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BY ELECTRONIC FILING

December 23, 2020

BC Labour Relations Board
600 - 1066 West Hastings Street
Vancouver, BC V6E EX1

Attention: Najeeb Hassan, Registrar

Dear Sir/Madam:

Re: The Federation of Post-Secondary Educators (“FPSE”) and Various Faculty Associations - AND - Post-Secondary Employers’ Association (“PSEA”) and Various Post-Secondary Employers

Application pursuant to Section 88 of the *Labour Relations Code* re the COVID-19 Response at Post-Secondary Institutions

We represent FPSE and the unions enumerated in Appendix “A” (the “Faculty Associations”) and are authorized to make this application on their behalf for response by PSEA, the bargaining agent for the post-secondary employers enumerated in Appendix “A” (the “Post Secondary Employers”).

NATURE OF APPLICATION

The Federation of Post-Secondary Educators applies to the Labour Relations Board pursuant to s.88 of the *Labour Relations Code*. FPSE seeks the assistance of the Board in addressing the serious and growing concerns that post-secondary educators have about the working conditions in the post-secondary education system during the COVID-19 Pandemic.

The Post Secondary Employers and their provincial bargaining agent, the Post-Secondary Employers’ Association, have a duty to ensure that educators’ working conditions continue to comply with their statutory and collective agreement obligations.

PARTIES

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Various Applicant Unions and
Respondent Employers

Names and contact information listed
in Appendix “A” to this s. 88
Application

INTRODUCTION

1. Post-secondary institutions have long been places where people from different backgrounds come together to improve their own skills, debate ideas, and advance our collective knowledge. They are venues for community building and personal, social, and cultural development. They are economic hubs that employ thousands of people and attract talented and gifted learners and educators to our province. Post-secondary education provides immense benefits to both individuals and society at large.
2. In this unprecedented public health crisis, maintaining an effective and safe post-secondary education system is critical, not only to ensure the people in British Columbia can continue their educations, but also to ensure post-secondary institutions remain that beacon of community support and important economic generator that our province has come to rely on.
3. While FPSE voices its concerns from the perspective of workers in the post-secondary educational sector in this application, the working conditions of post-secondary educators has much greater implications beyond those employees. The teaching conditions and structures of our post-secondary system impact learners and their communities, and shape our collective social values.
4. Nine months ago, post-secondary education was suddenly transformed by the global pandemic. FPSE and its local associations have heard from many members who have serious concerns about the failure of their institutions to manage the significant negative effects this overhaul, namely increased workload and the associated impacts on the members' mental and

physical health, job security, and costs and struggles associated with working from home. Consequently, there is an extremely high level of burnout amongst educators, confusion and stress over job security, and frustration over their employers' failures to understand the magnitude of the challenges facing educators.

FACTS

Timeline

5. FPSE is a federation of twenty member locals, representing about 10,000 faculty and staff at 20 public and private educational institutes in British Columbia.
6. The factual background to this application is complex and the circumstances of provincial health orders and their application in the delivery of advanced education continues to change. The background facts below are intended to provide the context for this application which illustrate generally the nature of the difference and its concerns.
7. While we have broadly described below the common issues facing all of the named Faculty Associations and their members, we have not included all of the detailed facts for each institution. Many of those facts are set out in some detail in s. 54 applications filed concurrently by the individual Faculty Associations against their corresponding Post-Secondary Employer.
8. PSEA is the bargaining agent for 19 public post-secondary institutions in BC. They provide labour relations advice and interpret the collective agreements for employers. PSEA has shared responsibilities with the post-secondary institutions to respond to COVID-19 as it affects educators.
9. Post-secondary institutions began implementing precautions in response to COVID-19 as early as February 2020. While each institution took their own approach, many implemented similar precautions, for example, increasing cleaning of physical spaces, discouraging faculty from traveling, and limiting the public on campuses. Many convened COVID-19 tasks forces or committees to manage their response.
10. In March 2020, the Provincial Government implemented a number of public health orders to reduce the spread of COVID-19. Post-secondary institutions, in an effort to abide by these orders and protect their communities, abruptly suspended in person teaching and required their faculty to quickly adapt their courses to online delivery.
11. Faculty began delivering lectures through videoconference, adapting assignments, and developing new ways to assess students progress, all while being empathic to the effect the switch was also having on students. As campuses closed down, institutions began requiring their faculty to work from home. These changes had drastic and immediate effects on the labour relations dynamic in the advanced education sector.

