is that we would view that the role of nurse practitioners would be more like that of physicians and that regional health authorities should be able to use them in a manner which is much more flexible than a contract that might be more appropriate for nurses. (At page 538.)

[21] Laurie Blakeman, MLA for Edmonton-Centre, raised these concerns about the exclusion of nurse practitioners:

> I note in the legislation, the very first thing out actually, that the bill is throwing the nurse practitioners out to fend for themselves. I've been very interested in – I don't know how to describe them – that group. Most of them are women, I think, and I've always thought this was a real advancement for women in the nursing professions and have watched with keen interest the progression and expansion of their role, and I'm not very happy to see that they have been left without anyone sort of fighting on their behalf. I mean, we've got the doctors who've got their own AMA, but the nurse practitioners don't, and this is not aligning them with anything else. They've been stranded there, and I'd like to know why the government chose to do this – it's quite specific – and whether this was the intention of putting these changes in here that relate directly to them. (At page 543.)

[22] The MLA for Edmonton-Riverview, Dr. Kevin Taft, added:

> One particular aspect of this bill addresses nurse practitioners. Now, we all know that nurse practitioners are highly trained specialists. They typically have a master's degree and advanced training in nursing, and they are given extensive responsibilities and autonomy to practise much more fully than the standard registered nurse is allowed to do. They are also, I suspect – we don't know, but this is my suspicion – crucial to the future of health reform in this province. One of the aspects of this bill is that it prevents them from being part of a bargaining unit. It actually, as I understand and read the bill, forbids them from being part of a bargaining unit under a union.
>
> One twist to that that was brought to my attention this afternoon is that while the bill was doing this, current regulations, as they were explained to me, required that nurse practitioners must be employees either of a regional health authority or of some other equivalent sort of body. So we were in a situation where nurse practitioners had to be employees, but they were not going to be allowed to organize and have the normal rights of an employee under labour relations, probably a situation that would be open to an immediate court challenge. I consulted with the Minister of Health and Wellness. He was able to respond to me quite rapidly that the regulations had been changed and that a substantial degree of autonomy is going to be granted to the nurse practitioners so that they are not required to be employees under the new regulations.
>
> A concern that remains that I leave with the minister to consider is that the number of nurse practitioners in this province is small. They have no association, they have no college, no particular voice that speaks for them on an organized basis, so they are left at the moment when this bill is passed having to negotiate one-on-one with regional health authorities or their other employers. That sets up a difficult situation, to say the least, for the nurse practitioners, and it's probably not something that will encourage the expansion of that profession, assuming that they do have a big future ahead of them, and I certainly hope that they do. (At page 546.)

[23] Minister Dunford later responded to these and other concerns about the legislation as follows:

> As far as was determined by the government, we thought it was a reasonable request [by employers for the legislation] in order to provide a platform from which bargaining in the future would spring. We see the fairness in it in the sense that we are still allowing employees to have collective bargaining on their behalf go forward, that they'll still be, should they wish it, represented by a union except in the case of the nurse practitioner.
>
> Now, the nurse practitioner was, I think, unfairly characterized here earlier. What we were basically talking about - and if I could dare use an American term here in a British parliamentary system - is someone who has gained the professional

> attributes of a physician's assistant. So we were talking in this frame of reference, then, of someone who is between a registered nurse and the physician. There's a whole new challenging and exciting and interesting field of endeavour there that needs to be explored under health reform. (At page 547.)

[24] We turn to consider the evidence of the two nurse practitioners at the centre of the present application.

[25] Rochelle Young has worked for AHS throughout her career. She began as a registered nurse in 2003 at the Stollery Children's Hospital. After obtaining her Master of Nursing – Nurse Practitioner in 2013, she continued to work at the Stollery, working in her professional capacity as a nurse practitioner. She assesses and treats children in relation to sleep concerns and assists with the clinical practice in the sleep lab.

