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Alberta Labour Relations Board
501, 10808 – 99 Avenue
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Attention: Tannis Brown, Director of Settlement

Dear Madam:

Re: Determination Application and Application under s. 2(d) of the *Canadian Charter of Rights and Freedoms* brought by the United Nurses of Alberta and Jessica Wakeford affecting Alberta Health Services

We are counsel for the United Nurses of Alberta and their member, Jessica Wakeford.

Please find enclosed an Application for Determination, as noted above.

Thank you.

Yours truly,

CHIVERS CARPENTER

A handwritten signature in black ink, appearing to read 'Kristan A. McLeod', is written over a horizontal line.

KRISTAN A. MCLEOD

(Email: kmcleod@chiverslaw.com)

KM/ljn

Enclosure

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ALBERTA LABOUR RELATIONS BOARD
Determination Application and Application under s. 2(d) of the
Canadian Charter of Rights and Freedoms

A. APPLICANT:

United Nurses of Alberta (the "Union" or "UNA") and Jessica Wakeford

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B. NAME OF EMPLOYER AND INDIVIDUALS AGAINST WHOM THE COMPLAINT IS BEING MADE (RESPONDENTS):

Alberta Health Services ("AHS" or the "Employer")

MAILING ADDRESS:

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Calgary, AB T2W 1S7

LEGAL COUNSEL:

Jackie Laviolette
Associate General Counsel, Labour and Employment
Phone: (403) 943-0924
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C. SECTIONS WHICH ARE ALLEGED TO HAVE BEEN VIOLATED:

This determination application is brought pursuant to ss. 12(2)(a) and/or 16(3) and 12(3)(o) of the *Labour Relations Code* RSA 2000 c. L1 (the "*Code*") and alleges a breach of s. 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

D. INTRODUCTION

1. The United Nurses of Alberta (the "Union" or "UNA") and Jessica Wakeford (together, the "Applicants") apply for a determination that Ms. Wakeford and other employees of Alberta Health Services who are Nurse Practitioners doing direct nursing care or nursing instruction, are members of UNA's bargaining unit.
2. The Applicants also assert that s. 1(1)(l)(iii) of the *Code* violates the right to freedom of association as protected in s. 2(d) of the *Charter*. Together, ss. 1(1)(l)(iii) and 21 of the *Code* prevent Nurse Practitioners from bargaining collectively under the *Code*.
3. The Union holds certificate 73-2013 at the Labour Relations Board for Alberta Health Services employees described as: "All employees when employed in direct nursing care or nursing instruction." Included in the UNA certificate are all registered nurses (RNs) and registered psychiatric nurses (RPNs) who provide direct nursing care. The United Nurses of Alberta has successfully represented Registered Nurses and Registered Psychiatric Nurses for 40 years.
4. The other bargaining units of the Employer are represented by the Health Sciences Association of Alberta (HSAA) (certificate 141-2017) and the Alberta Union of Provincial Employees (AUPE) (certificate 98-2017 for auxiliary nursing employees and 140-2017 for general support services employees).

E. PARTICULARS

i. The Charter Breach

5. Section 21(1) of the *Code* 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." However, s. 1(1)(iii) provides that, "in this Act" an "employee" does not include "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". The *Code* defines a "nurse practitioner" as "a registered nurse within

the meaning of the Nursing Profession Act who is entered on the Nursing Profession Extended Practice Roster under that Act" (s.1(s.1)). Thus, Nurse Practitioners are precluded from organizing under the *Code*. In no other jurisdiction in Canada are Nurse Practitioners statutorily excluded from collective bargaining.

6. The Alberta exclusion resulted from changes made to the *Labour Relations Code* in 2003 by way of the *Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003* (Bill 27). Prior to those changes, the version of the *Labour Relations Code* in force between January 1, 2002 and March 31, 2003, defined "employee" as:

(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.

There was no mention of nurses or nurse practitioners. Under this statutory regime and prior to the exclusion of nurse practitioners from the *Code*, UNA was in the process of bargaining on behalf of nurse practitioners with AHS's predecessor regional health authorities.

7. The Hansard record from March 17, 2003 provides some insight into the legislative intent in excluding nurse practitioners from the *Code's* ambit. Clint Dunford, the Progressive Conservative MLA for Lethbridge West and the Minister of Human Resources and Employment, said the following at second reading of Bill 27:

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 nor 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.

...

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].

(p. 534)

8. The Alberta Hansard record from March 17, 2003 also includes the ministerial statement made by Gary Mar, Minister of Health and Wellness. While generally speaking about the reduction of the number of health authorities from 17 to 9 and the reduction of the number of collective agreements, he also generally emphasized the importance of "flexibility" in the delivery of health care. He made the following observations:

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 healthcare providers. Now, we have already done much to make the healthcare system more efficient and more responsive, but more remains to be done, and we need to pick up the pace.

...