12. FPSE understood that when the institutions shut down abruptly in March 2020 that their COVID-19 responses may not be perfectly responsive to member needs in the short term; however, FPSE anticipated cooperating with the institutions and PSEA through a process of meaningful consultation to establishment plan for future semesters. FPSE expected that future plans would provide strong protections for students and staff against COVID-19, while also ensuring students received the best education available and educators were supported in this shift away from in-person teaching.

13. The provincial scope of the common issues facing the Faculty Associations is demonstrated by the comments and integrated actions of the Post Secondary Employers. For example, on March 21, 2020, Coast Mountain College described the coordinated effort by post-secondary institutions as follows:

Our leadership team is working in a coordinated framework across the broader BC public sector facilitated by PSEA, the Public Sector Employers' Council Secretariat (PSEC) and the Ministry of Advanced Education, Skills and Training. We will communicate details directly to you once they become available; our expectation is that this information will be released shortly. We can assure you that as soon as we learn more, we will share any information we have to address your concerns

14. Consistent with the above statement made early in the pandemic, the President of Camosun College recently declined to discuss remedy with the CCFA because of the broader application of the workload impact on members of Faculty Associations across the province. On December 2, Sherri Bell wrote to the CCFA as follows:

...workload is a larger issue than Camosun College; this topic is being grappled with across post-secondary institutions and the public sector in the Province. As such, I am not able to grant the remedy (or any remedy) the Union is seeking to resolve the grievance as there are provincial implications.

15. Educators were hopeful that proper support and equipment to deliver remote teaching opportunities would be in place for the 2020 fall semester; however, no meaningful progress has been made in any of the institutions in which the members of the Faculty Associations work to improve the working conditions of educators nor to ensure their health and well-being.

16. This failure has resulted in significant concerns among educators related to workload, health, support, and job security. The following are examples of some of FPSE concerns.

- (a) **Insufficient training and support for remote teaching:** many educators report they have not received adequate technological or pedagogical training on how to deliver remote teaching. Some educators were required to redesign their courses for online delivery multiple times due to changing requirements. The insufficient training and support for remote teaching has also led educators to worry about their ability to support students, student evaluations, and impacts on promotions and tenure.
- (b) **Failure to manage workload resulting from remote teaching:** Shifting to remote teaching has significantly increased the workload of educators, and has not been

mitigated by employers. In some instances, educators have had their normal courses split into multiple online courses which results in a significant increase in teaching hours without corollary decreases in other areas of work nor additional compensation. In other cases, normal caps on online classes have been waived and the large online class sizes result in substantial increase in workload. Educators report being overburdened by increases in student emails and a greater difficulty meeting course outcomes as result of the increased demands of remote teaching.

- (c) **Insufficient Support for Working from Home:** Educators working from home often have to provide their own equipment and utilities required to teach from home: computer, speakers, microphones, heating, internet, and phone service. Educators report a lack of technical support and compensation for providing these resources themselves.

In addition, educators do not always have appropriate spaces in their homes to operate an office, or struggle to manage their home workspace in the context of spouses or roommates who also working from home, childcare, or environmental challenges. Some employers are refusing to support educators in their home environment, resulting in increased sedentariness, physical ailments from poor ergonomics, and the increased stress from managing the issues described above.

- (d) **Concerns over job security and return to work safety plans:** Many educators have already been laid off and are concerned about whether their recall rights will be respected when in-person teaching resumes. Many more are worried how long their employers can manage these economic circumstances. Others are concerned about when education will return to face-to-face instruction and how this will be conducted safely.
- (e) **Deterioration in educators' mental and physical health:** The cumulative effect of these issues is reports from all locals of high levels of burnout, exhaustion, and deterioration of educators' mental and physical health. The impact to remote teaching has negatively affected students as well, and educators report spending more time supporting students' emotional needs; while supporting students is important, it adds another mental and emotional toll on already over-burdened educators. Educators also report feeling that management does not understand the scope of the workload increases nor the negative effect the changes is having on educators. These negative effects are exacerbated by the fact that many educators were not able to take their normal vacations over the summer.

SUBMISSION

The Board's Jurisdiction Under section 88

17. The *Code* provides an avenue to address this situation expeditiously and the Board is uniquely situated as an impartial adjudicative tribunal to assist and to avoid labour unrest in the post-secondary education sector.

