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Via Courier

Alberta Labour Relations Board
#501, 10808 – 99 Avenue
Edmonton, Alberta
T5K 0G5

**Attention:** **Tannis Brown, Director of Settlement**
**Dan Galdamez, Labour Relations Officer**

Dear Ms. Brown / Mr. Galdamez:

**Re: An Application for Intervener Status brought by the Health Sciences Association of Alberta ("HSAA") pursuant to section 12 and 16 of the *Labour Relations Code* respecting an application for determination brought by the United Nurses of Alberta ("UNA"), Jessica Wakeford ("Wakeford"), and Rochelle Young ("Young") affecting Alberta Health Services ("AHS") – Board File No. GE-07762**

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We are counsel for HSAA. HSAA is the certified bargaining agent for persons employed by AHS in a paramedical technical or paramedical professional capacity under ALRB Certificate No. 141-2017.

We make the following submissions in respect of the section 2(d) Charter challenge filed by UNA/Wakeford/Young.

**A. Section 2(d) Charter challenge**

1. HSAA supports the UNA/Wakeford/Young constitutional challenge under section 2(d) of the *Canadian Charter of Rights and Freedoms* to have the exclusion of a Nurse Practitioner as an "employee" under section 1(1)(l)(iii) of the *Labour Relations Code* (the "Code") declared unconstitutional.

2. A person employed as a Nurse Practitioner, including but not limited to Jessica Wakeford and Rochelle Young, has a constitutional right like every other health care employee governed by the Code "to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals".

    - *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, at para. 89
    **[see TAB 5 / UNA Authorities]**

3. The deliberate exclusion from the Code of a person employed as a Nurse Practitioner, and the resulting inability to join with other employees and form or become a member of a union under the Code, constitutes a substantial interference with that person's ability to engage in associational activities, including collective bargaining through a union within the legislated framework of the Alberta healthcare sector, and is a violation of that person's section 2(d) *Charter* rights.

4. There is no evidence – nor even a party – to prove that the infringement of a Nurse Practitioner's section 2(d) *Charter* rights can be justified under section 1 of the *Charter*. There is no evidence showing any rational connection between the exclusion of Nurse Practitioners from the definition of an "employee" under the Code and any underlying pressing and substantial objective. There is also no evidence that the Government of Alberta considered any less intrusive measure to achieve whatever the underlying purpose or objective there may have been for the exclusion.

5. Accordingly, HSAA submits that the UNA/Wakeford/Young *Charter* challenge should be granted, and the parties and affected intervenors should proceed to schedule a determination application.

**B. Remedy on section 2(d) Charter challenge**

6. With respect to remedy for this part of the UNA/Wakeford/Young application, HSAA submits that *Charter* disputes do not take place in a vacuum. The Board must assess the objectives of the legislative scheme being challenged (i.e. the Code), as well as the practical constraints it faces in fashioning a remedy and the consequences of potential constitutional remedies.

- *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, para. 30 **[TAB 1]**

7. The Courts recognize the expertise of this Board in terms of labour relations and the Code, and have confirmed the need for this Board to consider the broader legislative context in which a *Charter* challenge is made (emphasis added):

> The overarching consideration is that labour boards are administrative bodies of a high calibre. The tripartite model which has been adopted almost uniformly across the country combines the values of expertise and broad experience with acceptability and credibility. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at pp. 235-36, Dickson J. (as he then was) characterized the particular competence of labour boards as follows:
>
> > The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

> It must be emphasized that the process of Charter decision making is not confined to abstract ruminations on constitutional theory. **In the case of Charter matters which arise in a particular regulatory context the ability of the decision maker to analyze competing policy concerns is critical.**

- *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, para. 16 **[TAB 2]**

8. The remedy that flows from a declaration in this particular legislative and factual context – i.e. if a Nurse Practitioner is no longer excluded from the legislated definition of "employee" under the Code – is that a Nurse Practitioner then has the same rights as other employees under the Code specific to the healthcare sector in Alberta, and must then be placed within one of the four (4) legislated bargaining units (at least within AHS).

9. The regulatory context of this dispute is that the legislature has directed that an "employee" under the Code who is employed by a regional health authority – i.e. AHS – must be placed in one of the following mandated bargaining units, being:

   (a) Direct nursing care or nursing instruction;

   (b) Auxiliary nursing care;

   (c) Paramedical professional or technical services; and

   (d) General Support Services (GSS).

- *Regional Health Authority Collective Bargaining Regulation* (the "Regulation"), *Alta. Reg. 80/2003, section 2* **[TAB 3]**

10. In 2010, this Board heard arguments from EMS employees and their then unions (various CUPE Locals) who were challenging the 4 legislated bargaining units and arguing that the legislated bargaining units violated the EMS employees' section 2(d) *Charter* rights to select a union of the employees' choosing.

11. In dismissing the applications and the *Charter* challenges relating to the 4 legislated bargaining units, the Board stated (emphasis added):

> In 2007, the Supreme Court of Canada declared that freedom of association, protected in section 2(d) of the *Charter*, includes protection of the right of collective bargaining. This case considers whether the legislation Alberta introduced infringes the protection afforded to the right to collectively bargain. **It also considers whether the legislation leaves the Board with any discretion to design collective bargaining structures other than those directed by the legislation.**

> After careful consideration of all of the evidence and the thorough and helpful submissions of the parties, we conclude that Alberta has not substantially interfered with the freedom of association of the Applicants and hence has not infringed section 2(d) of the *Charter*.
>
> **We also conclude the legislation does not leave the Board with any discretion to design collective bargaining structures other than those directed in the legislation.**

- *Alberta Health Services (Re)*, [2010] ALRDB No. 9, at para. 4 – 6 **[TAB 4]**

12. This Board has confirmed that there is no basis for employees under the Code to form some kind of a fifth bargaining unit outside of the 4 legislated bargaining units. In fact, this Board has confirmed that the Regulation amounts to a clear rejection of the possibility of a fifth bargaining unit within the healthcare sector for employees falling within the scope of the Regulation.

