ALBERTA LABOUR RELATIONS BOARD

AN APPLICATION FOR DETERMINATION BROUGHT BY UNITED NURSES OF ALBERTA, JESSICA WAKEFORD AND ROCHELLE YOUNG AFFECTING ALBERTA HEALTH SERVICES

BOARD FILE NO. GE-07762

SUBMISSIONS OF THE UNITED NURSES OF ALBERTA, JESSICA WAKEFORD AND ROCHELLE YOUNG

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I. Introduction

1. This 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 L-1 (the "*Code*") and alleges a breach of s. 2(d) of the *Canadian of Rights and Freedoms* (the "*Charter*"). The Applicants 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*. 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.

2. The purpose and effects of the Nurse Practitioner exclusion in section 1(1)(l)(iii) of the *Code* substantially interferes with the Applicants' freedom of association. The purpose of the exclusion was to prevent Nurse Practitioners from bargaining collectively. The effects of the exclusion was (1) to unilaterally nullify existing agreements entered into by the Union on behalf of Nurse Practitioners; (2) to stop the bargaining that was in process on behalf of Nurse Practitioners; (3) to remove the Nurse Practitioners from UNA's bargaining Unit (despite a recent ruling putting them in UNA's Unit); (4) to prevent the Nurse Practitioners from choosing a representative of their choice; (5) to substantially interfere with the ability of Nurse Practitioners to collectively engage their employer in a meaningful way to address their workplace goals.

3. Nurse Practitioners have tried individually and collectively to engage with their Employer to achieve workplace goals and their attempts have been denied or ineffective. They have not been afforded the opportunity to negotiate or reach an agreement on the terms and conditions of their employment; they have not been consulted on changes to their terms and conditions of employment and the employer has not engaged in meaningful discussion with them. In *Mounted Police, infra*, the Supreme Court of Canada has stated:

> As we have seen, s. 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(d) more

pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.

4. Evidence before the Board has shown that Nurse Practitioners lack the power to bargain and pursue workplace goals with their more powerful employers. Nurse Practitioners are not covered by the *Code* or any alternate statutory regime of collective bargaining. Similar to the horticultural workers in *Hermanns Contracting, infra* "they are simply and improperly left to wither on the vine". The Nurse Practitioner exclusion infringes the Applicants' right to freedom of association under s 2(d) of the *Charter* and is not justified under s 1 of the *Charter*. This application is unopposed.

II. The Facts

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(l)(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, since 2003 Nurse Practitioners are precluded from organizing under the *Code.* In no other jurisdiction in Canada are Nurse Practitioners statutorily excluded from collective bargaining under the relevant labour relations regime.

6. The Alberta exclusion resulted from changes made to the *Code* in 2003 by way of the *Labour Relations (Regional Health Authorities Restructuring)* Amendment *Act, 2003* (Bill 27) (**TAB 1**). Prior to Bill 27, the version of the *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.

7. There was no exclusion of nurses or Nurse Practitioners. Under this statutory regime and prior to the exclusion of Nurse Practitioners from the *Code*, the United Nurses of Alberta ("UNA") was in the process of bargaining on behalf of Nurse Practitioners with some of Alberta Health Services ("AHS")'s predecessor regional health authorities and had reached letters of understanding regarding Nurse Practitioners in some of AHS's predecessor regional health authorities.

Hansard record

8. The Hansard record from March 17, 2003 (**TAB 2**) provides some statements regarding 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 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]. (p. 534)

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

10. 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)

11. 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)

Testimony of David Harrigan

12. David Harrigan, Director of Labour Relations for UNA, testified that he has held that position since 1989. In 1989, there were over 200 different employers. While the locals held the certificates, UNA always bargained as a group.

13. In 1994, Employers merged into Health Authorities or Regions: first 17, then 9 (in 2004), then 1 (in 2008). The regionalization did not really affect UNA collective bargaining as UNA has always bargained provincially and continues to bargain provincially. UNA currently bargains on behalf of employees engaged in direct nursing care and nursing instruction which includes Registered Nurses, Registered Psychiatric Nurses and undergraduate nurses.

14. Mr. Harrigan testified that, prior to 2003, UNA bargained on behalf of Nurse Practitioners and had negotiated agreements on behalf of Nurse Practitioners (referred to at the time as advanced practice nurses) in northern communities. Mr. Harrigan referred to the Letter of Understanding between Keeweetinok Lakes Regional Health Authority #15 and United Nurses of Alberta (Representing Local #315) Re: Northern Communities [Exhibit 6]; Letter of Understanding between United Nurses of Alberta, Local #315 and Keeweetinok Lakes Regional Health Authority #15 Re: Hours of Work [Exhibit 7], and Letter of Understanding between Keeweetinok Lakes Regional Health Authority and United Nurses of Alberta, Local 315 Northern Communities Only– Northern Communities [Exhibit 8].

15. Letter of Understanding between Keeweetinok Lakes Regional Health Authority #15 and United Nurses of Alberta (Representing Local #315) Re: Northern Communities [Exhibit 6] provided for additional compensation for additional duties for Nurse Practitioners. Letter of Understanding between United Nurses of Alberta, Local #315 and Keeweetinok Lakes Regional Health Authority #15 Re: Hours of Work [Exhibit 7] described the hours of work for Nurse Practitioners. Letter of Understanding between Keeweetinok Lakes Regional Health Authority and United Nurses of Alberta, Local 315 Northern Communities Only – Northern Communities [Exhibit 8] provided additional compensation based on hours of work.

16. The locals had the power to reach Letters of Understanding that had to be approved by the Executive and then would go out for a vote to the Local.

17. Mr. Harrigan testified that UNA was in the process of bargaining with the Calgary Regional Health Authority for the Nurse Practitioners when Bill 27 came into force. UNA had brought an application to the Alberta Labour Relations Board (the "Board") for a determination that a Nurse

Practitioner was in their bargaining unit. The Board ruled that the Nurse Practitioner was performing direct nursing care. [See: *U.N.A. v Calgary Regional Health Authority*, 1999 CarswellAlta 803, [1999] Alta. LRBR 458, **TAB 3**]. Mr. Harrigan testified that the primary issues in dispute involved hours of work and compensation. He testified that UNA has a number of different classifications and was suggesting in bargaining that Nurse Practitioners be in their own classification. Then Bill 27 came in and said they were no longer in the bargaining unit, and bargaining ceased.

18. After Bill 27, Nurse Practitioners contacted UNA from time to time, but UNA told them there was nothing they could do because they were excluded under the *Code*.

19. Mr. Harrigan testified that UNA was <u>not</u> consulted prior to Bill 27, nor was UNA given any forewarning of the changes. UNA was not consulted with respect to UNA's role with respect to Nurse Practitioners or with respect to bargaining on behalf of Nurse Practitioners. UNA suggested in consultations with the Government that the section should be changed so that Nurse Practitioners are not prohibited from organizing. There was no response from the Government.

Testimony of Rochelle Young

20. Rochelle Young became a Registered Nurse in 2003. Ms. Young worked in mental health and pediatric surgery, Pediatric Intensive Care Unit, and was a Registered Nurse in clinic working in the Sleep Medicine Clinic. Ms. Young has been employed by AHS throughout her career. Ms. Young commenced her Master of Nursing - Nurse Practitioner – Pediatric in 2007 and graduated in 2013 as a Nurse Practitioner. She got her Master of Nursing - Nurse Practitioner to expand her knowledge and care.

21. Ms. Young's role as a Nurse Practitioner is with the Stollery Children's Hospital seeing children independently in the Sleep Medicine Clinic. Her role is to assess and treat children regarding sleep concerns (respiratory and otherwise), including ordering and interpreting polysomnogram and oximetry testing. Ms. Young assists with the clinical practice in the Sleep Lab.