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. (p 537)

9. There was also a comment in the Legislature that excluding nurse practitioners from collective bargaining reflects that their practice is in-between that of doctors and nurses. Minister Mar, responded as follows to a question from Brian Mason, NDP MLA for Edmonton-Highlands:

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 scope 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 would be able to use them in a manner which is much more flexible than a contract that might be more appropriate for nurses.
(p. 538)

10. This is echoed in Clint Dunford's later comments:

Mr. Dunford: ... 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.
(p. 547)

11. Thus, Hansard reflects that the Government's intent in excluding nurse practitioners from the *Code* was to prevent them from bargaining collectively. Thus, the exclusion is for an improper, unconstitutional purpose.

12. The exclusion of Nurse Practitioners from the *Code* denies their freedom to bargain collectively through a representative of their choosing and denies their access to a meaningful labour relations process for collective bargaining.

ii. The Determination Application

13. As was set out above, the Union holds certificate 73-2013 for Alberta Health Services employees described as: "All employees when employed in direct nursing care or nursing instruction." Included in the UNA certificate are all registered nurses (RNs) and registered psychiatric nurses (RPNs) who provide direct nursing care.

14. Nurse Practitioners are Registered Nurses with additional education and experience. The work of Nurse Practitioners is similar to that of Registered Nurses, except that they have additional skills and supplement their nursing model of care with a medical model of care. That is, whereas Registered Nurses provide holistic care and do not provide a diagnosis, Nurse Practitioners provide holistic care *and* can provide a diagnosis and address physiological issues. Thus, they do more differential diagnoses than do Registered Nurses, and do more in-depth medical histories with clients than do Registered Nurses.

15. Before a person can register as a Nurse Practitioner in Alberta, they must be a Registered Nurse and complete graduate education and training in advanced clinical practice. Such programs are most often at the master's or post-master's level. To practise, Nurse Practitioners must also be registered with the College and Association of Registered Nurses of Alberta ("CARNA") and must adhere to the applicable Nursing Practice Standards and Code of Ethics.

16. Specifically, the *Registered Nurses Profession Regulation*, Alta Reg. 232/2005 (the "*Regulation*"), sets out the following requirements for the registration of a Nurse Practitioner with CARNA:

4(1) An applicant for registration as a regulated member on the nurse practitioner register must

(a) have successfully completed a baccalaureate degree in nursing satisfactory to the Registration Committee,

- (b) have completed 4500 hours of registered nursing practice satisfactory to the Registration Committee,
- (c) have successfully completed a nurse practitioner education program approved by the Council,
- (d) be registered on the registered nurse register, and
- (e) have passed any examination respecting nurse practitioner practice approved by the Council.

17. Consistent with this, s. 15 of the *Regulation* establishes that Nurse Practitioners can do all of the same tasks as can Registered Nurses, plus additional tasks:

15(1) Regulated members on any register may, within the practice of registered nursing and in accordance with the standards of practice governing the performance of restricted activities approved by the Council, perform the following restricted activities:

- (a) to cut a body tissue, to administer anything by an invasive procedure on body tissue or to perform surgical or other invasive procedures on body tissue below the dermis or the mucous membrane;
- (b) to insert or remove instruments, devices, fingers or hands
 - (i) beyond the cartilaginous portion of the ear canal,
 - (ii) beyond the point in the nasal passages where they normally narrow,
 - (iii) beyond the pharynx,
 - (iv) beyond the opening of the urethra,
 - (v) beyond the labia majora,
 - (vi) beyond the anal verge, or
 - (vii) into an artificial opening into the body;
- (c) to insert into the ear canal under pressure, liquid, air or gas;
- (d) to reduce a dislocation of a joint except for a partial dislocation of the joints of the fingers and toes;
- (e) to dispense, compound, provide for selling or sell a Schedule 1 drug or Schedule 2 drug within the meaning of the Pharmaceutical Profession Act;

- (f) to administer a vaccine or parenteral nutrition;
- (g) to compound or administer blood or blood products;
- (h) to administer diagnostic imaging contrast agents;
- (i) to administer radiopharmaceuticals, radiolabelled substances, radioactive gases or radioaerosols;
- (j) to prescribe or administer nitrous oxide, for the purposes of anaesthesia or sedation;
- (k) to perform a psychosocial intervention with an expectation of treating a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs
 - (i) judgment,
 - (ii) behaviour,
 - (iii) capacity to recognize reality, or
 - (iv) ability to meet the ordinary demands of life;
- (l) to manage labour or deliver a baby.

...

(5) A regulated member on the nurse practitioner register may, within the practice of registered nursing, perform the restricted activities listed in subsection (1) and the following additional restricted activities when practising as a nurse practitioner:

- (a) to prescribe a Schedule 1 drug within the meaning of the Pharmaceutical Profession Act;
- (b) to prescribe parenteral nutrition;
- (c) to prescribe blood products;
- (d) to order and apply any form of ionizing radiation in medical radiography;
- (e) to order any form of ionizing radiation in nuclear medicine;
- (f) to order non-ionizing radiation in magnetic resonance imaging;
- (g) to order or apply non-ionizing radiation in ultrasound imaging, including any application of ultrasound to a fetus;
- (h) to prescribe diagnostic imaging contrast agents;

- (i) to prescribe radiopharmaceuticals, radiolabelled substances, radioactive gases and radioaerosols.

