ALBERTA LABOUR RELATIONS BOARD

August 28, 2020

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RE: An Unfair Labour Practice complaint and Application for a Cease and Desist Order brought by The Alberta Union of Provincial Employees affecting Alberta Health Services - Board File No. GE-08227

[1] The Alberta Union of Provincial Employees ("AUPE" or the "Union") and Alberta Health Services ("AHS" or the "Employer") are in the course of bargaining a new collective agreement for the general support services ("GSS") bargaining unit of employees of AHS. During the bargaining period, on February 10, 2020, AHS gave notice pursuant to the "Contracting Out" article of the Collective Agreement it was considering contracting out its remaining in-house laundry services.

[2] Shortly thereafter, AUPE filed a complaint with the Board asserting the Employer's actions violate sections 60 (bad faith bargaining), 147(3) (statutory bargaining freeze), and 148(1)(a)(ii) (interference with representation) of the *Labour Relations Code* (the "*Code*"). The allegations presented in its complaint are as follows:

(a) The notice of contracting out is tied to a recent 1% increase given in an arbitration award, is an attempt by AHS to intimidate the bargaining unit and its bargaining committee into accepting a 1% rollback, and thus violates the duty to bargain in good faith (s. 60) and interferes with the Union's representational rights (s. 148(1)(a)(ii));

(b) The consultation process triggered by the notice is a charade, given the Government of Alberta's support for contracting out, and AHS thus deprives AUPE of the ability to effectively, fairly and substantively negotiate the consequences of the contracting out, violating the duty to bargain in good faith (s. 60);

OUR VISION...

The fair and equitable application of Alberta's collective bargaining laws.

OUR MISSION...

To administer, interpret and enforce Alberta's collective bargaining laws in an impartial, knowledgeable, efficient, timely and consistent way.

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(c) Implementation of the contracting out process during bargaining constitutes a violation of the statutory bargaining freeze (s. 147(3));

(d) The collective agreement consultation process subverts collective bargaining by having the discussion and implementation of these changes take place outside the collective bargaining process, thus violating the duty to bargain in good faith (s. 60) and the spirit and letter of the statutory bargaining freeze (s. 147(3)).

[3] The matter lay dormant for a period when the COVID-19 pandemic interrupted the parties' bargaining. Then, in June of 2020, AHS notified AUPE of its intention to move forward with the contracting out process and a request for proposal ("RFP"), and AUPE applied to the Board for an interim injunction to prevent that pending the hearing of its complaint. In case management, AHS represented the RFP process would not start before September 1, 2020. Accordingly, the parties agreed to proceed with a hearing on the merits of the complaint, with the Board expediting the hearing and result, rather than having AUPE pursue its interim application.

[4] The matter was heard by a panel of the Board (Schick, Cunliffe, Farkas) via video-conference on August 5 and 6, 2020. At the end of the Union's case, upon the request of AHS, the Board summarily dismissed the section 148(1)(a)(ii) complaint, but proceeded on the other complaints. At the end of the hearing, the Board reserved its decision.

[5] Having reviewed the evidence before it at the hearing and the submissions of the parties, the Board dismisses AUPE's complaint. Our reasons follow.

Evidence

Background

[6] The Board received a comprehensive agreed statement of facts and book of agreed documents from the parties. From these materials, we set out the background for this dispute.

[7] AHS came into existence on April 1, 2009. AUPE was certified by the Board as bargaining agent for the province-wide GSS bargaining unit of AHS (with the exception of existing non-union enclaves). The Board declared the receiving collective agreement for this unit would be the collective agreement between Capital Health and AUPE, and the Board directed the parties to commence bargaining for a renewed collective agreement. A new collective agreement was ratified by the parties on April 20, 2012, expiring on March 31, 2014.

[8] Notice to bargain for the next round of bargaining was served by AUPE on January 3, 2014. The parties bargained some terms, while remaining terms were subject to interest arbitration. The resulting collective agreement was finalized on July 19, 2016, expiring on March 31, 2017.

[9] AUPE again served notice to bargain on January 3, 2017. The current collective agreement was ratified on November 15, 2018, expiring on March 31, 2020 (the "Collective Agreement"). Wages for the last year of the Collective Agreement were the subject of a wage re-opener arbitration, the award for which was issued on January 31, 2020 (the "January Arbitration Award").