22. Ms. Young testified that when she became a Nurse Practitioner she knew she would be out-of-scope, but did not appreciate what she would be giving up. When Ms. Young became a Nurse Practitioner in 2013, the initial offer in her current position was less than she had been making as a Registered Nurse. Ms. Young testified that she tried to negotiate different wages. She sent an email to Human Resources in August, 2014 voicing her concerns about the Nurse Practitioner compensation. [See: email to Vickie Kaminski from Rochelle Young, dated August 7, 2014, [Exhibit 1]]. Ms. Young met with Deb Gordon in September and was told that Nurse Practitioners would be placed on C- Stream (clinical) for compensation. Ms. Young testified that the C-Stream did have a raise at the bottom of the scale but no significant change to the top of the scale. Ms. Young was placed on the C-Stream. Ms. Young testified that her salary was then initially higher than she was making as a Registered Nurse by a couple thousand dollars a year. She understood that the change to C-Stream had already been decided when she met with Deb Gordon.

23. Ms. Young testified that she did not form an agreement at the meeting with Deb Gordon. She and two other Nurse Practitioners attempted to raise concerns regarding the overall pay structure, there was no opportunity to negotiate with their employer.

24. Ms. Young then wrote to the Health Minister to inquire about allowing Nurse Practitioners to access other forms of compensation such as billing codes. Ms. Young testified that the Health Minister replied that the Government was interested in Nurse Practitioners and were working on a strategy and she spoke to compensation. Ms. Young stated that the low end of the compensation was raised but the upper end was not raised. [See: Letter to Rochelle Young from Sarah Hoffman, dated September 23, 2015 [Exhibit 2]. Ms. Young testified that she did not think these changes were as a result of her email or meeting with Deb Gordon as Ms. Gordon had alluded to moving Nurse Practitioners to a C-Stream in her meeting and Ms. Young believed that making the adjustment was already on the table.

25. Ms. Young testified that Registered Nurses make more than she does. Ms. Young is currently making $52.00 per hour and there are Registered Nurses who are making more under the Collective Agreement (particularly since Ms. Young is salaried and has no opportunity for

additional work/pay) [See: Collective Agreement between Alberta Health Services, Covenant Health, Lamont Health Care Centre, The Bethany Group (Camrose) and The United Nurses of Alberta, [Exhibit 9]. Ms. Young testified that Registered Nurses have been getting steady increases and twice-yearly cash incentive payouts. Ms. Young's salary has been frozen since 2014.

26. Ms. Young testified that she was not able to participate in any form of bargaining. There was no meeting with the Employer to bargain and no one else was bargaining on her behalf.

27. Ms. Young testified that she then became a member of the Nurse Practitioner Association of Alberta ("NPAA"). She became active in the NPAA as a potential avenue to address fair compensation. Ms. Young said that she did not find it helpful. Ms. Young stated that the NPAA has a role to play, but that it was not an appropriate body to work through negotiations as it is a volunteer association and the level of skill required is not present.

28. Ms. Young then joined a group of colleagues to form a Community of Practice to raise their profile as a community to negotiate - if not for better wages then for better working conditions. There are between 21-25 Nurse Practitioners in this group, which has met monthly since 2014. The Community of Practice meetings are used for skills review for the Pediatric Nurse Practitioner role, to discuss ongoing research, and to troubleshoot barriers to optimizing practice at the Stollery. Ms. Young testified that the Community of Practice does not have a negotiated agreement with the Employer. Ms. Young said that they had invited a management group to observe the process. Ms. Young testified that Human Resources came to discuss compensation and to answer questions and concerns in a meeting in 2017 or 2018 when there was a salary freeze. Ms. Young testified that they were not able to negotiate an agreement. Ms. Young stated that when Human Resources discussed compensation, Nurse Practitioners in the Community of Practice discussed the freeze and the pay structure. Ms. Young stated that they spoke and the Employer listened, but no resolution was brought forward from that meeting. Ms. Young stated that there has been a pay freeze since 2014.

29. In April, 2018, Ms. Young received an email from Todd Gilchrist indicating a change to the evaluation process [See: email from Todd Gilchrist to Rochelle Young, dated April 24, 2018

[Exhibit 3]. Ms. Young testified that previously performance evaluations were conducted on a yearly basis and were an opportunity to try to increase compensation. Ms. Young stated that at the end of her last performance review she was told that AHS is in a freeze and no change in compensation would occur. Ms. Young testified that there was no performance evaluation or development conversation this year, so this reduced an opportunity to discuss compensation.

30. In September, 2018, Mr.Gilchrist sent a memo indicating there would be a "greater deduction on your pay once a month (or every second pay) to cover the increased LTD cost…there will also be a rate increase to your supplementary health benefits…". [Exhibit 4]. Ms. Young testified that she was not consulted and there was no negotiation before wages were reduced for benefit coverage.

31. Ms. Young testified that in her job at the Stollery, she is not involved in hiring or firing, and does not take part in any disciplinary decisions.

32. Ms. Young testified that approximately 21 Nurse Practitioners are in the Community of Practice. They work in different areas of the Stollery Children's Hospital including oncology, gastroenterology, pain, cardiology and neurology.

33. Ms. Young testified that she heard of this application and contacted UNA. Ms. Young decided that this would be the most advantageous avenue to discuss fair wages with the Employer.

Testimony of Jessica Wakeford

34. Jessica Wakeford became a Registered Nurse in 2005. She practiced in cardiology intensive care unit and oncology, and has worked in the Northwest Territories and in rural hospitals, inpatient and labour and delivery. She was a member of UNA when she worked as a Registered Nurse and was a UNA Unit Representative for a few years. She went back to school in 2011 to do her Master of Nursing – Nurse Practitioner, and graduated in 2014. Ms. Wakeford's first Nursing Practitioner position with AHS was on a Palliative Community Consult team in October, 2014.

35. Ms. Wakeford became a Nurse Practitioner to improve access and care for patients in Alberta. Ms. Wakeford testified that it was frustrating for her to be out-of-scope as a Nurse Practitioner. Ms. Wakeford knew it would create some barriers. She had previously been an active Union member.

36. When Ms. Wakeford was originally hired, she was given an offer that put her on the beginning step on the pay grid and was making less than she made as a Registered Nurse. Ms. Wakeford sent the letter back and was told that it was a wage freeze and there was no opportunity to move up the grid. She accepted the offer as she felt she had no other choice.

37. Ms. Wakeford testified that she had numerous conversations with management regarding her compensation. She asked about her wage which was $48.00 an hour compared to Registered Nurses who made $52.00 an hour. Management told her that she was out-of-scope, there was a wage freeze and nothing could be done. Ms. Wakeford was frustrated that other nurses can move up the steps, and Nurse Practitioners were completely frozen on the step they were on.

38. Ms. Wakeford testified that she has no decision-making authority for hiring and firing, is not involved in disciplining other employees, and does not have any managerial role. When the manager is away, she covers for the clinical side but does not do any administrative duties.

39. Ms. Wakeford works with one other Nurse Practitioner on the Palliative Consult Team. There are between 20-25 Nurse Practitioners in the Edmonton Zone Continuing Care Group. Ms. Wakeford testified that the Continuing Care Nurse Practitioners as a group had conversations with Management regarding wages and hours of work. The Continuing Care group meet 3-4 times a year. They have had multiple discussions with her new Manager and the Manager has told them that she is working on it and is taking it "up the ladder". The first time was in November, 2018 and January, 2019. Ms. Wakeford testified that when they raised the issue of salary, the Manager says they are frozen and that they are out of scope.

40. Ms. Wakeford also testified that she had conversations with her new current Manager and she agreed to complete the paperwork to reclassify Ms. Wakeford and it will go to Deb Gordon. Ms. Wakeford testified that there is so much discrepancy – that it is really dependent on some of the managers. Her current Manager told Ms. Wakeford that she should not have been started at the current salary step, but she has no ability to change that.