18. As CARNA explains, Nurse Practitioners “provide essential health services grounded in the registered nurse profession’s values, knowledge, theories and practice” and can do all of the tasks a Registered Nurse can do, but can also:

- conduct comprehensive health assessments,
- diagnose health/illness conditions
- treat and manage acute and chronic illness within a holistic model of care
- order and interpret screening and diagnostic tests,
- perform procedures, and
- prescribe medications and therapeutic interventions,

(CARNA, “Scope of Practice for Nurse Practitioners”, December 2017, p. 3)

19. AHS’s Nurse Practitioners operate across the health care system within this scope of practice (AHS Career Profile – Nurse Practitioner).

20. Consistent with the above, Ms. Wakeford worked for approximately ten years as a Registered Nurse before obtaining her Master’s Degree and becoming a Nurse Practitioner. For her Master’s Degree, she took the following 11 courses, which essentially added a medical component and advanced nursing component to her nursing education:

- Advanced Anatomy
- Women’s Health
- Children’s Health
- Adult Health
- Older Adult Health
- Pathophysiology

- Pharmacotherapeutics in Advanced Nursing Practice
- Advanced Health Assessment for Nurse Practitioners
- Facilitating Inquiry
- Foundations for Advanced Nursing Practice
- Nurse Practitioner Practice Consolidation (final practicum which includes a combination of all ages of patients)

21. Ms. Wakeford has been a Nurse Practitioner for three and a half years.

22. As a Nurse Practitioner, Ms. Wakeford works for AHS on a community consult team for palliative care. Physicians or Nurse Practitioners refer individuals to the team to assist them in managing their symptoms. In this way, Ms. Wakeford provides direct nursing care to patients as a Nurse Practitioner.

23. The team is made up of Physicians, two Nurse Practitioners and 10 Registered Nurses. Ms. Wakeford works on the rural part of this community consult team and works closely with four Registered Nurses. The other Nurse Practitioner and six Registered Nurses work with the Physicians in Edmonton. Ms. Wakeford's team reports to an out-of-scope nurse manager.

24. The Manager does Ms. Wakeford's performance reviews and is responsible for hiring and discipline for the team and for scheduling. The Director of Palliative End of Life and Community Programs is Cynthia Johnson who provides administrative cover for the Manager when she is not available. When the Manager is not available, Ms. Wakeford will provide coverage but only for clinical situations and not for anything that involves labour relations decisions.

25. For the purposes of her pay, Ms. Wakeford is on the Management and Out-of-Scope wage structure and her benefits include a pension with the Local Authorities Pension Plan (LAPP).

26. Ms. Wakeford is a member of the Nurse Practitioners Association (the "Association"). Among other things, the Association lobbies for increased funding for Nurse Practitioner positions.

27. Like other Nurse Practitioners, Ms. Wakeford has concerns over the scope of her decision-making authority in the workplace, the lack of understanding among other healthcare professionals and the public about what Nurse Practitioners do, and her ability to raise concerns about client care without jeopardizing her employment.

28. Alberta Health Services employs over 300 Nurse Practitioners in a variety of areas such as in hospitals, home living, facility living, supportive living, palliative care and on Emergency Community Urgent Response Teams.

29. The community of interest of Nurse Practitioners is with UNA for the following reasons:

- UNA has a lengthy and successful history of representing RNs/RPNs and understands their concerns;
- Like RNs, Nurse Practitioners must hold a Baccalaureate in Nursing;
- NPs must work as Registered Nurses before registering as a Nurse Practitioner;
- In representing RNs/RPNs to their employer, UNA is best positioned to assist Nurse Practitioners in dealing with the employer regarding their ability to do their job and their professional responsibilities;
- RNs and Nurse Practitioners register with and their practice is governed by CARNA. Nurse Practitioners share Practice Standards and a Code of Ethics with Registered Nurses. UNA provides assistance to RNs and RPNs who have issues in dealing with their professional organizations.

E. SUMMARY AND BASIS OF THE APPLICATION

30. But for s. 1(1)(l)(iii) of the *Code*, Nurse Practitioners would fall into UNA's bargaining unit when they provide direct nursing care or nursing instruction. The Applicants submit that s.

1(1)(l)(iii) of the *Code* violates Nurse Practitioners' freedom of association and thus breaches s. 2(d) of the *Charter*.

F. REMEDY

31. The Applicants seek the following remedies:

- a) a declaration that the exclusion of Nurse Practitioners from the *Code* is unconstitutional;
- b) a declaration that Nurse Practitioners doing direct nursing care or nursing instruction are included in the UNA's bargaining unit;
- c) An order that the Board's decision be posted in AHS's workplaces in a place visible to employees; and
- d) Such further and other remedies as are just and reasonable in the circumstances.

DATED at the City of Edmonton, in the Province of Alberta, this 5th day of April, 2018.



Lee Coughlan
United Nurses of Alberta