[10] Contained within the Collective Agreement is Article 40 – Contracting Out. That Article reads, in its entirety:

> 40.01 The Employer will not contract out services that will result in the loss of encumbered Regular General Support Services Bargaining Unit positions without meaningful consultation and discussion with the Union. This does not impact the ability of the Employer to make changes through attrition.
>
> 40.02 The Employer shall provide the Union with at least ninety (90) days written notice prior to when a final decision is required. Lesser notice may be provided when urgent issues rapidly emerge.
>
> 40.03 The Employer agrees that it will disclose to the Union the:
>
> (a) nature of, and rationale for, the initiative,
> (b) scope of the potential contracting out,
> (c) potential impacts on Regular Employees, and
> (d) anticipated timeframe for the initiative.
>
> 40.04 The Union shall provide in writing to the Employer possible alternatives to the contracting out initiative.
>
> 40.05 During the notice period, the Parties shall discuss reasonable alternatives to maximize retention of Regular Employees potentially affected by the contracting out initiative, including examination of potential retraining and/or redeployment opportunities as an alternative to Article 16: Layoff and Recall.
>
> 40.06 The Union may at any point ask to discuss with the Employer, services that are currently contracted out for specified work. Upon request the Employer agrees to entertain and give serious consideration to submissions and rationale from the Union based on an identified interest for specific work where the Union feels the Bargaining Unit may be better able to perform those services.
>
> 40.07 **Dispute Resolution**
>
> (a) The application of the consultation process in this Letter of Understanding is subject to Article 8: Grievance Procedure.
> (b) The final decision regarding contracting out is not subject to Article 8: Grievance Procedure.

[11] On November 29, 2019, in advance of the commencement of the next round of collective bargaining, Dennis Holliday (Executive Director, Negotiations and Labour Relations) of AHS, sent a letter to Jim Petrie (Director, Labour Relations) of AUPE, providing notice of workplace initiatives that may occur during the upcoming bargaining period (the "November Letter"). That letter states:

> In advance of 2020 collective bargaining commencing, we wish to provide information on a number of initiatives that could impact the AHS workforce and specifically the [GSS] bargaining unit.
>
> ...
>
> The following initiatives are opportunities AHS has identified to address savings and efficiencies in the health care system, and/or changes in services to better serve patients and families.
>
> ...
>
> Contracting Out – Laundry/Linen – Under Consideration for 2020:
> Contracting out the remaining AHS Laundry/Linen operations would impact approximately 235 FTE.
>
> ...
>
> Business as Usual Initiatives
> It is also anticipated there will be other initiatives arising out of the identification of savings and efficiencies as part of AHS' business as usual management and review of its operations, although such initiatives are not fully understood or assessed at this time. Initiatives may vary in magnitude and level of impact to the workforce. Initiatives will be disclosed as required and in accordance with AHS' collective agreement obligations.

[12] The words "laundry" and "linen" were used interchangeably throughout the documents and testimony, and have the same meaning throughout this decision.

[13] The Union served notice to bargain for this round of collective bargaining on December 6, 2019. As of the date of the Board's hearing, the parties had met for two days of bargaining: February 12 and 13, 2020. Proposals were exchanged on that first date.

[14] A couple of days prior to that first bargaining meeting, on February 10, 2020, AHS provided written notice of potential contracting out of in-house laundry services pursuant to Article 40 of the Collective Agreement (the "February Letter"). This notice was provided at a meeting between AHS, represented by Mr. Holliday and Mario Chies, Vice-President, Cancer Control Alberta & Clinical Support Services, and AUPE, represented by Mr. Petrie, Terry Agoto and Tim Gough. At that meeting, Mr. Holliday advised that:

- AHS was considering contracting out Linen services;
- If contracting out occurred, it would impact approximately 275 regular employees and 150 casual employees in 54 sites, all sites being outside of Edmonton and Calgary. The largest sites impacted would be Grande Prairie, Fort McMurray, Red Deer, Ponoka, Lethbridge and Medicine Hat;
- Contracting out was being considered with respect to laundry due to two challenges. First, AHS facilities, infrastructure and capital equipment were older, requiring either significant upgrades or replacement. The cost to upgrade facilities was estimated at $35 to $40 million dollars to current needs, not future needs or larger capacity. Second, the

future of laundry involves "greening" the industry, through less water and less harmful chemicals. AHS is not in the laundry industry and is not in a position to keep up with leaders in the laundry industry;
- AHS is open to listening to ideas from AUPE; and
- The contracting out process will involve an RFP and it is difficult to know what the outcome of the RFP would be.