41. Ms. Wakeford said that there are zone meetings three times a year where Nurse Practitioners discuss work and advocating for Nurse Practitioners at Alberta Health Services.

42. Ms. Wakeford testified that Alberta Health Services assembled a Workforce Strategic Plan [Exhibit 5], which is to create efficient Nurse Practitioner roles that are integrated into the healthcare system and provide improved healthcare access. The Workforce Strategic Plan does not address hours of work. There is a discussion about lack of a funding model. Ms. Wakeford testified that Nurse Practitioners do not have a funding model. Physicians have a fee-for-service model. Nurse Practitioners do not have any model for services.

43. Ms. Wakeford could not recall any discussion about remuneration or bargaining in the Alberta Health Services Zone Nurse Practitioner meetings. She testified that the purpose of the meetings is to advance the scope of practice, and make connections so the Nurse Practitioners could consult with each other where needed.

44. Ms. Wakeford became a member of the NPAA in 2014; she was not a member for a few years, and then became a member again in 2018.

45. Ms. Wakeford testified that she has participated in discussions with Management as part of the group of Continuing Care Nurse Practitioners. There have been a lot of discussions about hours of work but there has been "no agreement about what to do" and "nothing has been determined". Ms. Wakeford testified that "there has been no decision with how to continue" and they are just waiting for AHS to decide on a plan. Ms. Wakeford testified that there is frustration about not negotiating an agreement about remuneration, and Alberta Health Services is continually stalling discussions and "not getting anywhere".

III. The Legal Framework

46. The decisions in the following cases provide the legal framework for the application:

***Dunmore v Ontario (Attorney General)*, 2001 SCC 94 ("*Dunmore*") (TAB 4)**

47. In *Dunmore*. the Supreme Court of Canada considered whether the exclusion of agricultural workers from Ontario's *Labour Relations Code* violated the right to freedom of association guaranteed in s. 2(d) of the *Charter*.

48. In *Dunmore*, the Court articulated the applicable test when a statutory omission, such as the one at issue here, potentially breaches the right to freedom of association. The majority held that, while the does not ordinarily oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms, there are circumstances in which there is such an obligation. Determining whether the government has a positive duty under s. 2(d) requires consideration of the following:

i) Are the claims grounded in a fundamental freedom protected by s. 2(d), rather than in access to a particular statutory regime? (para 24)

ii) Have the applicants demonstrated that exclusion from a statutory regime permits substantial interference with the exercise of protected s. 2(d) activity? (para 25)

iii) Is the government responsible for the inability to exercise the fundamental freedom? (para 26)

49. Moreover, the Court held that the effective exercise of the right to freedom of association "may require not only the exercise in association of the constitutional rights and freedoms (such as freedom of assembly) and lawful rights of individuals, but the exercise of certain collective activities, such as making majority representations to one's employer" (para 30).

50. Applying this test in *Dunmore*, the Court held that the exclusion of agricultural workers from Ontario's labour legislation did violate the *Charter*. In reaching this conclusion, the Court

reiterated that in *Delisle* it had commented that it could find such a breach in exceptional circumstances.

51. The exceptional circumstance in *Dunmore* was the particular vulnerability of agricultural workers which precluded them from organizing absent legislative protection. Specifically, the Court noted the following attributes of agricultural workers: political impotence; lack of resources to associate without state protection; vulnerability to reprisals by employers; poor pay; difficult working conditions; low levels of skill and education; low status; and limited employment mobility (para 41). As the Court subsequently noted in *Health Services*, the agricultural workers addressed in *Dunmore*, "faced barriers that made them substantially incapable of exercising their right to form associations outside the statutory framework" (para 35). Additionally, unlike the government employer at issue in *Delisle*, the private sector employers of agricultural workers are not bound by the and thus, absent legislation, agricultural workers had no means to compel their employers to refrain from actions analogous to unfair labour practices (para 41).

52. It was this evidentiary foundation that led the Court to conclude that the exclusion of agricultural workers from labour legislation did violate the *Charter*. That is, the effect of the statutory exclusion was to prevent agricultural workers from organizing and thus the legislation infringed their freedom of association. The Court directed the Ontario government to enact legislation to give effect to agricultural workers' freedom of association.

***Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 ("*Health Services*") (TAB 5)**

53. At issue in *Health Services* was the constitutionality of provincial legislation overriding certain provisions of some public sector collective agreements and precluding certain topics from being the subject of collective bargaining in the future. In this context, the Court held that freedom of association, as protected by s. 2(d) of the *Charter*, encompasses the right to bargain collectively. Thus, employees have a right to unite, to present demands to employers collectively, and to engage in meaningful discussions in an attempt to achieve workplace-related goals (para 89). The Court explained that this constitutional right protects "the ability of workers to engage in associational

activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment" (para 89).

54. The Court held that, when considering whether there has been a breach, adjudicators are to ask whether the effect of the state action substantially interferes with the activity of collective bargaining. The Court explained: "...the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith" (*Health Services*, para 90, citing *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 16). The Court held that determining whether a government measure amounts to "substantial interference" involves two inquiries (para 93):

> a) An inquiry into the importance of the matter affected to the process of collective bargaining, specifically, to the capacity of the union members to come together and pursue collective goals in concert; and
>
> b) An inquiry into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
>
> (para 93)

55. With respect to the first inquiry, laws or state actions that prevent or deny meaningful discussion and consultation about working conditions may substantially interfere with collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements (*Health Services*, para 96).

56. As the Court explained:

> To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry

> in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted. (para 92)

57. With respect to the second inquiry, the question is whether the legislative measure or government action respects the duty to consult and to negotiate in good faith (*Health Services*, para 97). In this regard, the Court cited the International Labour Organization's statement that good faith collective bargaining "implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith" (para 98).

58. Applying this test to the facts before it in *Health Services*, the Court held that most of the legislation at issue violated the right to freedom of association and was thus unconstitutional.

***Fraser v Ontario (Attorney General)* ("*Fraser*"), 2011 SCC 20 (TAB 6)**

59. At issue in *Fraser* was Ontario's *Agricultural Employees Protection Act* (the "*AEPA*") which the Ontario legislature enacted following the Supreme Court's decision in *Dunmore v Ontario (Attorney General)*, 2001 SCC 94. In *Dunmore,* the Supreme Court had held that the exclusion of agricultural workers from Ontario's *Labour Relations Code* violated the right to freedom of association as guaranteed in s. 2(d) of the *Charter*.

60. Rather than incorporating agricultural employees into Ontario's *Labour Relations Act*, the Ontario legislature passed the *AEPA* which established a separate labour regime for agricultural workers.

61. The Court concluded that the *AEPA* does not breach the s. 2(d) right to freedom of association because it gives employee associations the right to make representations to their employers, and requires employers to listen to oral representations or read written representations, and thus contains an implicit duty on employers to consider employee representations in good faith

and engage in meaningful dialogue. Thus, s. 2(d) protects workers' freedom to meaningfully exercise the right to associate in an attempt to achieve collective goals, and the right to have their collective representations considered and discussed in good faith (paras. 2, 46).

***Mounted Police Association of Ontario v Canada*, 2015 SCC 1 ("*Mounted Police*") (TAB 7)**

62. In *Mounted Police,* the Supreme Court had to decide whether excluding members of the Royal Canadian Mounted Police ("RCMP") from collective bargaining under the *Public Service Labour Relations Act*, enacted by the *Public Service Modernization Act*, SC 2003, c 22, s 2 ("*PSLRA*"), and imposing a non-unionized labour relations regime violated the guarantee of freedom of association in s. 2(*d*) of the *Charter*. RCMP members were not permitted to unionize or engage in collective bargaining and they had been excluded from the *PSLRA* and its predecessor statute since collective bargaining was first introduced in the federal public service in the late 1960s. Instead, there existed a non-unionized labour relations regime. The appeal was directed at the constitutionality of the scheme comprising both the *PSLRA* exclusion and the non-unionized labour relations process.

