


| | |
|---|--|
| FAX From: Taylor Janis LLLP Suite 120, 301-14 th Street NW Calgary, AB T2N 2A1 Tel: 403-474-0411 Fax: 587-356-0422  TAYLOR JANIS [™] WORKPLACE LAW | To: Chivers Carpenter Attention: Kristan McLeod Fax number: 780.439.8543 |
| | Re: Board File GE-07762 RE: Appropriate Forum |
| | Date: May 31, 2018 |
| | Number of Pages: 9 (not including cover) |

T
TAYLOR JANIS^{LLP}

Micah A. Kowalchuk
E-mail: mkowalchuk@taylorjanis.com

May 31, 2018

By Fax (780) 422-0970 (9 pages)

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

COPY

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

Re: Board File No. GE-07762 RE: Appropriate Forum

We are counsel for the NPAA and we provide this additional submission in respect of the above matter.

a) Contact Details of the Parties

The Intervener:

Nurse Practitioner Association of Alberta
PO Box 71192 Northtown
Edmonton, Alberta, T5E 6J8
Email: president@albertanps.com
Attn: Teddie Tanguay, President

The Respondents:

United Nurses of Alberta
700, 1150 – Jasper Avenue
Edmonton, AB, T5K 0C7
Fax: (780) 426-2093
Attn: David Harrigan / Lee Coughlan

Alberta Health Services
900, 9925 – 109 Street NW
Edmonton, AB, T5K 2J8
Fax: (780) 424-4309
Attn: Dennis Holliday

b) Relevant section of the *Labour Relations Code*

- a. NPAA relies on Section(s) 12 and 16 of the Code

CALGARY

Suite 120, 301 – 14th Street NW, Calgary, AB T2N 2A1
TOLL-FREE: +1.844.224.0222 TEL: 403.474.0411 FAX: 587.356.0422

EDMONTON

Suite 400, 10216 124 Street NW, Edmonton, AB T5N 4A3
TOLL-FREE: +1.844.224.0222 TEL: 780.428.7770 FAX: 780.428.7775

CANADA
PROVINCE OF ALBERTA

Board File No. GE-07762

ALBERTA LABOUR
RELATIONS BOARD

BETWEEN:

UNITED NURSES OF ALBERTA
AND
JESSICA WAKEFORD

APPLICANTS

-and-

ALBERTA HEALTH SERVICES

RESPONDENT

-and-

THE ALBERTA UNION OF PROVINCIAL EMPLOYEES
COVENANT HEALTH
NURSE PRACTITIONER ASSOCIATION OF ALBERTA
ATTORNEY GENERAL OF ALBERTA
HEALTH SCIENCES ASSOCIATION OF ALBERTA
ATTORNEY GENERAL OF CANADA
KEVIN HUNTLEY
DINA SOTIROPOULOS
and
ANTHONY FALVI

INTERVENORS

SUBMISSIONS ON BEHALF OF THE NURSE PRACTITIONERS
ASSOCIATION OF ALBERTA
RE: APPROPRIATE FORUM


TAYLOR JANISSM
WORKPLACE LAW

#120 – 301 14 ST. NW
Calgary, Alberta
T2N 2A1

SUBMISSIONS ON APPROPRIATE FORUM

I. Introduction

1. This submission is in reply to the question of whether the Alberta Labour Relations Board is the most appropriate forum to determine the constitutional issue.

II. Submissions

2. The following submissions are put forwards on behalf of the Intervenor, the Nurse Practitioners Association of Alberta.

A. The Framework Regarding *Charter* Jurisdiction and Labour Boards

3. As recognized by the Alberta Labour Relations Board's Practice Directive, Chapter 18(a), the Labour Relations Board has jurisdiction to apply the *Charter*, but it cannot strike down any laws as a whole. What the Board can do, however, is choose to not apply legislation that they find violates the *Charter*. The reason behind this is aptly summarized through a cursory review of cases, which also provide insight into what the most appropriate forum would be in the matter at hand.
4. The leading case regarding jurisdiction (and the case behind the Board's practice directive) and the *Charter* flows from *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, [1991] 2 SCR 5 ("*Cuddy*"). Within this matter the Supreme Court noted the simple fact that "*a formal declaration of invalidity is not a remedy which is available to the Board. Instead, the Board simply treats any impugned provisions as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, which is a remedy exercisable only by the superior courts, the ruling of the Board on a Charter issue does not constitute a binding legal precedent but is limited in its applicability to the matter in which it arises*".
5. Within this decision, the Supreme Court also chose to define a test to aid in whether a Tribunal should choose to exercise their jurisdiction when presented with a *Charter* matter. That test can be summarized as looking into whether a Tribunal already has jurisdiction over the whole of the matter before it. In determining this, the question to be asked is whether the Tribunal has jurisdiction over the parties, the subject matter, and the remedy sought by the Applicant.