[15] Mr. Holliday also provided AUPE with AHS's internal communication plan about the contemplation of an RFP for outsourcing all remaining linen services.

[16] AUPE responded they were disappointed to hear AHS was considering the initiative, and AUPE did not think AHS could engage in this initiative due to the statutory freeze period.

[17] AHS advised the primary rationale for considering the initiative related to costs associated with capital infrastructure and equipment, estimated to be 35 to 40 million dollars to upgrade equipment and facilities to current standards only.

[18] The parties agree the contracting out initiative would impact 275 regular employees across 54 sites, working approximately 235 FTEs. Laundry Worker I, Laundry Worker II and Working Leader-Laundry are classifications which would be impacted. It is uncertain whether there would be direct or indirect impacts to other classifications.

[19] After the two bargaining dates of February 12 and 13, 2020, the COVID-19 pandemic intervened. As a result, AUPE and AHS agreed to postpone further collective bargaining until September 1, 2020 or later. They also agreed to extend a Letter of Understanding providing for no involuntary loss of employment for employees in the GSS bargaining unit until September 1, 2020.

[20] On June 9, 2020, Mr. Holliday of AHS had a call with Mr. Petrie and Mr. Agoto of AUPE. In that call, Mr. Holliday advised that AHS wanted to re-engage the discussion about the contracting out initiative, as set out in the February Letter. Mr. Holliday confirmed nothing had changed with respect to the initiative, except AHS had not sent out an RFP in May 2020 and, if AHS decided to send out an RFP, it would likely happen in September 2020. Mr. Holliday also reminded AUPE of its option to provide AHS with alternatives in writing.

[21] In response, Mr. Petrie advised on that call that, as the parties are in bargaining, the issue needed to be dealt with at the bargaining table and, as the parties had agreed to delay bargaining until September 1, the contracting initiative could thus not move forward. He advised AUPE intended to reactivate its unfair labour practice complaints before the Board and seek a decision preventing AHS from contracting out linen services.

[22] On July 2, 2020, Mr. Holliday attempted to contact Mr. Petrie to invite AUPE to discuss the contracting out initiative, but Mr. Petrie was not available at the time.

[23] With respect to a history of contracting out, the parties agree AHS (or in some cases its predecessors) has contracted out some services that would otherwise be performed by employees in the GSS bargaining unit, including:

- Linen services in the Edmonton Zone, since approximately 1994 or earlier;
- Linen services in the Calgary Zone, prior to the early 1990s;
- Protective services, in part, in the province since April 1, 2010;
- Environmental services at Chinook Regional Hospital (since approximately 2010) and Alberta Hospital Edmonton and, in part, at Peter Lougheed Centre (since the 1980s) and Rockyview General Hospital (prior to 2010);
- Environmental services in various AHS non-acute care community facilities, at some time prior to November 15, 2018 (the ratification of the current collective agreement);
- Medical transcriptionist services, in part, at some time prior to November 15, 2018 (the ratification of the current collective agreement);
- Environmental, linen and nutrition food services at various AHS mental health facilities, at some time prior to November 15, 2018 (the ratification of the current collective agreement); and
- Environmental, linen and nutrition food services at group homes owned by AHS, at some time prior to November 15, 2018 (the ratification of the current collective agreement).

[24] The Board notes the parties have both proceeded in this matter on the basis that, if the contracting out does occur, it will likely take place during the bargaining freeze period.

