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BC Public Service Agency
810 Blanshard St
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**Attention: Keith Evans**

Dear Sirs/Mesdames:

**Re: BCGEU ("Union") -and- the Government of the Province of British Columbia represented by the BC Public Service Agency (the "Province")**
**Joint Application under Section 72 of the *Labour Relations Code* (the "*Code*")**

Further to our discussion on July 14, 2022, I can confirm the Union has instructed me to provide a detailed explanation of the Union's approach to essential services. It is our hope that this explanation will provide insight into the Union's essential service proposals and also form the basis of meaningful discussions between the parties.

The Union's approach corresponds directly with the reconsideration panel in *Beacon Hill Lodge*, BCLRB No. 2/86. After citing at length, the "controlled strike" section of Professor Weiler's seminal text, *Reconcilable Differences*, the Board stated the following:

> We quote this lengthy passage because it aptly describes the tensions at work in matters arising under Section 73. On the one hand, the Board must designate those services performed by the striking union members which are essential to the life, health or safety of the public. On the other hand, the Board designates the manner in which the facility, production or services is to be run or maintained with a view to preserving the maximum disruption to the employer's operation while putting out of work the maximum number of union members. **By maximizing the amount of economic pressure on <u>both</u> sides, the Board places the greatest degree of economic pressure possible on the parties to conclude a collective agreement and thus end the collective bargaining dispute**. (underline in original, boldfaced added.)

Furthermore, the right to strike has since been confirmed as an "indispensable" and "essential part of a meaningful collective bargaining process" (*Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 ["*SFL*"] at para. 3) and is thus protected by Section

2(d) of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 ("*Charter*"). Any ordered essential services that are not at minimum levels run afoul of this *Charter* right.

Lastly, it is recognized throughout Canada that striking activity is a public policy goal which cannot be neatly contained. The law allows, accepts, and expects that striking activity will negatively impact third party individuals and businesses as well as other areas of an economy. This was concisely pointed out by the BCSC in *Health Employers Assn. of British Columbia v. HEU*, 2007 BCSC 372 2009 BCCA 39:

> 85 Strikes are an effective economic tool in securing collective agreements because of the widespread disruption they cause to both the employer and unrelated third parties. The latter become a captive audience who may bring pressure to bear on an employer to settle the terms or conditions of the collective agreement with its employees. Broader communities who are affected by the workplace dispute can also bring pressure to bear on both sides to settle their differences.

All these points inform the interpretation of section 72 in the following ways.

*"Strictly Necessary" Requirement*

Closely overlapping with the "necessary or essential" language of section 72 is the international law concept of "strictly necessary". The recognition that strike activity is *Charter*-protected brings with it two concomitant features which underline the "strictly necessary" component.

The first is that *Charter* protections engage international law. Canadian courts and tribunals are required to comply with the country's international law obligations. International law requires that the essential services "be defined restrictively". The ILO, following a survey of collective bargaining legislation in different nations, released an expert report, *Freedom of Association and Collective Bargaining*, ILO, International Labour Conference, 81st Session, 1994 ("ILO Expert Report"), which described the concept of "strictly necessary" as follows:

> 161. In the view of the Committee, such a service should meet at least two requirements. Firstly, and **this aspect is paramount, it must genuinely and exclusively be a minimum service,** that is one which is limited to the operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear. Secondly, since this system restricts one of the essential means of pressure available to workers to defend their economic and social interests, their organizations should be able, if they so wish, to participate in defining such a service, along with employers and the public authorities. (emphasis added)

The second is that to demonstrate Charter compliance the impugned restrictions must survive the application of the *Oakes* test. The minimal impairment stage of *Oakes* compels the adoption of the "strictly necessary" requirement.

This means that services which have both an essential and non-essential component must only be designated to the extent of the work that is actually and strictly essential.

*Necessary or Essential*

Although the "necessary or essential" language echoes the international law concept of "strictly necessary" it is broader than that because it also denotes a direct and immediate correlation between the removal of the service and any threat to the public.

The Board has consistently found that services are <u>not</u> necessary or essential for prevention of an immediate and serious danger where alternatives exist: *Sodexho v. HEU*, B218/2005 at para. 12; *Vancouver (City)*, B150/2007 (hospital cafeteria); *University of Victoria v. CUPE*, B177/2012 at para. 31 (dormitory food services).