[26] When Ms. Young first started work as a nurse practitioner, she made less than she had been making as a registered nurse. She quickly took steps to raise her concern about her wages with AHS. In August 2014, she sent an email to AHS's human resource's department ("HR"), raising the issue. A meeting was held with HR in September 2014, during which Ms. Young and three other nurse practitioners voiced concerns about the overall compensation structure for nurse practitioners. They were informed by HR that nurse practitioners would be moved to the C-Stream (clinical) for compensation. This resulted in an increase at the bottom of the scale, but no change at the top end.

[27] In response to questions by AHS in cross-examination about whether it was her advocacy with HR that resulted in this change to her wage, Ms. Young responded that, based on HR's comments during the meeting, it was clear the change to the C-Stream was already in the works prior to the meeting. AHS provided no evidence to counter this assertion. Nor did AHS provide evidence to explain what prompted the change. Ultimately, Ms. Young was placed on the C-Stream, resulting in an increase to her wages. Her salary has been frozen ever since.

[28] In 2015, Ms. Young wrote to then Minister of Health, Sarah Hoffman, inquiring about whether nurse practitioners might be permitted to access other forms of compensation. The

Minister responded that a strategy was being looked at. Her letter also indicates AHS "undertook a review of NP salaries and revised the salary range on April 1, 2014", maintaining the maximum earning rate and increasing the starting rate by 15%. We note the change to the salary range, as referenced, pre-dates Ms. Young's first inquiries to AHS about her salary concerns.

[29] The pay freeze referred to in Ms. Young's evidence was not solely directed at nurse practitioners. Rather, it arose in the context of a salary freeze imposed for all AHS non-union/exempt employees, ultimately codified by government in April 2018 under the *Salary Restraint Regulation*, A.R. 6/2018. In its closing argument, although not taking a position on the merits of the *Charter* issue, AHS pointed out UNA members did not receive an increase in wages last year. Of course, that was the result of a negotiated collective agreement between UNA and AHS.

[30] Ms. Young joined the NPAA as a potential avenue to address her concerns about nurse practitioner compensation. However, she did not find this helpful for the purposes of negotiations as it was a volunteer organization and its focus was to raise awareness about the nurse practitioner practice. According to Ms. Young, no one in the NPAA has the expertise to engage AHS in negotiations regarding terms and conditions of employment. None of this evidence was challenged and there was no evidence presented to suggest the NPAA has bargained on behalf of the Individual Applicants or that it has any form of mandate to do so.

[31] In 2015, Ms. Young joined a group of colleagues at the Stollery to raise the nurse practitioner profile in the workplace. There are somewhere between 21 and 25 nurse practitioners in this group and they meet monthly for "community of practice meetings". They discuss skills review, ongoing research, and how to optimize the nurse practitioner practice in the workplace. At some point in 2018, after the imposition of the *Salary Restraint Regulation*, the group invited someone from HR to discuss compensation and answer questions. Nurse practitioners raised concerns about the ongoing pay freeze and their pay not keeping pace with other health professionals. The HR representative listened, but nothing was proposed in response.

[32] From time to time, Ms. Young receives notice of changes to her terms and conditions of employment. In April 2018, AHS informed her there would be a change to the performance review process for exempt/nonunion employees. In September 2018, AHS notified her there would be a greater deduction on her pay to cover increased LTD costs and there would be a rate increase to her supplementary health benefits. There was no discussion with Ms. Young about these changes before they were made.

[33] Jessica Wakeford was a registered nurse, practicing in cardiology intensive care and oncology before going back to university to obtain her Master of Nursing – Nurse Practitioner degree. She worked in a physician's office before starting work as a nurse practitioner on an AHS Palliative Community Consult team in October 2014.

[34] When she started for AHS, she was given an offer that put her on the beginning step of the pay grid and would have resulted in her making less than she made as a registered nurse and less than the RNs who worked with her on the consult team. When she objected to the offer, she was told there was a wage freeze and there was no opportunity to move up the grid. She accepted the offer.