18. Section 88 of the *Code* provides:

88. If a difference arises during the term of a collective agreement, and in the board's opinion delay has occurred in settling it or it is a source of industrial unrest between the parties, the board may, on application by either party to the difference, or on its own motion,

- (a) inquire into the difference and make recommendations for settlement, and
- (b) if the difference is arbitrable, order that it be immediately submitted to a specified stage or step in the grievance procedure under the collective agreement or, whether or not the difference is arbitrable, request the minister to appoint a special officer.

19. Section 88 should be interpreted in light of the purposes of the *Code* under s. 2:

2(1) The following are the purposes of this *Code*:

- (a) to encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees;
- (b) to encourage cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and promoting workplace productivity;
- (c) to minimize the effects of labour disputes on persons who are not involved in the dispute;
- (d) to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions;
- (e) to ensure that the public interest is protected during labour disputes;
- (f) to encourage the use of mediation as a dispute resolution mechanism.

(2) The board shall exercise the powers and perform the duties conferred or imposed on it under this *Code* having regard to the purposes set out in subsection (1).

20. There are few, if any, cases in BC that aid in the interpretation of this section. As a result, FPSE submits that the Board should adopt the Supreme Court of Canada's approach from *Rizzo & Rizzo Shoes Ltd., Re* ([1998] 1 S.C.R. 27), namely (at 21):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Difference

21. In order for Board to exercise its jurisdiction under this section, a “difference” must be present between the parties. FPSE submits that the plain and ordinary meaning of “difference” is consistent with the definition from Merriam Webster Dictionary: an instance or cause of disagreement.¹

22. In this case, the “difference” is the failure to negotiate and agree on the proper level of support for educators delivering remote education, including balancing workloads and providing technical, financial, and pedagogical support. FPSE is prepared to discuss these issues with PSEA and the institutions, but PSEA refuses to engage in discussions or has actively prohibited the employers from having discussions with their locals. The parties not only disagree on how to properly address these issues, but whether the issues even need to be discussed. This difference between the parties as a result of the employers’ responses to the COVID-19 crisis and failure to discuss their response with FPSE are labour relations differences within the meaning of s. 88.

Industrial Unrest or Delay

23. The second requirement for the Board to exercise jurisdiction under s. 88 is that the difference is causing industrial unrest or there has been delay in dealing with the difference.

24. In the prominent consolidation case, *Island Medical Laboratories Ltd. v. H.S.A.B.C.* ([1993] B.C.L.R.B.D. No. 329), the Board held that the requirement for unrest included the potential unrest and if there were actual unrest, it did not have to be “profoundly serious in nature” (at 117).

25. In *Victoria (City) v. City Hall Employees' Assn., Local 388* ([2005] B.C.W.L.D. 4117), the Board held that, in light of s. 2, it would be illogical to force employees to manufacture unrest in order to bring themselves within a strict or literal reading of the *Code* (at 25).

26. Instead, when unusual circumstances support it, the Board should exercise its discretion to intervene when doing so would support the purposes of s. 2. In particular, even if other mechanisms are available to employees to resolve differences, the Board should intervene when using those other mechanisms would allow the workplace issues to “fester” thereby undermining the purposes of the *Code* (*Pacific Press Ltd. v. G.C.I.U., Locals 525-M & 25-C*, [1996] B.C.L.R.B.D. No. 146).

27. In this case, there are several Faculty Associations raising substantially similar issues with the Post Secondary Employers across the province about ongoing and increasingly difficult impacts on their members as a result of coordinated employer action. The Faculty Associations have filed various unresolved grievances and several have filed s. 54 applications with the Board.

¹ <https://www.merriam-webster.com/dictionary/difference>

28. Thus, extensive, adversarial litigation and hundreds of hours of hearings may be required to resolve the issues raised in this application. There can be no doubt that such litigation would be representative of industrial unrest in this sector.

29. While these issues remain unresolved, there be unrest in the form of many educators individually exercising their rights to be compensated for the costs of working from home or in the form of numerous subsequent grievances which challenge the manner in which Post Secondary Employers have managed their pandemic response. Given the overall dissatisfaction, there is some risk that groups of educators may consider job action against Post Secondary Employers, and FPSE may consider starting other legal actions.