63. The Supreme Court concluded that the exclusion of RCMP members from collective bargaining under para (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringed s. 2(*d*) of the *Charter* and was not justified under s. 1 of the *Charter*. The Supreme Court also found that s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361 ("*RCMP Regulations*"), were inconsistent with s. 2(*d*) of the *Charter*.

64. The Supreme Court stated that s. 2(*d*) must be interpreted in a "purposive and generous fashion" *and* that "in order to determine whether a restriction on the right to associate violates s. 2(*d*) by offending its purpose, we must look at the associational activity in question in its full context and history. Neither the text of s. 2(*d*) nor general principles of interpretation support a narrow reading of freedom of association" (para 47).

The Right to a Meaningful Collective Bargaining Process

65. The Supreme Court stated that s. 2(*d*) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals. This guarantee includes a right to collective bargaining. However, that right is one that guarantees a process rather than an outcome or access to a particular model of labour relations. The Court stated that "s. 2(*d*) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power…Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals" (*Mounted Police*, para 70).

66. The Court further explained what constitutes a meaningful process of collective bargaining:

> 71 The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees ..." (para 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(*d*).

67. The right to a meaningful process of collective bargaining will not be satisfied by a legislative scheme that strips employees of adequate protections in their interactions with management so as to substantially interfere with their ability to meaningfully engage in collective negotiations (*Mounted Police*, para 80).

68. Section 2(*d*) protects the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. The Court stated that a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence

sufficient to enable them to determine their collective interests and meaningfully pursue them (*Mounted Police*, para 81).

69. Section 2(*d*) protects the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. Freedom of association requires that the employer consider employees' representations in good faith, *and engage in meaningful discussion with them*. The Court stated:

> In summary, a meaningful process of collective bargaining is a process that gives employees meaningful input into the selection of their collective goals, and a degree of independence from management sufficient to allow members to control the activities of the association, having regard to the industry and workplace in question. A labour relations scheme that complies with these requirements and thus allows collective bargaining to be pursued in a meaningful way satisfies s. 2(*d*)."
> (para 99)

Paragraph (d) of the Definition of "Employee" In Section 2(1) of the PSLRA Infringed Section 2(d) of the

70. The Court examined whether subsection (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringed s. 2(*d*) in its purpose. Paragraph (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* excluded RCMP members from the application of the *PSLRA*. The Supreme Court in *Delisle* held that the exclusion of the RCMP from the *PSSRA*, the *PSLRA*'s predecessor legislation, did not violate s. 2(*d*) of the *Charter*. The Supreme Court reconsidered its decision in *Delisle* for two reasons. First, *Delisle* was decided before the Court's shift to a purposive and generous approach to the exercise of freedom of association. At the time *Delisle* was decided, the right to a meaningful process of collective bargaining was not recognized as part of the s. 2(*d*) guarantee. The Court was *not* addressing the issue of whether the purpose of the *PSSRA* exclusion was to prevent RCMP members from engaging in collective bargaining. The question of an interference with the right to a meaningful process of collective bargaining was neither asked nor answered in *Delisle*.

71. Second, in *Delisle*, only part of the scheme governing the labour relations of RCMP members — their exclusion from the *PSSRA* — was before the Court. In *Mounted Police*, the

challenge targeted the entire labour relations scheme - the exclusion from the application of the *PSLRA* and the imposition of the labour relations regime that the Court found was intended to deny RCMP members the right to form an independent association capable of engaging in a meaningful process of collective bargaining.

72. The Supreme Court held that the purpose of the *PSLRA* exclusion infringed s 2(d). The Court stated that the statutory exclusion of RCMP members must be read and its constitutionality assessed in relation to P.C. 1918-2213, the Order in Council that constituted the labour relations regime that applied to members of the RCMP at the time of enactment of the *PSSRA*. The Supreme Court stated that the blanket prohibition of associational activity in pursuit of workplace goals imposed by P.C. 1918-2213 unquestionably violates s. 2(*d*) of the *Charter*. The implementation of this labour relations regime was made possible by the exclusion of the RCMP members from the labour relations regime governing the federal public service under the *PSSRA*.

73. The Court found that the *PSSRA* exclusion and P.C. 1918-2213, working together, constituted a labour relations regime that was designed to interfere with the right to freedom of association of RCMP members. These two prongs of the predecessor labour relations regime shared a common purpose. They were both intended to deny to RCMP members the constitutional exercise of their freedom of association. Like P.C. 1918-2213, subsection (*e*) of the definition of "employee" in s. 2(1) of the *PSSRA*, now re-enacted as subsection (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA*, is tainted by an improper purpose and breaches s. 2(*d*) of the *Charter* (para 130).

74. The Court stated:

> 131 The purpose of para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA*, viewed in its historical context, thus violates s. 2(*d*) of the *Charter*. The *PSSRA* and, later, the *PSLRA* established the general framework for labour relations and collective bargaining in the federal public sector. A class of employees, the members of the RCMP, has, since the initial enactment of this regime, been excluded from its application in order to prevent them from exercising their associational rights under s. 2(*d*). Thus the issue to be addressed is whether the purpose of excluding a specific class of employees from the labour relations regime impermissibly breaches the constitutional rights of the affected

employees. The issue is not whether Parliament must impose a new statutory labour relations regime in the presence of a legislative void.

75. Paragraph (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* excluded every person "who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members".

76. The Court held that the exclusion of RCMP members from the *PSSRA* in 1967 was intended to prevent them from engaging in collective bargaining. The then-Commissioner of the RCMP acknowledged this in correspondence to the Solicitor General of Canada in 1980, stating: "There is no enabling legislation which allows members to collectively bargain and we must infer that Parliament has not intended that members of the Force have that right" (para 134). RCMP members continued to be excluded in identical terms as under the *PSSRA*, and no other statute permitted RCMP members to engage in a process of collective bargaining. The Court held that the *PSLRA* exclusion made possible the imposition of the SRRP, which it found to substantially interfere in both purpose and effect with the RCMP members' rights to a meaningful process of collective bargaining. The Court stated "Working in tandem with P.C. 1918-2213, the *PSSRA* exclusion had similarly sought to deny the members of the RCMP the exercise of their right to freedom of association. The simple re-enactment of this exclusion in the *PSLRA* did not cure this constitutionally impermissible purpose. The *PSLRA* exclusion is but a part of a constitutionally defective regime of labour relations, designed to prevent the exercise of the s. 2(*d*) rights of RCMP members. We therefore conclude that the purpose of the *PSLRA* exclusion infringes s. 2(*d*) of the *Charter*" (para 135).

77. The Court concluded that "the purpose of the exclusion in s. 2(1) of the *PSLRA* substantially interferes with freedom of association. At this point, we need not consider the effects of the *PSLRA* exclusion independently from those of the imposition of the SRRP as a labour relations regime" (para 136).

78. The Court held that this conclusion does not mean that Parliament must include the RCMP in the *PSLRA* scheme. Section 2(*d*) of the *Charter* does not mandate a particular model of labour

relations. The Court's conclusion with respect to the constitutionality of the *PSLRA* exclusion meant that Parliament must not substantially interfere with the right of RCMP members to a meaningful process of collective bargaining unless this interference can be justified under s. 1 of the *Charter*. The Court then turned to whether the infringements of s. 2(*d*) rights caused by the legislative imposition of the SRRP and by the exclusion of RCMP members from the application of the *PSLRA* were justified under s. 1 of the *Charter*.

79. The Court held that s 1 of the *Charter* permits Parliament to enact laws that limit rights if it established that the limits are reasonable and demonstrably justified in a free and democratic society. This required that the objective of the measure be pressing and substantial, and that the means by which the objective was furthered be proportionate in that the means are rationally connected to the law's objective, minimally impair the s. 2(*d*) right, and are proportionate in effect. The onus rests on the party seeking to uphold the limitation of the right, and the burden of proof is a preponderance of probabilities (para 139).