[35] She has since had numerous conversations with her manager, taking issue with her compensation. She was consistently told she was out-of-scope, there was a wage freeze, and she could not move up any steps in the wage grid. More recently, however, Ms. Wakeford's manager agreed to complete paperwork aimed at moving Ms. Wakeford to a different step on the wage grid because she may have been placed at the wrong step when she started. However, there has been no change so far as the request has to be considered by upper management.

[36] There are about 20-25 nurse practitioners working in continuing care in the same zone as Ms. Wakeford. They meet with their manager three or four times a year. In meetings held in November 2018 and January 2019, after the filing of the present application, members of this group, including Ms. Wakeford, raised concerns about inequities in terms of the steps on the wage grid and hours of work. Issues surrounding on-call work were also raised, but they did not affect Ms. Wakeford because she is not required to be on-call. On the issue of wages, the group

was informed their wages are frozen and management can do nothing to address such matters. Other concerns are being taken "up the ladder", but the group has heard nothing back. During cross-examination, Ms. Wakeford acknowledged it may be too early to know how AHS will respond. AHS presented no evidence to explain what if any steps are being taken to look into the matters raised.

[37] In November 2018, AHS published a document entitled *Nurse Practitioner Workforce Strategic Plan: Enhancing integration and practice* ("Strategic Plan"). Its focus is to create efficient nurse practitioner roles that are integrated into the healthcare system and provide improved healthcare access. The Strategic Plan does not discuss terms and conditions of employment. It does, however, discuss the lack of a funding model for nurse practitioners.

[38] Ms. Wakeford joined the NPAA in 2014. She dropped out for a few years and joined again in 2018.

DECISION

[39] Based on the uncontested evidence before us, Ms. Wakeford and Ms. Young are employed by AHS in their professional capacity as nurse practitioners in accordance with the *Public Health Act* and the regulations under that *Act*. There was no evidence before us to suggest Ms. Wakeford and Ms. Young should be excluded from employee status under section 1(1)(l) of the *Code* on the basis of performing managerial functions or being employed in a confidential labour relations capacity. They are "employed to do work" and "in receipt of or entitled to wages" within the meaning of section 1(1)(l) of the *Code*. It follows that, but for the exclusion of these nurse practitioners from employee status under section 1(1)(l)(iii), they would be "employees" for the purposes of the *Code*.

[40] Section 21 sets out the rights of employees and employers under the *Code*. Subsection (1) provides that an "employee" has the right "to be a member of a trade union and to participate in its lawful activities" and "to bargain collectively with the employee's employer through a bargaining agent". The Applicants rightly point out the effect of the exclusion under section 1(1)(l)(iii) is to deny nurse practitioners these statutory rights.

[41] At issue before us is whether the *Code's* exclusion of nurse practitioners infringes the Individual Applicants' right to freedom of association under section 2(d) of the *Charter*. The Applicants allege the purpose of the exclusion was to prevent nurse practitioners from bargaining collectively, as evidenced by the *Hansard* materials. They also allege the exclusion has had the following unconstitutional effects:

- unilaterally nullifying the existing LoU entered into by UNA on behalf of nurse practitioners;
- bringing to a halt bargaining UNA was undertaking on behalf of nurse practitioners;
- removing nurse practitioners from UNA's bargaining unit, despite a Board ruling putting them in UNA's unit;
- preventing nurse practitioners from choosing a representative of their choice;
- substantially interfering with the ability of nurse practitioners to collectively engage their employer in a meaningful way to address their workplace goals.

[42] They ask the Board to find the exclusion violates section 2(d) of the *Charter* and is not justified under section 1. This application was unopposed by the Alberta Government and AHS. HSAA, AUPE, and NPAA all support the Applicants' position on the *Charter* challenge. The Applicants seek a finding the exclusion does not constitute a bar to their determination application, which remains outstanding before this Board.