6. The Supreme Court continued developing the legal framework in respect of the question of what the most appropriate forum is to consider *Charter* issues in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 ("*Cooper*"). In considering the words of the Supreme Court in *Cooper*, we note as an aside that the Labour Relations Board, unlike the Human Rights Commission, has been recognized to have specialized expertise. Nevertheless, the words of the Supreme Court have some merit in considering the question of what the most appropriate forum should be.
7. In *Cooper*, the Supreme Court stated that "*the Commission has no special expertise with respect to questions of law. Having the complainant seek a declaration of constitutional invalidity in either the Federal Court or a provincial superior court would be more efficient, both to the parties and to the system in general, given that any ruling of the Commission on the constitutional validity of a provision of the Act would be the subject of judicial review proceedings. In such a setting, the question can be debated in the fullness it requires in such a setting and the proper expertise can be brought to bear on its resolution*". [Emphasis added]
8. This was further expanded on at para. 13, where the Supreme Court went on to note that "*Although the judiciary certainly does not have an interpretive monopoly over questions of law, in my opinion, it must have exclusive jurisdiction over challenges to the validity of legislation under the Constitution of Canada, and particularly the Charter. The reason is that only the courts have the requisite independence to be entrusted with the constitutional scrutiny of legislation when that scrutiny leads a court to declare invalid an enactment of the legislature. Mere creatures of the legislature, whose very existence can be terminated at the stroke of a legislative pen, whose members, while the tribunal is in existence, usually serve at the pleasure of the government of the day, and whose decisions in some circumstances are properly governed by guidelines established by the executive branch of the government, are not suited to the task*". [Emphasis added]
9. What we can draw from *Cooper* is that, ultimately, there is no question that superior courts are to be considered the appropriate venue when there is a *Charter* question before a Board. In addition, unlike the determination application that would fall squarely within the jurisdiction of the Labour Relations Board and would be judicially reviewed on the basis of reasonableness, in the context of a *Charter* application, such as the one before the Board, any judicial review conducted concerning the *Charter* is to be reviewed on a standard of correctness (this was recently re-affirmed in Alberta in *Alberta Union of Provincial Employees v Northern Alberta Institute of Technology*, 2018 ABQB 236).

B. The Need for Efficiency

10. As the Board and the various Counsels are aware, any litigation concerning *Charter* challenges can be a long and drawn out process. In the matter at hand, assuming success by the Applicant, the United Nurses of Alberta, on the *Charter* matter, what falls within the jurisdiction of the Board to rule is, as pled by the Applicants, a declaration that the exclusion is unconstitutional. The other remedies asked for are ones that are properly the subject of the determination application and would flow from a full Labour Relations Board hearing on that question after a determination of the *Charter* issues.
11. Although this remedy would assist with the initial Application as pled, as we have seen by the various intervenors who have petitioned for inclusion, the issue itself is one that has much broader implications to the parties involved. There are many Nurse Practitioners who would still be in an effective legal limbo, who would then need to file their own applications to determine their right to representation. In addition, there would be possibility of a judicial review being sent forward to the superior courts, and this review would be conducted on the more strenuous correctness standard, which requires a fulsome review of all the evidence put before the Board to allow the Courts to determine whether the decision is correct in law.
12. In considering the idea of efficiency in a *Charter* matter, one of the more memorable recent examples concerned the Saskatchewan Federation of Labour versus the Government of Saskatchewan. This involved a legal analysis of the *Public Service Essential Services Act of Saskatchewan ("the PSESA")*. This legislation was originally challenged by various parties in July of 2008. From there, several intervenors filed additional matters in a variety of forums, including a challenge by the Canadian Union of Public Employees before the Labour Relations Board. The Labour Relations Board, who determined they lacked jurisdiction to properly consider the PSESA, first heard the matter in November of 2009, with a decision rendered in February of 2009.
13. From there, the Court of Queen's Bench provided a fiat that the various applications should be heard before the Court in a combined matter, with this fiat issued on August 9, 2010. The Court of Queen's Bench then heard the matter and rendered a decision on February 6, 2012. Flowing from there, the decision of the Court of Queen's Bench was taken to the Court of Appeal for judicial review, and was heard in November of 2012, with a further decision rendered on April 26, 2013. Finally, this led to an appeal to the Supreme Court of Canada on May 16, 2014, with a final decision rendered on January 30, 2015.

14. As can be seen, from beginning to end, *Charter* litigation of this type and character can be a substantial and convoluted process, where there can be significant time for the parties involved to find final resolution before the Courts. It is expected that perhaps this litigation would be less complex, however, as we see from the number of intervenors and parties involved, there is still significant complexity in this matter, enough that the question of what would be the proper forum is, as the Board noted, a matter of concern.