80. The Court concluded that paragraph (*d*) of the definition of "employee" at s. 2(1) of *Public Service Labour Relations Act*, S.C. 2003, c. 22, infringed s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* and the infringement was not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s 1 of the *Charter*.

***Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 ("*SFL*") (TAB 8)**

81. While the Supreme Court's decision in *SFL* primarily concerns the right to strike, the Court made important comments regarding the nature and context of the right of freedom of association.

82. In *SFL,* the constitutionality of two Saskatchewan statutes was at issue: *The Public Service Essential Services Act*, *SS* 2008, c P-42.2 and *The Trade Union Amendment Act*, 2008, SS 2008, c. 26. The former statute had the effect of prohibiting public sector employees from striking. The latter statute changed the union certification process and the Court found it to be constitutional.

83. The Supreme Court held that the prohibition on striking violated s. 2(d) of the *Charter*. In doing so, the Court *affirmed* that s. 2(d) encompasses a right to a meaningful process of collective bargaining, functions to protect individuals from more powerful entities, and allows individuals to band together in pursuit of common goals (paras 53, 55). The Court described the right to strike as essential to the collective bargaining process and found that "this collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives" (para 54).

***International Union of Operating Engineers, Local 793 v Hermanns Contracting Limited*, 2017 CarswellOnt 19500 ("*Hermanns Contracting*") (TAB 9)**

84. In *Hermanns Contracting,* the Union challenged the statutory exclusion of certain specified horticultural employees from the coverage of the *Labour Relations Act* (the "*Act*"). The Union asserted that the exempted employees did not have access to collective bargaining under the *Act*, the *Agricultural Employees Protection Act* ("*AEPA*") or any other collective bargaining statute. Therefore, the exclusion of the specified horticultural employees from the coverage of the *Act* was underinclusive, and in violation of the guarantee of freedom of association contained in section 2(d) of the *Charter*.

85. The Board, citing *Fraser v. Ontario (Attorney General)* (2011), 2011 SCC 20, stated that

> the Court once again said that there are bargaining activities that are protected by section 2(d) of the *Charter*. Those activities include the employer and employees meeting and bargaining in good faith in the pursuit of a common goal of peaceful and productive accommodation. Furthermore, the dialogue between the employer and the employees must be part of a process that permits meaningful pursuit of the above-mentioned goal. However, no particular model of labour relations or specific bargaining method is required.
> (para 61)

86. The Board applied the following legal analysis referred to as "the *Dunmore* test":

a) Is the activity in question covered by the freedom of association?

b) Has there been substantial interference with the activity? and,

c) Is the state accountable for the inability to exercise a fundamental freedom?

87. The Board held that the Supreme Court of Canada has made it abundantly clear over the past 20 years that the right of employees to form and join trade unions is an important activity encompassed by the freedom of association, so the Union met the first limb of the test.

88. The Union asserted that the statutory exclusion denied the affected employees the right to access any statutory collective bargaining regime whatsoever, and hence offended the s 2(d) guarantee of freedom of association. The Union asserted that substantial interference existed because the affected horticultural employees had no access to any statutory protected regime of collective bargaining whatsoever. They were not covered by the *Act*. They were not covered by the *AEPA*. "They are simply and improperly left to wither on the vine" (para 103).

89. The AG argued that horticultural employees did organize and bargain collectively in Ontario. The Board held that the evidence before the Board did not support that argument. The Board stated:

> 107 In fact, the evidence before the Board points to the opposite conclusion for horticultural workers. The evidence of Mr. O'Neill, which was not rebutted by the AG, is that the only "proof" of associational activity concerning any horticultural employees similar to some of the affected employees in this case consists of the landscaping agreements referred to above, which are agreements initiated by employers who want to work on unionized job sites and not by employees. They are not collective agreements for the purpose of the Act when entered into by employers whose primary business is horticulture: *Jackson-Lewis supra*. The AG has presented no evidence of unionizing or collective agreements that arose from the wishes or efforts of horticultural employees as opposed to horticultural employers. Furthermore, those agreements only pertain to landscaping employees, notwithstanding that they are only expressions of employer and not employee wishes. Moreover, the AG produced no evidence that employees in horticulture production operations, and in particular employees engaged in tree farming or soil production, had ever been organized or had access to collective bargaining. Mr. O'Neill's evidence that his attempts to organize horticultural employees were stymied by the horticultural exclusion was not challenged or contradicted. There is simply no evidence of any voluntary associational activity by employees covered by the section 3(c) exclusion at all. There has been no employee exercise of the right of freedom of association on the facts.

90. The AG's second proposition was that the Union had *not attempted* to engage in non-statutory collective bargaining with the Employer. The Board found this argument not to be persuasive. The Board stated that

> Mr. Ardito's uncontradicted evidence is that Mr. Hermanns' reaction to an invitation to discuss issues of importance to employees was first met with silence, and then with a sudden termination of employment and escort off the property. Mr. O'Neill testified that the Employer has steadfastly opposed the certification applications and unfair labour practice complaints on constitutional grounds and refused to discuss their merits with the Union. In these circumstances, it would be emphasizing form over substance and ignoring labour relations reality to say the Union did not attempt to engage the Employer because the Union did not send a formal letter to commence negotiations.
> (para 108)

91. The AG then argued that the Union had shown no evidence of unconstitutional purpose on the part of the Ontario Legislature with respect to the horticultural exclusion. The AG said the Union had not been able to show the exclusion of horticultural workers from the *Act* was enacted for the purpose of preventing horticultural employees from engaging in collective bargaining. The Board held that the AG's argument was based on a flawed premise. That premise was that the Union must be able to point to express language on the part of the Ontario legislature that the intent of the horticultural exclusion was to disenfranchise horticultural workers from unionization and collective bargaining. The Board held that the Union could and did show that the Ontario Legislature excluded horticultural workers from collective bargaining up to 1992, allowed them access for about three years, and then restored the exclusion. Therefore, they were in an analogous position to the agricultural workers in *Dunmore* (para 111).

92. The AG then argued that the characteristics of the labour market for horticultural employees did not point to employee vulnerability. The AG claimed that this was relevant because of the commentary by Bastarache J. in paragraph 35 of *Dunmore*, where he spoke of "exceptional circumstances", "unique contexts" and "no possibility for association as such without minimum statutory protection". The AG asserted that the evidence demonstrated that horticultural employees did not meet this test because some affected employees of the Employer were paid above the minimum wage and received wage increases, found other remunerative employment after leaving the Employer, and could take advantage of "a shortage of skilled labour in the industry".

93. The Board held that "the argument of the AG does not withstand factual and legal scrutiny, and is not consonant with modern constitutional and labour relations jurisprudence" (para 115).

94. The Board stated at para 115:

> From the decision of the Supreme Court of Canada in *Dunmore supra* onward, the Courts have focused on the inherently vulnerable nature of the employer-employee relationship to extend section 2(d) protection to a wide variety of employees. It is not necessary for the Union to prove that horticultural employees are the "lowest of the low". Here is a short summary of workers found to be able to rely upon the *Charter* section 2(d) guarantee of freedom of association:
>
> - Agricultural workers in Ontario (*Dunmore supra*)
> - Health care workers in British Columbia (*Health Services supra*)
> - Seasonal farm workers in Quebec (*L'Écuyer supra*)
> - Casino managers in *Quebec* (*Casinos supra*)
> - Members of the RCMP in Canada (*MPAO supra*)
>
> 116 In particular, it is very difficult for anyone to assert that casino managers and members of the RCMP are employed in low-paying positions in industries with low security of employment. It is actually quite the opposite. Yet, they are entitled to the statutory guarantee of freedom of association found in the when they are denied access to basic associational rights of unionization and collective bargaining. That addresses the legal position of the AG's argument on this issue.