[43] In support of their position, the Applicants rely on the Supreme Court of Canada's decision in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 ("*Dunmore*"). The case represented the beginning of a sea change in the Supreme Court of Canada's jurisprudence relating to section 2(d) of the *Charter*. At issue was the constitutionality of the exclusion of agricultural workers from Ontario's statutory labour relations regime. In departing from pre-existing jurisprudence narrowly defining the protection afforded by section 2(d) of the *Charter*, the majority found the absence of legislative protection for farm workers to organize in order to achieve workplace goals constituted a substantial interference with the right to associate guaranteed by section 2(d) of the *Charter*.

[44] In assessing whether the *Charter* right was violated, the majority applied the well-established test set out in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 and *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (modified to apply section 2(d) as opposed to sections 2(a) and (b) of the *Charter*), saying (at para. 13):

> In order to establish a violation of s. 2(*d*), the appellants must demonstrate, first, that such activities fall within the range of activities protected by s. 2(*d*) of the *Charter*, and second, that the impugned legislation has, either in purpose or effect, interfered with these activities.

[45] However, the analysis in *Dunmore* was somewhat more nuanced because of the particular type of claim at issue. There, as is the case here, the issue was whether exclusion from a statutory regime violates the right to freedom of association guaranteed in section 2(d) of the *Charter*. While the *Charter* does not ordinarily require the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms, there are circumstances where such an obligation arises. The majority articulated the following analytical framework for determining whether exclusion from a statutory regime breaches section 2(d) (at paras. 24-26):

1. Are the claims grounded in a fundamental *Charter* freedom, rather than in access to a particular statutory regime?
2. Have the Applicants demonstrated that exclusion from a statutory regime permits substantial interference with the exercise of protected section 2(d) activity?
3. Is the state responsible for the inability to exercise the fundamental freedom?

[46] Turning to the first matter, the claim before us takes issue with the exclusion of nurse practitioners from the *Code*, with the thrust of the case centering on whether the purpose or effect of the exclusion is to prevent nurse practitioners from bargaining collectively. The Applicants point to the Individual Applicants' efforts to engage in discussions with AHS about their terms and conditions of employment. They also raise the impact of Bill 27 on UNA's representation of nurse practitioners in bargaining and in respect of LoUs it had negotiated on their behalf. Collective bargaining activities lie at the heart of this matter.

[47] In the Supreme Court of Canada's recent decision on section 2(d) in the labour relations context, *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.R. 245 ("*SFL*"), the majority began its decision by discussing the evolving scope of activities protected by section 2(d) as follows:

> 1 In the *Alberta Reference (Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313), this Court held that the freedom of association guaranteed under s. 2(d) of the *Canadian Charter of Rights and Freedoms* did not protect the right to collective bargaining or to strike. Twenty years later, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, this Court held that s. 2(d) protects the right of employees to engage in a meaningful process of collective bargaining. The rights were further enlarged in *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, where the Court accepted that a meaningful process includes employees' rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith. And, most recently, in *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3, the Court recognized that a process of collective bargaining could not be meaningful if employees lacked the independence and choice to determine and pursue their collective interests. Clearly the arc bends increasingly towards workplace justice.

[48] The majority in *SFL* went on to find the right to strike is an essential part of a meaningful collective bargaining process and protected by section 2(d). Despite the breadth of constitutional protection afforded by the section, it does not guarantee all aspects of associational activity related to collective bargaining. It protects only against substantial interference with a meaningful process of collective bargaining. It does not require a particular model of labour relations, nor does it guarantee a particular outcome: *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3, at para. 67 and 93; and *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, at para. 91.

[49] Based on the above, we have no difficulty finding the claims are grounded in a fundamental *Charter* freedom rather than simply gaining access to the *Code's* bargaining regime. We are also satisfied the activities at issue fall within the ambit of section 2(d) of the *Charter*.