- *Health Sciences Assn. of Alberta (Re)*, [2012] A.L.R.B.D. No. 1, at para. 40 **[TAB 5]**

13. If the Board grants the UNA/Wakeford/Young section 2(d) *Charter* application, then the Board's role will be to assess – in Part 2 of the bifurcated hearing – where Wakeford and Young, as Nurse Practitioners, should be placed in terms of the 4 legislated bargaining units.

14. The Board's assessment of the proper bargaining unit for Wakeford and Young will be based primarily on their prime functions and their community of interest, similar to how the Board addressed the placement of certain EMS employees under the Regulation:

> There is nothing in section 2(2) of the *RHACB Regulation* that takes away this Board's ability to use the prime function test to resolve determination applications like the one brought before us . . . The Board may still be called upon to make a determination under section 12(3)(o) regarding whether employees who are alleged to be providing "emergency health services" fall in the PPT Unit. In addressing those applications, the Board will first have to determine whether an employee's prime function is "the provision of emergency health services". If it is, the employee will fall in the PPT Unit by virtue the clear wording of section 2(2) of the *RHACB Regulation*. If an employee's prime function is not "the provision of emergency health services", the Board must then consider whether the prime function of the employee otherwise lands them in the PPT Unit or leads to their placement in some other unit.

- *Health Sciences Assn. of Alberta (Re), supra*, at para. 43 **[TAB 5]**

15. As employees under section 1(1) of the Code, Wakeford and Young will then be within the provisions of the Code – including section 21(1) of the Code and other Code provisions that specifically apply to healthcare employees of AHS such as Division 15.1 (Essential Services) and Division 16 (Compulsory Interest Arbitration). They will also fall under the Board's practice in assessing the 4 legislated healthcare bargaining units set out in ALRB Bulletin #10 – Bargaining Units for Hospitals and Nursing Homes.

16. HSAA notes that this is not a situation where the Code does not already exist in terms of a legislated context and framework for healthcare employees in Alberta. This is also not a situation where:

    a. Nurse Practitioners are somehow coming into this particular factual context as a new profession with an undefined associational and collective bargaining framework, or

    b. where the Nurse Practitioners form a unique type or class of healthcare employee, wholly independent from other paramedical professionals, and who have never before been employees under the Code or had the benefit of union representation in the healthcare sector.

17. Nurse Practitioners are not an entire class of workers – such as all agricultural workers in Ontario (as in *Dunsmore*), or thousands of RCMP law enforcement officers across Canada (as in *MPAO*) – who have never before been "employees" or had rights under the Code, or for whom the Code's general structure and provisions may be ill suited in terms of the specific and somewhat unique industry or sector.[1]

18. Rather, the uncontradicted evidence before the Board is that:

    a. Nurse Practitioners used to be included in the definition of "employee" under the Code, and had the right to, and did, undertake collective bargaining through a union until 2003;

    b. In 2003, the Government arbitrarily excluded Nurse Practitioners as employees under the Code, and thus removed their right to be a member of a union and bargain collectively through a union;

    c. Individual Nurse Practitioners who are employed by AHS have made several unsuccessful attempts on their own since 2003 to negotiate better terms and conditions of employment; and

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[1] For example, Police officers in Alberta fall under the provisions of the *Police Officers Collective Bargaining Act*, RSA 2000, c. P-18, and not within the Code itself. Employees, unions, and employers in the construction industry in Alberta also have a number of separate provisions under Part 3 of the Code that do not apply to employees, unions, or employers in other industries or sectors under the Code. By contrast, Nurse Practitioners have previously been employees under the Code, and the Code provisions and other legislation that otherwise applies to unionized healthcare employees of AHS is perfectly well suited to the Nurse Practitioners. There is no reason, in this context, to do otherwise.

d. In 2019, the Government of Alberta has not attempted in any manner to justify that continued exclusion of Nurse Practitioners from the definition of "employee" under section 1(1)(l)(iii) of the Code.

19. The reality is that the arbitrary exclusion of Nurse Practitioners from the Code only began in 2003, and it involved a change to their then status as employees under the Code and a change to the rights that all Nurse Practitioners had enjoyed up to that point.

20. In this context, Wakeford and Young, as Nurse Practitioners, have a right to be placed back as employees under the Code, and be reinstated to the pre-2003 status of Nurse Practitioners, and then have the same rights as other healthcare employees who otherwise fall within the definition of "employee" under the Code.

21. In this specific factual and legislative context, there is only one place for the affected Nurse Practitioner employees to be placed – being a return to the Code as employees and a return of the associated rights of an employee under section 21(1) of the Code, just as the Nurse Practitioners enjoyed prior to 2003.

22. From that relief, once Ms. Wakeford and Ms. Young are properly included within the definition of "employee", the Board must consider their status as employees within the existing structure of the Code and the bargaining units mandated by the Regulation – and not caste them adrift into some new and unknown other structure that does not yet exist.

23. HSAA submits that the Board must now assess, in the Part 2 of this bifurcated hearing yet to be scheduled, where the Nurse Practitioner fits as an "employee" under the Code within the 4 legislated healthcare bargaining units.

Please contact the writer if you have any questions or require any further information.

**SEVENY SCOTT**

**Per:**

**Dan Scott**

/encl.

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