95. The Board found that there had been substantial interference with the horticultural employees' guarantee of freedom of association set out in s 2(d) of the *Charter*. The Board found that the evidence before the Board demonstrated that there had been no unionization or associational activities made in horticulture at the behest of employees, below average or minimum wage levels for workers in the industry, and no protection against unfair labour practices directed at associational activities. The Board stated:

> In short, the Ontario Legislature's actions in enacting the horticultural exclusion met the standard set by Bastarache J. in paragraph 46 of *Dunmore supra* where he wrote: "the wholesale exclusion of agricultural workers from a labour relations regime can only be viewed as a stimulus to interference with organizing activity". This observation applies equally to the horticultural workers in this case" (para 124). The Board held that the Union succeeded in proving substantial interference.

96. With respect to the third limb of the test, the AG defended the horticultural exclusion on two grounds: the Union had not established a positive rights claim; and the does not guarantee employees their collective bargaining regime of choice.

97. The Board agreed that the does not guarantee employees their collective bargaining regime of choice, however, the Supreme Court of Canada has prescribed minimum requirements for freedom of association. Those requirements include:

> • The right to collectively present demands related to employment conditions to the employer;
>
> • The duty of the employer to receive the demands in good faith;
>
> • The right to a meaningful process of collective bargaining; and
>
> • The ability of employees to advance workplace concerns free of management's influence (para 115)

98. The Board held that the exclusion of horticultural workers from the *Act* meant that the *Act* did not provide horticultural workers with those minimum requirements. The horticultural employees were not covered by the *Act*, nor were they covered by the *AEPA*. They had no statutory protection. The Board held that "They are like the title character in the 1960's hit record by Martha and the Vandellas because they have "nowhere to run to, nowhere to hide". The affected horticultural workers are in a statutory no man's land" (para 129).

99. The Board stated at para 130:

> In these circumstances, the observations of Bastarache J. In *Dunmore supra* are applicable: "the exclusion of an entire category of workers from the LRA can only be viewed as a foreseeable infringement of their rights". It is worthwhile to remember that the horticultural exclusion contained in section 3(c) of the Act is an anomalous one. Persons who perform horticultural work employed by a municipality, a golf club, a hotel or any other non-horticultural employer enjoy the protections of the Act. It is only persons who perform horticultural work for an employer whose primary business is agriculture or horticulture who have been deliberately excluded from the Act by the Ontario Legislature and who are denied the protections of the Act. This exclusion of an entire category of workers violates the guarantee of freedom of association set out in section 2(d) of the *Charter*.

100. The Board found that the Union satisfied the third limb of the test. As the AG led no evidence and made no submissions thereon, the Board further found that section 3(c) of the *Act* could not be demonstrably justified under section 1 of the *Charter*.

***Northern Alberta Institute of Technology and AUPE, Re*, 2015 CarswellAlta 893, [2015] Alta. LRBR LD-027 (TAB 10), upheld at 2018 ABQB 236 (*"NAIT"*) (TAB 11)**

101. *NAIT* began with a determination application brought by the Alberta Union of Provincial Employees ("AUPE") on April 21, 2008, pursuant to the *Public Service Employee Relations Act* (*"PSERA"*) affecting the Board of Governors, Northern Alberta Institute of Technology ("NAIT"). AUPE sought to have the Board determine the employee status of more than 150 persons falling within a number of identified classifications. AUPE amended its application to allege that section 12(1)(f)(ii) of *PSERA*, as it related to those persons who are Systems Analysts violates s 2(d) of the *Canadian Charter of Rights and Freedoms*.

102. The *Systems* Analysts did not have access to the statutory collective bargaining scheme of the *Code*, and section 12(1)(f)(ii) of *PSERA* excluded them from the statutory collective bargaining scheme of *PSERA.* The question before the Board was whether such exclusion violated section 2(d).

103. The parties agreed the most recent relevant statement of the applicable law was the Supreme Court's decision in *Mounted Police*.

104. The Board held the following:

> 24 In *Mounted Police*, the Supreme Court found the exclusion of RCMP members from the definition of "employee" in section 2(1) of the federal *Public Service Labour Relations Act* to be unconstitutional, but it did so in the additional context of the imposition of what the Court found to be a defective alternative regime for labour relations. The Court declined to decide whether the exclusion would be unconstitutional independent of the imposition of the defective alternative regime (paragraph 136). NAIT and the Intervenors distinguish the situation of the systems analysts on that basis. No alternative regime is imposed on them. NAIT and the Intervenors argue the exclusion of the systems analysts from *PSERA* does not preclude the systems analysts from collectively pursuing their workplace goals outside of existing Alberta labour statutes.

> 25 We agree with NAIT and the Intevenors that, while section 12(1)(f)(ii) excludes the designated groups from the regime of collective bargaining contemplated by *PSERA*, this does not mean the persons in question are prohibited from associating for the purpose of making representations to their employer on working conditions. We do not find the exclusion from *PSERA* constitutes a substantial interference with the ability of the systems analysts to collectively engage their employer in a meaningful way to address their workplace goals. We have no evidence such representations have been attempted, been denied or been ineffective. We cannot assume they would be. Accordingly, we do not agree the systems analysts have been deprived of their section 2(d) rights.
>
> 26 Accordingly, the Board determines section 12(1)(f)(ii) of *PSERA* does not prohibit the systems analysts from making representations to NAIT on working conditions. The provision merely excludes the systems analysts from being part of AUPE's bargaining unit for "collective bargaining". The provision does not constitute a breach of the section 2(d) rights of the systems analysts.

105. AUPE sought judicial review of the *Charter* Decision. The Court of Queen's Bench stated that s 2(d) of the *Charter* protected the right of employees to associate to achieve collective goals. If, properly interpreted, this provision had the effect of making it impossible for the excluded employees to act collectively to achieve workplace goals, thereby substantially impairing the exercise of the s. 2(d) associational right, then it was unconstitutional, citing *Fraser* at 46 (para 54). The Court stated that the question was "therefore, on a proper interpretation, does s.12(1)(ii)(f) substantially impair the exercise of associational rights by the excluded employees?"

106. The Court stated:

> 70 Properly interpreted, s. 12(1)(f)(ii) excludes the designated groups, including the 'systems analysts' from the regime of collective bargaining contemplated by the *Employee Relations Act.* This does not mean, however, that they are excluded from any collective bargaining, as argued by AUPE nor does it mean that the designated employees are denied the meaningful right to exercise their right to free association. Clearly, one can associate without being in a collective bargaining unit. Nor because they are prohibited from "collective bargaining" as this term is used in the Act, does it follow that they are prohibited from joining with others to have meaningful collective negotiations on workplace matters. As McLachlin, C.J. said at para 68 of *Mounted Police*, speaking for the majority: "..the right is one that guarantees a process rather than access to a particular model of labour relations".
>
> 71 In *Mounted Police*, the Supreme Court considered the exclusion of members of the RCMP from the collective bargaining process under the *Public Service Labour Relations Act*. It found the regime imposed upon the RCMP by the legislation as an alternative to the

excluded collective bargaining to be defective. It was in this context that the Court found the exclusion to be unconstitutional. The Supreme Court specifically declined to determine whether the exclusion of the RCMP under the impugned provision of the *Public Service Labour Relations Act* would be unconstitutional independent of the alternative scheme imposed: *Mounted Police*, para 136.

72 The present case is different. Unlike the situation in *Mounted* Police, section 12(1)(f)(ii) does not impose an alternative regime on the excluded employees.

73 There is no evidence that the excluded employees have been precluded from collectively engaging with their employer to achieve work place goals. In point of fact, there is no evidence that they have even tried. In this context, I cannot conclude they have been deprived of their section 2(d) rights.

IV. Analysis

107. *Dunmore* provides the analytical framework the Board should employ in this case. Essentially there are three stages of analysis:

a) Is the activity in question covered by the freedom of association?

b) If so, has there been substantial interference with the activity? and

c) If so, has there been state action such that the state can truly be held accountable for any inability to exercise a fundamental freedom.