[50] The next step in the *Dunmore* analysis is to consider whether the exclusion from the statutory regime permits substantial interference with the exercise of the protected activity. Applied to the case before us, this involves consideration of whether the exclusion of nurse practitioners from the *Code's* ambit has, either in its purpose or effect, substantially interfered with a meaningful process of collective bargaining.

[51] Prior to the amendments in 2003, the *Code's* definition of employee included nurse practitioners (so long as they otherwise met the definition of "employee"). The *Code's* specific exclusion of nurse practitioners from employee status, after a Board ruling finding that a nurse practitioner was in one of UNA's bargaining units and at a time UNA was engaged in bargaining on behalf of nurse practitioners with the CRHA, suggests the purpose for removing nurse practitioners from the *Code* was to deny them the ability to engage in collective bargaining.

[52] The Applicants say this intention is borne out by comments made by the relevant government Ministers of the day during Bill 27's second reading. We accept that assessing legislative intention for the purposes of *Charter* analysis can be difficult and should not be undertaken lightly. What is unique about this case is that no one contested the Applicants' position regarding legislative intent. Particularly significant, in our view, is the government's decision not to participate in the application to present any additional evidence or alternative argument for the Board's consideration. The NPAA, while agreeing with the Applicants' position about the purpose of the legislation, contended an additional purpose was to empower nurse practitioners to utilize a broader scope of practice involving more independent clinical decision-making.

[53] Based on the only evidence and arguments before us, we accept the Applicants' position regarding the legislative intent for the exclusion of nurse practitioners from the *Code*. While there might have been other reasons for the exclusion, we conclude one of the purposes was to deny nurse practitioners the ability to engage in collective bargaining – a purpose which substantially interferes with freedom of association. Having so found, the third part of the

Dunmore test is easily established. The section is tainted by its unconstitutional purpose and, therefore, breaches section 2(d) of the *Charter*.

[54] The Applicants go on to claim the effect of the *Code's* exclusion has been to substantially interfere with a meaningful process of collective bargaining. They point to the uncontested evidence indicating the passing of Bill 27 immediately brought to a halt UNA's representation as it related to nurse practitioners. They also rely on Mr. Harrigan's evidence indicating there was no consultation with UNA prior to the exclusion coming into force, also uncontested.

[55] The efforts of the Individual Applicants, along with some of their colleagues, to engage with AHS to achieve workplace goals were also raised as a basis to claim substantial interference. The Applicants say there has been no opportunity afforded to negotiate, no consultation about changes to terms and conditions of employment, and no meaningful discussion in response to the concerns raised. The evidence, they say, shows nurse practitioners lack the power to bargain and pursue workplace goals with their more powerful employer.

[56] Having found an unconstitutional purpose for the exclusion of nurse practitioners from the *Code*, it is unnecessary for us to rule on the effects of the exclusion. Based on the only information before us, the exclusion of nurse practitioners from the *Code* violates section 2(d) of the *Charter*. No case was presented to justify the infringement under section 1 of the *Charter*.

[57] For the reasons set out above, we find section 1(1)(l)(iii) of the *Code* in breach of section 2(d) of the *Charter* as it affects Ms. Young and Ms. Wakeford. As a result, we find section 1(1)(l)(iii) of the *Code* has no effect for the purposes of the determination application before us. The Individual Applicants are employees under the *Code*.

[58] The Applicants ask the Board to proceed with their determination application. The Board notes the Supreme Court of Canada's jurisprudence in relation to section 2(d) of the *Charter* does not mandate a particular model of labour relations. In light of this, the Board suspends the effect of the finding in the preceding paragraph for a period of 12 months to allow the government time to consider its options in light of the Board's decision. The Board sends a copy

of this decision to the Attorney General of Alberta and the Minister of Labour and Immigration. The Applicants' determination application is held in abeyance pending the conclusion of the suspension.

ISSUED and DATED at the City of Edmonton in the province of Alberta this 25th day of November 2019 by the Labour Relations Board and signed by its Vice-Chair.

Nancy E. Schlesinger
Vice-Chair