In *Farwest Handydart*, BCLRB No. 15/96 ("*Farwest Handydart*") these alternatives included more expensive, alternative means of transport to health care services:

> 12 …. There is no doubt some economic expense may be associated with the use of alternative means of transport and frustration of service users, families, caregivers and the community may well exist. That, however, does not satisfy the statutory requirements the Board is mandated to apply…it is one thing to observe that economic damage, inconvenience and community frustration may be significant, it is quite another to conclude that the service required to prevent their existence is essential.

The Board has also consistently made clear that **where the withdrawal of a service results in inconvenience, frustration and even hardship to the public, this does <u>not</u> make those services essential or necessary.**

*Immediate and Serious Danger*

As expressly stated by section 72, harm must be both serious and immediate. Serious requires that there be a significant impact on the public. And immediate denotes an urgency to the setting of levels. Importantly, the adjectives "serious" and "immediate" both ensure that speculative dangers do not leak into essential service designations. Speculative risk was significantly discounted by the Board in *Argo Road Maintenance v. BCGEU*, B73/2007:

> 20 The responsibility of the Board is to ensure that a labour dispute does not cause immediate and serious danger to the health, safety or welfare of the residents of British Columbia. **It is not appropriate for the Board to designate services as essential because it is possible that serious and dangerous conditions will arise**

> **at some unknown time in the future.** This designation would not fulfill the Board's role of ensuring the controlled strike exerts the maximum pressure on the Employer. Essential service orders are fluid in nature in order to address this concern about serious or dangerous conditions arising in the future. The public is protected if there is a change in circumstances, as the Essential Services Order can be varied by an expedited application to the Board or by the agreement of the parties. Also, there is an emergency provision in the Essential Service Order which provides that employees will be available in the event of any emergency or disaster situation. In the event of a dispute between the Employer and the Union as to whether an emergency or disaster situation exists, the employees will perform the work in question. (emphasis added)

The Union's position is that weight of the evidence is that any negative repercussions are speculative and contingent on other factors not in the control of the Board.

*Welfare*

The Board must restrictively interpret "welfare", which is an inherently ambiguous term (see Vice Chair Germaine's comments in *City of Victoria and CUPE*, BCLRB No. B280/94), in a manner that presumes *Charter* compliance and does not elevate economic "rights" over the constitutional freedom and right to strike.

We do not suggest that economic impact could never rise to the level of welfare. For example, the catastrophic and widespread economic collapse of an industry or a community would likely engage the "welfare" language in section 72. However, it is important to balance the concept of economic impact with the *Charter*-protected activity engaged by a strike. The Union adopts the test set by Chief Justice Dickson in *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460:

> 32. I do not mean to suggest that any economic harm to a third party will suffice to justify the abrogation of the right to strike. In an interdependent economy it is inevitable that a work stoppage in one industry will entail detrimental economic consequences for at least some individuals in other industries. The objective advanced to justify legislation which infringes a Charter- protected right or freedom must relate to a "pressing and substantial concern" in order for the legislation to be saved under s. 1: Oakes, supra, at pp. 138-39. Moreover, the third element of the s. 1 proportionality requirement propounded in Oakes calls for a weighing of the legislative objective against the deleterious effects of the measures which limit the enjoyment of the Charter right or freedom. These principles suggest that **the relevant question, therefore, is whether the potential for economic harm to third parties during a work stoppage is so massive and immediate and so focussed in its intensity as to justify the limitation of a constitutionally guaranteed freedom in respect of those employees**. (emphasis added)

Thus, in our view, before the Board could designate a service that only engages economic activity, the Province would have to show the withdrawal of the service would be: i)

massive; ii) immediate; and, iii) focused in intensity (ie not dispersed through the broader society).

## Conclusion

We have endeavoured to set out our position in an attempt to facilitate the mediation process and provide an understanding of the bases for the Union's various positions in mediation. If you wish to share this letter with your client and throughout government, we are happy for you to do so. Indeed, we respectfully suggest that this letter may be useful in ensuring ministries' and agencies' proposals are aligned with the law and policy of the Board and courts.

Yours truly,

VICTORY SQUARE LAW OFFICE LLP
per:

Colin Gusikoski
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