C. Application of the Principles to the Facts

15. If we consider the basic structure, as outlined, we can summarize the appropriate lens from which to view this situation as follows:
- a. Does the Board have jurisdiction over the whole of the matter, including the appropriate remedy?
 - b. Would a superior court provide a more efficient venue to hear the matter?
16. On the first question, although the Board does have jurisdiction over the whole of the matter, this jurisdiction exists as defined in the specific and narrow question before the Board concerning only the Nurse Practitioners who would fall within the scope of the application. If the Board were to reach a determination in this narrowly defined matter, it is highly likely that additional hearings would be proposed and filed concerning other Nurse Practitioners and their potential inclusiveness in other bargaining units, or by the Nurse Practitioners themselves in seeking to overturn the legislation and provide them with full representational rights.
17. We can see how, flowing from the initial application, a wide variety of parties have gone to the Board and noted their desire to intervene in this matter in terms of both the *Charter* question and the determination application. As a result, the Board has asked whether the parties involved still feel that a different forum would be the most appropriate one to fully litigate this matter. The parties now involved with this litigation include:
- a. The following trade unions:
 - i. The United Nurse of Alberta;
 - ii. The Alberta Union of Provincial Employees;
 - iii. The Health Sciences Association of Alberta;

- b. The following employers:
 - i. Covenant Health;
 - ii. Alberta Health Services;
 - c. The following representation associations:
 - i. The Nurse Practitioners Association of Alberta;
 - d. The following individuals who have asked to intervene:
 - i. Jessica Wakeford;
 - ii. Kevin Huntley;
 - iii. Dina Sotiropoulous;
 - iv. Anthony Falvi;
18. As per the *Code*, there are four bargaining units within the province of Alberta, which are:
- a. Direct nursing care or nursing instruction;
 - b. Auxiliary nursing care;
 - c. Paramedical professional or technical services;
 - d. General support services;
19. The total group of Nurse Practitioners who are members of these representative associations or work for those employers is, as outlined in the intervenor application, a significant number. As well, the trade unions at play here encompass a variety of bargaining units and represented groups, and we suspect there would be arguments made as far as where Nurse Practitioners would fit within those bargaining units, if this application is successful. We would note the Board seems quite aware of these potential concerns, hence why submissions regarding this were requested by the Board.
20. Although, on its face, the narrow issue can be addressed by the Board, the more effective and efficient method that would truly address the status of all Nurse Practitioners within the Province of Alberta would be to refer the question regarding the *Code* to a superior court for a full determination on the constitutional validity of this provision, and upon a decision being rendered by that superior court (or any appellate court to which it may be referred), the matter would return to the Board to provide a full hearing on the determination application. This would, we respectfully submit, result in the most efficient use of the Board's resources and would provide a true, and comprehensive, answer to the question of the status of Nurse Practitioners within Alberta.

21. Finally, we further respectfully submit that, due to the correctness standard at play for a *Charter* question, any judicial review on the matter would require any superior court to fully review all the evidence, testimony, and legal arguments placed directly before the Board itself. The end result is that this matter would, in many ways, be re-litigated before that same superior court regardless of the Board's decision and illustrates further efficiency concerns which would be the likely result.

D. Conclusion

22. In summary, we respectfully submit that the most appropriate forum and approach for the Board to undertake is to retain jurisdiction to decide the question of most appropriate bargaining units, with all intervenors providing submissions on this matter, but for this to occur after a full determination of the *Charter* question before a superior court.

Submitted on behalf of the Intevenor by



#120 – 301 14 St. NW

Calgary, Alberta

T2N 2A1

- Cc: NPAA**
Attn: Teddie Tanguay
Via Email (president@albertanps.com)
- Cc: Seveny Scott Lawyers**
Attn: Dan Scott
Via Email (dans@sevenyscott.ca)
- Cc: HSAA**
Attn: Laura Hureau (Executive Director)
Via Fax: (780) 488-0534
- Cc: Chivers Carpenter**
Attn: Kristan McLeod
Via Fax: (780) 439-8543
- Cc: Jessica Wakeford c/o UNA**
Attn: Lee Coughlan
Via Fax: (780) 426-2093
- Cc: AHS**
Attn: Monica Bokenfohr / Jackie Laviolette
Via Fax: (780) 424-4309
- Cc: AUPE**
Attn: The Learned Larry Dawson & Company
Via Fax: (780) 930-3392
- Cc: McLennan Ross LLP**
Attn: Chris Lane, Q.C.
Via Fax: (780) 482-9100

This letter, including any attachments, is confidential and legally privileged. If you are not the intended recipient, any redistribution or copying of this message is prohibited. If you have received this letter in error please notify us immediately by phone or email and shred this letter.