Witnesses

[25] The Board heard from three witnesses on behalf of AUPE: Jim Selby, Deborah Nawroski, and Chris Dickson; and one witness on behalf of the Employer: Mario Chies.

a) Jim Selby

[26] Mr. Selby is a Research Officer with AUPE. In relation to AHS laundry privatization he was asked by AUPE to perform a search for articles showing the attitude and policies of the United Conservative Party ("UCP") and current Government of Alberta concerning privatization. He found and put into evidence before the Board various excerpts from media stories and the UCP platform.

[27] One media report dated March 13, 2019, quotes now Premier Jason Kenney pledging during the 2019 Alberta election campaign to save the province money by cancelling a plan to upgrade AHS laundry facilities and contract the work out instead. That intention is reflected in excerpts from the UCP platform in that election, which states:

> A [UCP] government would save taxpayers $200 million by taking [AHS'] common-sense advice to contract out laundry service.
>
> - AHS made a decision based on the best available advice to contract out their laundry services. This was overruled by the NDP who put ideology over value for tax dollars.
> - A [UCP] government would proceed with AHS' original plan to contract out laundry services rather than the NDP's plan to spend hundreds of millions of dollars purchasing unnecessary equipment.

[28] The excerpts provided by Mr. Selby also give a number of examples in media stories and the UCP platform where the UCP, its candidates, and now MLAs, speak in favour of privatization of various public services.

[29] Mr. Selby also provided a media extract about the government's immediate response to the January Arbitration Award, referred to above. In those articles, Finance Minister Travis Toews is quoted as stating the award, which granted a 1% increase, as well as other arbitration awards granting increases, will challenge the government as it works to cut spending, and that the government will have to look at other cost savings to cover the increased costs, including adjustment to workforce levels and finding efficiencies in program service delivery.

[30] Two further exhibits were put into evidence through Mr. Selby. The first was the Blue Ribbon Panel on Alberta's Finances Report and Recommendations dated August 2019, often referred to as the "McKinnon Report". That report contains a number of recommendations calling for cuts in public sector employment and wages and expressing privatization as one of the recommended options for reducing costs.

[31] The second was an Alberta Health Services Performance Review by Ernst & Young LLP (the "Ernst & Young Report") dated December 31, 2019. The Government of Alberta mandated a review of AHS finances and commissioned Ernst & Young to perform the review and produce this report. Included in its recommendations is for AHS to assess opportunities for further outsourcing of non-clinical support services, including "[f]ulfilling the government direction to expand alternative service delivery of laundry and linen operations to current AHS operations thereby reducing cost, improving and modernizing service and avoiding replacement costs for end of life equipment".

b) Deborah Nawroski

[32] Deborah Nawroski is a member and steward with AUPE. She is the Chair of AUPE Local 56 and Chapter 7 of that Local, which covers GSS members in Fairview, Grimshaw and Manning. She is also on the bargaining committee for this round of AHS/AUPE GSS bargaining.

[33] Ms. Nawroski testified concerning the impact of the announcement of potential privatization of laundry services on the members she serves. She indicated potentially affected members are terrified about job losses, and concerned the Union cannot protect their jobs or negotiate effectively. She testified such members have expressed their disillusionment with the Employer and with the Union, feeling they are not valued by either and that there is likely no hope of a resolve. As a result, she testified those members are willing to do anything in bargaining to stop job losses if possible; that they have stopped standing up for themselves or reporting issues, so as to protect their jobs; and that members are reaching out to her asking about bumping provisions, creating animosity among members. She testified as to the impact of these things on her as a member of the bargaining committee: she indicated that she had become uncertain and was second-guessing what positions the Union should take in bargaining.

c) Chris Dickson

[34] Chris Dickson is a Negotiator and Union Representative with AUPE, and is responsible for the current round of AUPE/AHS GSS negotiations, as well as the previous two rounds.

[35] Ms. Dickson testified that in the previous round of bargaining (for the current Collective Agreement) there were no discussions about the contracting out of laundry services.

[36] She testified the first time contracting out laundry services came up during this round of bargaining was on the date of the first bargaining session, February 12, 2020. Shelley Chen, an AHS negotiator, gave Ms. Dickson a heads-up there was a recommendation in the Ernst & Young Report concerning laundry services, and this might lead to a proposal coming out concerning the contracting out of those services.

[37] On cross-examination, Ms. Dickson confirmed she had been made aware of the pre-bargaining November Letter from AHS prior to beginning bargaining.