30. There is also a significant risk that educators will no longer be able to handle the increased workload, emotional stress of supporting students, and the mental and physical toll of working from home, causing unrest through taking increased sick days or stress leaves, which could cause a cascade of work shifting to other workers who are already overburdened themselves. There is a real chance of an increase in Worker's Compensation claims.

31. Alternatively, even if the Board did not find that is extensive, ongoing labour dispute constitutes industrial unrest, s. 88 is triggered in this case because of the significant delay addressing the difference between the various Faculty Associations and the Post Secondary Employers (*Rio Tinto Alcan Inc. and Unifor, Local 2301, Re*, [2015] B.C.W.L.D. 5374, at 38). What constitutes a "significant delay" depends on the specific circumstances.

32. In this case, the difference started when the Post Secondary Educators moved their courses online and educators began working from home following the initial directions from the B.C. Provincial Health Officer in mid-March. At the time, and consistently since, FPSE has urged PSEA and the Post Secondary Educators to take the time necessary to develop and implement proper measures to minimize the impact of shifting all education delivery online and having their educators work form home.

33. Unfortunately, however, PSEA and individual institutions have failed to take any meaningful steps to ensure their educators are properly supported. This has continued through now to two subsequent post-secondary semesters without a resolution.

34. The delay in addressing this difference is now more than nine months long. Educators are on the precipice of entering their third semester of teaching from home. Educators are feeling pressured to accept untenable workloads and uncertainty and, like many of us living through this pandemic restrictions, the burden is taking its toll. Without urgent redress, this next semester could prove disastrous for post secondary educators and their employers across the Province.

35. Educators report feeling have been abandoned by their employers. They feel that their employers are intending to wait out the pandemic and not make any meaningful changes to their working conditions, in hopes that educators will simply be able to carry the burden until in-person teaching can resume.

36. The lack of support and proper management by employers is exploiting educators' professionalism, their high expectations of themselves, and their caring for their students. The

stress and burnout is compounding the longer these conditions persist and it is not reasonable or fair to expect educators to wait for the employers to respond appropriately.

37. The present labour relations framework, structured around the legalistic and formal grievance and arbitration process, is not well suited for the urgent circumstances posed by COVID-19. Coordinated mediation, consultation and problem-solving are all superior processes to address the issues underlying the industrial unrest in the post-secondary education sector and the Board is well suited to assist with those processes consistent with s. 88 and the principles set out in s. 2 of the *Code*.

38. Thus, in our submission, when considering the purposes of the *Code* in context of a global pandemic, and applying a contextual and purposive interpretation, the conditions facing post-secondary educators meet the requirements to trigger Board intervention under s. 88 of the *Code*.

REMEDY

39. FPSE and the Faculty Associations submit that the appropriate remedy in this case is for the Board to investigate the differences between the parties and make recommendations to resolve it, pursuant to s. 88(a) of the *Code*.

40. FPSE and the Faculty Associations believe that that there needs to be a provincial understanding and agreement as to how the Post-Secondary Employers will continue to respond to COVID-19 through a transparent and accountable framework that minimizes or mitigates corresponding workload increases.

41. In particular, FPSE and the Faculty Associations seek a robust, mediated process, including consideration and discussion of the following components:

- (a) Consultation and joint development of policy that impacts employee workload with Faculty Associations and/or FPSE;
- (b) Creating local and provincial processes to identify and resolve employee workload concerns in an expedited matter;
- (c) Consultation and joint development of safety protocols for educators who have to do in-person teaching;
- (d) Proper support for teaching from home; and
- (e) Providing processes for consultation prior to any upcoming changes or continuation of changes in upcoming semesters during the continuing COVID-19 pandemic.

42. FPSE, on behalf of the Faculty Associations and their members, requests that Board assist the parties on an expedited basis to resolve these urgent concerns and prevent further labour unrest.

SERVICE

43. We have provided electronic copies of our submissions to the respondents below concurrent with filing.

Yours truly,

VICTORY SQUARE LAW OFFICE LLP

per:



Steven Rogers
Law Corporation

SR/km
cc: Client
Rosalie Cress
Tom Teasdale
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Appendix "A" Applicant Unions and Respondent Employers

APPENDIX "A" – VARIOUS APPLICANT UNIONS AND RESPONDENT EMPLOYERS

Various Applicant Unions

Various Respondent Employers

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