A) Is the Activity in Question Covered by the Freedom of Association?

108. The Applicants submit that the activity in question is covered by the freedom of association. The right of employees to form and join trade unions is an important activity encompassed by the freedom of association. The Supreme Court of Canada stated in *Dunmore* that "... unions remain core voluntary associations based in the principle of freedom of association" (para 38). In *Health Services*, the Supreme Court stated "We conclude that s.2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues" (para 19). In *Mounted Police*, the Supreme Court stated "We conclude that the s.2(d) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests" (para 5). In this case,

the exclusion of Nurse Practitioners from the *Code* concerns an activity covered by the freedom of association – collective bargaining.

B) Has there been Substantial Interference with the Activity?

109. In *Dunmore*, the Supreme Court stated: "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" (para 13).

110. The Nurse Practitioner exclusion has, both in purpose and effect, interfered with these activities.

(i) The Purpose of the Nurse Practitioner Exclusion Infringes Section 2(d)

111. Paragraph (iii) of the definition of "employee" in s. 1(1)(l) of the *Code* excludes every person who is "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".

112. The Nurse Practitioner exclusion resulted from changes made to the *Code* in 2003 by way of the *Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003* (Bill 27). Prior to Bill 27, 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.

113. There was previously no exclusion of nurses or Nurse Practitioners. Under this statutory regime and prior to the exclusion of Nurse Practitioners from the *Code*, UNA bargained on behalf of Nurse Practitioners. UNA negotiated on behalf of Nurse Practitioners in the northern communities and entered into three Letters of Understanding dealing with wages and conditions of work [See: Exhibits 6, 7 & 8] .

114. UNA brought an application to the Board for a determination that a Nurse Practitioner was in their bargaining unit. The Board ruled that the Nurse Practitioner was performing direct nursing care and was properly in UNA's bargaining unit. [See: *U.N.A. v Calgary Regional Health Authority*, 1999 CarswellAlta 803, [1999] Alta. LRBR 458 **TAB 3**]. UNA was in the process of bargaining with the Calgary Regional Health Authority for the Nurse Practitioners when Bill 27 came into effect excluding them from the *Code*.

115. UNA was not consulted prior to Bill 27, nor was UNA given any forewarning of the changes. UNA was not consulted with respect to UNA's role with respect to Nurse Practitioners or with respect to bargaining on behalf of Nurse Practitioners. UNA subsequently suggested that the section should be changed so that Nurse Practitioners not be prohibited from organizing. There was no response from the Government.

116. The Hansard record from March 17, 2003, set forth above, provides insight into the legislative intent in excluding Nurse Practitioners from the *Code*'s ambit. It is submitted that the Hansard reflects that the Government's intent in excluding nurse practitioners from the *Code* was to prevent them from bargaining collectively. Beyond these remarks in the Alberta Legislature, we could find no other policy rationale for the exclusion of Nurse Practitioners from the *Code*.

117. Thus, it is submitted that the Nurse Practitioner exclusion is for an improper, unconstitutional purpose. It is submitted that the purpose of the Nurse Practitioner exclusion in s. 1(1)(l)(iii) of the *Code* substantially interferes with freedom of association.

(ii) The Effects of the Nurse Practitioner Exclusion Infringe Section 2(d)

118. While it would be sufficient to find a violation of s. 2(*d*) solely on the basis of the improper purpose of the Nurse Practitioner exclusion, the exclusion also infringes s. 2(*d*) in its effects in that it substantially interferes with a meaningful process of collective bargaining.

119. In Health *Services*, the Supreme Court stated at para 92:

> To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.

120. Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions may substantially interfere with collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements (*Health Services*, para 96).

121. In this case, the Government excluded Nurse Practitioners from the ambit of the *Code,* without any consultation or negotiation with the Union, thereby rendering the LOUs in which the Union had negotiated on behalf of Nurse Practitioners meaningless, and forcing the Union to abandon the representations and negotiations they had been engaged in on behalf of the Nurse Practitioners. Section 1(l)(iii) of the *Code* has interfered with collective bargaining by invalidating existing agreements and consequently undermining the past bargaining processes that formed the basis for these agreements. The section 2(*d*) guarantee of freedom of association protects the capacity of members of labour unions to engage in collective bargaining on workplace issues

(*Health Services*, para 2). It is submitted that the Nurse Practitioner exclusion also breached the Union's and the Union members' rights to freedom of association under s 2(d) of the *Charter*.

122. Section 1(1)(l)(iii) of the *Code* denies Nurse Practitioners the right to access any statutory collective bargaining regime, and hence offends the section 2(d) guarantee of freedom of association. Substantial interference exists because Nurse Practitioners do not have access to any statutory protected regime of collective bargaining. They are not covered by the *Code*. They are not covered by any alternate statutory regime of collective bargaining. Similar to the horticultural workers in *Hermanns Contracting*, "they are simply and improperly left to wither on the vine".

123. Additionally, the Nurse Practitioner exclusion has substantially interfered *with* a meaningful process of collective bargaining. Initially, the bargaining that was ongoing was halted and the LOUs rendered meaningless. More recently, the exclusion from the statutory regime continues to permit substantial interference with the exercise of protected s. 2(d) activity.

124. In *Mounted Police*, the Supreme Court stated that s. 2(*d*) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals. This guarantee includes a right to collective bargaining. However, that right is one that guarantees a process rather than an outcome or access to a particular model of labour relations. The Court stated

> Section 2(*d*) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power…Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.
> (para 70)

125. The Court further stated:

> The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: "One of the fundamental achievements of collective bargaining is to palliate the historical

inequality between employers and employees ..." (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(*d*).
(para 70)

126. Section 2(*d*) protects the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. Freedom of association requires that the employer consider employees' representations in good faith and engage in meaningful discussion with them.

127. The evidence before the Board establishes that Nurse Practitioners have tried collectively engaging with their employer to achieve workplace goals and their attempts have been ineffective.

Rochelle Young

- Ms. Young and two other Nurse Practitioners attempted to raise the overall pay structure. There was no opportunity to negotiate and they did not form an agreement with the Employer. She was not able to participate in any form of bargaining. There was no meeting with the Employer to bargain. No one else was bargaining on her behalf.

- Ms. Young became a member of the NPAA as a potential avenue to address fair compensation, but did not find it helpful. NPAA was not an appropriate body to work through negotiations as it is a volunteer association and the level of skill required was not present.

- Ms. Young joined a group of colleagues to form a Community of Practice to raise their profile as a community to negotiate - if not for better wages than for working conditions. There were between 21-25 nurse practitioners. The Community of Practice does not have a negotiated agreement with the Employer. Human Resources came to discuss compensation and to answer questions and concerns in a meeting in 2017 or 2018. They were not able to negotiate an agreement. The Community of Practice spoke and the Employer listened but no resolution was brought forward from that meeting.

- In April, 2018 Ms. Young received an email from Todd Gilchrist indicating that there would be a change to the evaluation process. [Exhibit 3]. Previously, performance evaluations were conducted on a yearly basis which were an opportunity to try to increase compensation. At the end of her last performance review Ms. Young was told that they are in a freeze and there would be no change in compensation. There was no performance evaluation or development conversation performed this year so this reduced an opportunity to discuss compensation.

- In September, 2018, Mr. Gilchrist sent out a memo indicating that there would be a "greater deduction on your pay once a month (or every second pay) to cover the increased LTD cost…there will also be a rate increase to your supplementary health benefits…". [Exhibit 4]. Ms. Young was not consulted and there was no negotiation before the wages were reduced for benefit coverage.