[38] Ms. Dickson was asked whether the February Letter, which had been provided by AHS to AUPE on February 10, was discussed in her conversation with Ms. Chen. Ms. Dickson testified it was not. The conversation was a general discussion concerning the Ernst & Young Report; it also included some general discussion about a concern brought forward by AUPE that an AHS manager may have communicated with staff about potential laundry contracting out. She agreed that Ms. Chen may have referred to the February Letter in the context of discussing what this manager may have been referring to. Concerning the alleged communication, she testified Ms. Chen said AHS had no information a manger actually made those communications, and Ms. Dickson had acknowledged there might potentially be some confusion but had provided the name of the manager alleged to have done so. The Board notes the alleged communication is the subject of a different complaint by AUPE, and the issue is not before the Board in this hearing.

[39] Beyond this brief discussion, Ms. Dickson confirmed AUPE did not provide AHS with any response at that time to respond to the February Letter giving notice under Article 40. These brief discussions were the extent of discussions at the bargaining table about laundry contracting out.

d) Mario Chies

[40] Mario Chies is the Vice-President, Cancer Control Alberta & Clinical Support Services of AHS. He has held that position since 2013. One of the portfolios under his direction is linen services.

[41] Mr. Chies explained AHS currently has a mixed model for linen services. Services in Edmonton and Calgary, approximately 68% of the provincial total, is outsourced to a private provider, K-BRO. The rest of the province (rural/suburban) is done in-house, using AHS employees and equipment. This includes linen services for all its rural/suburban hospitals and clinics, and some long-term care and assisted living facilities. 72 different laundry facilities provide service in some form. Most of the hospital volume goes through five major laundry hubs, in Medicine Hat, Lethbridge, Ponoka, Red Deer, and Grande Prairie.

[42] Mr. Chies testified that over the last several years AHS has faced a strategic decision concerning its rural/suburban linen services. The equipment involved in linen services is expensive, and its repair and replacement is costly. Because of the state of its capital equipment, AHS has considered over several years whether to invest to bring its capital (both

facilities and equipment) up to repair or outsource the work to an external provider. The potential for contracting out has been considered for years: studies had been done prior to his arrival in the position in 2013, and reports were provided to the AHS executive team and the Alberta Government in 2014 and 2017.

[43] On cross-examination, Mr. Chies confirmed the "two paths" of capital investment or potential contracting out had been debated both before and since he entered into his current role. AHS had followed neither path previously because the governments of the day would neither commit to the capital investment nor give permission to contract out. He confirmed AHS would go down either path, as permitted by the government.

[44] Mr. Chies testified that in 2017 it was apparent certain equipment was at risk of imminent failure, necessitating in his view a decision on one of those two options: capital investment or outsourcing. AHS tasked KAIZEN Foodservice Planning & Design Inc. with reviewing the state of the laundry system and assessing how to solve the challenges the system was facing. On cross-examination, Mr. Chies indicated the mandate for KAIZEN to undertake the study was a joint mandate from AHS, Alberta Health and Alberta Infrastructure. On large capital projects, AHS has strong interaction with Alberta Infrastructure. In this case, both Alberta Infrastructure and Alberta Health had asked AHS to validate its previous business analysis concerning the capital costs for linen services.

[45] The focus of the review was on the five hubs providing the bulk of the rural/suburban linen service. KAIZEN was to create a report outlining the system's current state and making recommendations to AHS and Alberta Infrastructure as to what would be necessary to repair and/or replace the capital. In doing so, KAIZEN assessed to two possible standards. One was what would be necessary to replace equipment "like for like" and to meet the existing capacity. The other, more onerous, standard, would be to obtain more optimal modern equipment which was greener (less water usage) and more efficient (less human handling); this scenario would also account for anticipated growth 5 to 10 years into the future.

[46] KAIZEN's "Assessment of Selected AHS Existing Laundries Report" dated June 1, 2017 was put into evidence. The finding with respect to the "like for like" replacement or repair was the cost for all projects would be approximately $40 million total. In particular, the KAIZEN report indicated the Medicine Hat and Ponoka facilities required immediate attention to eliminate significant health and safety risks prevalent at those plants, at a cost of $9.35 million and $7 million respectively. To account for modernization and future capacity, the cost for all facilities would be in the range of $120-130 million.

[47] Mr. Chies testified the estimated cost savings by contracting out is approximately $2 million a year, but the true savings cannot be determined unless and until the work is tendered out. He referred to the approximately $40 million to $120-$130 million repair/replacement cost as a "cost avoidance" (as opposed to a "cost savings") in the event AHS contracts out rather than making those repairs.

[48] Upon completion, the KAIZEN report was communicated to representatives of Alberta Infrastructure and Alberta Health to decide how to proceed. Mr. Chies testified in chief that, in response to the report, the government of the day indicated the capital funding "might not materialize". On cross-examination he indicated the response was there was "no plan to infuse $40 million in capital".

[49] Rather, AHS was asked by the government to determine whether the Medicine Hat and Ponoka projects could be undertaken at a cost of under $5 million each. The importance of the $5 million figure is that it represents the cut-off at which AHS can undertake a capital project under its own budget. Any AHS capital project over $5 million is undertaken by the Government of Alberta, through Alberta Infrastructure.

[50] In response, KAIZEN did more detailed analysis of the Medicine Hat and Ponoka facilities, which it provided in approximately December of 2019. It was determined neither project could come under the $5 million threshold. The Ponoka project would cost a minimum of $5.2 million. With respect to Medicine Hat, the cheapest option would be to close that facility and consolidate those services in an upgraded Lethbridge facility: that option would cost a minimum of $8 million.

[51] When asked what happened next, Mr. Chies indicated AHS asked the government of the day how to proceed. No decision was made in response. AHS was not instructed to pursue either path. No capital funding was allocated for replacement or repair. No direction was provided to pursue contracting out. Mr. Chies confirmed in cross-examination that because the government did not instruct AHS to pursue contracting out, it did not do so.

[52] In the absence of government direction to either repair/replace or contract out, Mr. Chies testified AHS had to mitigate in the event of any capital failures. He gave recent examples of the longer downtimes for repair of equipment, such as an equipment failure in Grande Prairie a few days prior to the hearing, as a result of which laundry needed to be transported to Edmonton for four days.

[53] After the election of the current government, Mr. Chies testified AHS put forward its capital priorities, including its linen facilities, to the government sometime in approximately June of 2019. It provided the 2017 KAIZEN report on the cost of capital repair/replacement, as well as the option of outsourcing. Mr. Chies testified under cross-examination that he was aware of the new government's election platform concerning privatization. AHS then waited for a mandate from the government as to which path it would prefer. It did not receive any direction prior to 2020. On cross-examination, Mr. Chies indicated the Minister of Health wanted to engage in the Ernst & Young review first, and AHS was told there would be no decisions until that review was completed.

[54] On cross-examination, Mr. Chies was asked what input he had into the Ernst & Young Report. He indicated Ernst & Young asked about the state of AHS's laundry services, and they were provided with the various studies done by AHS, such as the KAIZEN report. The information Mr. Chies provided Ernst & Young reflected the two alternatives of capital repair/replacement or outsourcing.

[55] Mr. Chies testified that in early February, 2020, the Alberta Government instructed AHS to proceed with the necessary steps to contract out. This would require AHS to give the Union notice and trigger the 90 day consultation process pursuant to Article 40 of the Collective Agreement.

[56] Mr. Chies was asked whether he was aware of the wage re-opener arbitration decision that had been issued on January 31, 2020, and he testified he was. He was asked whether that

decision factored into AHS's decision to pursue contracting out. Mr. Chies stated it did not factor into AHS's decision; AHS had been instructed by the government to proceed with the required notification of intent to contract out.

[57] Under cross-examination, Mr. Chies was asked whether the direction from the government was given because of the recommendation contained in the Ernst & Young Report. Mr. Chies did not know. When asked how that direction was provided, he indicated the direction came from the Minister of Health via the Deputy Minister of Health to the CEO of AHS, and then to Mr. Chies.