Jessica Wakeford

- When Ms. Wakeford was originally hired, she was given an offer letter that put her on the beginning step on the pay grid and she was making less than she was making as a Registered Nurse. Ms. Wakeford sent the letter back and was told that it was a wage freeze and no opportunity to move up the grid. Ms. Wakeford accepted the offer as she felt she had no other choice.

- Ms. Wakeford had numerous conversations with Management regarding her compensation. Ms. Wakeford asked about her wage which was $48.00 an hour compared to Registered Nurses that made $52.00 an hour. Management told her that she was out-of-scope and there was a wage freeze and that nothing could be done. Ms. Wakeford was frustrated that other nurses can move up the steps and the Nurse Practitioners are completely frozen on the step they were on.

- The Continuing Care Nurse Practitioners as a group had conversations with management regarding wages and hours of work. The Continuing Care group meets 3-4 times a year. They have had multiple discussions with the Manager and the Manager has told them that she is working on it and is taking it "up the ladder". The first time was in November, 2018 and January, 2019. When they raised the issue of salary, the Manager said that they are frozen and that they are out of scope.

- Ms. Wakeford had conversations with her new current manager and she agreed to complete the paperwork to reclassify Ms. Wakeford and it would go to Deb Gordon. Ms. Wakeford stated that there is so much discrepancy – that it was really dependent on some of the managers. Ms. Wakeford's current manager told her that she should not have been started at the current grid step but she has no ability to change that.

- Alberta Health Services put together a Workforce Strategic Plan to work on creating efficient Nurse Practitioner roles to ensure integration into the healthcare system and provide access. The Workforce Strategic Plan does not address hours of work. There is a discussion about lack of a Nurse Practitioners funding model. Physicians have a fee-for-service model. Nurse Practitioners do not have any model for services.

- There are zone meetings three times a year where Nurse Practitioners discuss work and advocating for the role of Nurse Practitioners through Alberta Health Services. Ms. Wakeford could not recall any discussion about remuneration or bargaining in the Alberta Health Services Zone Nurse Practitioner meetings. The purpose of the meetings is about advancing the scope of practice and making connections so the Nurse Practitioners could consult with each other where needed.

- Ms. Wakeford participated in discussions with management as part of the group of Continuing Care Nurse Practitioners. There have been a lot of discussions about hours of work but there has been "no agreement about what to do" and "nothing has been determined". Ms. Wakeford testified that "there has been no decision with how to continue". Ms. Wakeford testified that there is frustration about not getting an agreement

about remuneration. She stated that AHS is continually stalling discussions and "not getting anywhere".

128. The evidence before the Board establishes that Applicant Nurse Practitioners and others have tried collectively engaging with their Employer to achieve workplace goals and their attempts have been denied and/or been ineffective:

- They have not been afforded the opportunity to negotiate or reach an agreement on the terms and conditions of their employment.
- They have not been consulted on changes to their terms and conditions of employment.
- The Employer has not engaged in meaningful discussion with them.

129. The exclusion from the *Code* constitutes a substantial interference with the ability of the Nurse Practitioners to collectively engage their Employer in a meaningful way to address their workplace goals. The evidence before the Board shows that representations have been attempted and have either been denied or been ineffective. We submit that the Nurse Practitioners have been deprived of their section 2(d) rights.

130. With respect to the argument that Nurse Practitioners are not "vulnerable", it is submitted that the Courts have focused on the inherently vulnerable nature of the employer-employee relationship to extend section 2(d) protection to a wide variety of employees. In *Hermanns Contracting Ltd.*, the Board at para 115:

> From the decision of the Supreme Court of Canada in *Dunmore supra* onward, the Courts have focused on the inherently vulnerable nature of the employer-employee relationship to extend section 2(d) protection to a wide variety of employees. It is not necessary for the Union to prove that horticultural employees are the "lowest of the low". Here is a short summary of workers found to be able to rely upon the section 2(d) guarantee of freedom of association:
>
> - Agricultural workers in Ontario (*Dunmore supra*)
> - Health care workers in British Columbia (*Health Services supra*)

- Seasonal farm workers in Quebec (*L'Écuyer supra*)
- Casino managers in *Quebec* (*Casinos supra*)
- Members of the RCMP in Canada (*MPAO supra*)

> 116 In particular, it is very difficult for anyone to assert that casino managers and members of the RCMP are employed in low-paying positions in industries with low security of employment. It is actually quite the opposite. Yet, they are entitled to the statutory guarantee of freedom of association found in the when they are denied access to basic associational rights of unionization and collective bargaining. That addresses the legal position of the AG's argument on this issue.
>
> Note: the Casino managers in Quebec case was quashed on judicial review at 2018 QCCS 4781; permission to appeal was granted at 2019 QCCA 90 (January 23, 2019).

131. With respect to the argument that the remedy for AHS's refusal to bargain in good faith is an application to the Court of Queen's Bench, the Applicants respond as follows: It is for the Board to decide whether the *Code* exclusion for Nurse Practitioners is unconstitutional such that UNA's determination application can proceed. The Board has that jurisdiction through ss 12(2)(a) and/or 16(3) and 12(3)(o) of the *Code* to determine findings of law and not since *Delisle* which has effectively been overturned has a court held that a group seeking s. 2(d) rights must make court applications to enforce bargaining rights.

132. The effects of the Nurse Practitioner exclusion also infringe section 2(d) of the *Charter*.

(C) Is the State Accountable for the Inability to Exercise a Fundamental Freedom?

133. As summarized in *Hermanns Contracting*, the Supreme Court of Canada has prescribed minimum requirements for freedom of association. Those requirements include:

- The right to collectively present demands related to employment conditions to the employer;
- The duty of the employer to receive the demands in good faith;
- The right to a meaningful process of collective bargaining; and

- The ability of employees to advance workplace concerns free of management's influence.

134. The exclusion of Nurse Practitioners from the *Code* means that the *Code* does not provide Nurse Practitioners with those minimum requirements. The Nurse Practitioners are not covered by the *Code*, nor any other statutory regime. They have no statutory protection.

135. In *Hermanns Contracting*, the Board stated:

> In these circumstances, the observations of Bastarache J. In *Dunmore supra* are applicable: "the exclusion of an entire category of workers from the LRA can only be viewed as a foreseeable infringement of their rights". It is worthwhile to remember that the horticultural exclusion contained in section 3(c) of the Act is an anomalous one. Persons who perform horticultural work employed by a municipality, a golf club, a hotel or any other non-horticultural employer enjoy the protections of the Act. It is only persons who perform horticultural work for an employer whose primary business is agriculture or horticulture who have been deliberately excluded from the Act by the Ontario Legislature and who are denied the protections of the Act. This exclusion of an entire category of workers violates the guarantee of freedom of association set out in section 2(d) of the *Charter*.

136. The Applicants have satisfied the third limb of the test.

(D) Are the Limits Imposed on the Nurse Practitioners' Section 2(d) Rights Justified Under Section 1 of the *Charter*?

137. Having established a violation of s. 2(*d*) of the *Charter*, the question arises as to whether exclusion from the *Code* constitutes a reasonable limit on the Nurse Practitioners' freedom to organize. Section 1 of the obliges the respondents, as the parties seeking to uphold the limitation, to establish both that the objective underlying the limitation is of sufficient importance to warrant overriding a constitutionally protected right or freedom, and that the means chosen to reach this objective are proportionate (*Dunmore*, para 48).

138. The Government is not opposing this application and led no evidence or pleadings. Section 1(1)(l)(iii) of the *Code* cannot be demonstrably justified under section 1 of the *Charter*.

V. Remedy

139. The Applicants seek the following remedies:

a) A declaration that s. 1(1)(l)(iii) of the *Code* breaches s. 2(d) of the *Charter* and thus does not bar the Applicants' application for determination.

b) The processing of the Applicants' application for determination;

c) 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 13th day of March, 2019.

Kristan McLeod and Shasta Desbarats
Counsel for the United Nurses of Alberta, Jessica Wakeford and Rochelle Young

List of Authorities