[58] Mr. Chies testified the decision to provide the formal Article 40 notice via the February Letter was jointly discussed by the AHS executive team, including the AHS Vice President in charge of human resources, and was made because it was required under the Collective Agreement. AHS is required to engage with AUPE to see if they have other alternatives to discuss besides either contracting out or capital investment (identified in the February Letter as the primary rationale for considering contracting out). When asked on cross-examination whether he thought the potential contracting out raised bargaining issues, he agreed it might, but that was not part of the consideration in triggering the Article 40 process: the AHS executive team considered the triggering of the Article 40 process was within AHS's rights under the Collective Agreement.

[59] Mr. Chies testified AUPE has not engaged in the consultation to any extent.

[60] On cross-examination, Mr. Chies was asked, if the Article 40 consultation process *did* move forward and alternatives were presented, who would be the decision-maker on what AHS would do? Mr. Chies responded he would review the alternatives, present his findings, and make recommendations, but the ultimate decision maker would probably be the Minister of Health. In making any recommendations, Mr. Chies would look for viable solutions and, if the option involved infusing capital, he would need to analyze the option. Mr. Chies was asked whether, if the government would not provide capital funding, there was any other option besides contracting out. He indicated he was not aware of any alternative, unless some different viable option came forward: for example, one which would change the services' return on investment.

[61] Upon the onset of the COVID-19 pandemic, Mr. Chies testified AHS's focus was on that emergency. It was not going to pursue the consultation during that time. In early June, AHS then sought to "resume" the process, and the 90 day timeline for that process. Without further alternatives being identified, AHS's recommendation to the government would be to proceed with contracting out, unless a capital infusion is forthcoming. Contracting out would be pursued via an RFP in early September.

[62] On cross-examination, Mr. Chies was asked whether AHS had recently asked AUPE for a further extension of the parties' bargaining pause, and their job security Letter of Understanding, to October 15, 2020. Mr. Chies was aware a request had been made, and that date sounded correct, but could not confirm the details. He was asked whether, as a result of that further pause, the 90 days of the Article 40 consultation process was still in effect or not? Mr. Chies did not know, and indicated the AHS executive team would need to consider this. On redirect, he indicated that, in the world of the COVID-19 pandemic, while technically 90 day

deadlines might come and go, there was always the potential more time might be given to the process, and AHS would need to consider the issue at the time.

[63] Mr. Chies was asked on cross-examination about AHS's Operational Best Practices ("OBP") program, which he confirmed is a systemic tool to measure and make changes to improve efficiencies in AHS. OBP is part of the regular course of business of AHS. When asked how the linen contracting out initiative fit into OBP, Mr. Chies stated it did not: the OBP process is separate from this contracting out process.

Analysis

[64] As indicated above, AUPE's complaint was brought pursuant to sections 60 (bad faith bargaining), 147(3) (statutory bargaining freeze), and 148(1)(a)(ii) (interference with representation) of the *Code*.

[65] At the end of the Union's case, and further to AHS's request, the Board summarily dismissed the section 148(1)(a)(ii) complaint, as set out in paragraph 8 of the Union's complaint and summarized in paragraph 2(a) of this decision. The Board determined it had heard insufficient direct or circumstantial evidence to make out a prima facie case showing any act by the Employer constituting a violation of s. 148(1)(a)(ii) as alleged in that paragraph. The Board declined to summarily dismiss the section 60 component of that same paragraph, which had also been requested by the Employer, as the Board felt it would be artificial and impractical to draw a clear boundary around that specific aspect of the Union's bad faith bargaining complaint.

[66] The arguments concerning the alleged bargaining in bad faith and the alleged breach of the statutory freeze are intertwined, as indeed the objectives underlying those sections are intertwined. For the purpose of its legal analysis, the Board considers it needs to answer the following key questions:

1. Does the bargaining freeze mean an employer cannot contract out in accordance with an express provision of the collective agreement unless the contracting out is in the "normal course of business"?

2. Has AHS breached the bargaining freeze on the basis there is no operational rationale for the contracting out?

3. Has AHS breached the duty to bargain in good faith by triggering the Article 40 process, and thus seeking to discuss contracting out under that process rather than at the bargaining table?

4. Has AHS breached the duty to bargain in good faith, or the bargaining freeze, on the basis the Article 40 process is "foregone conclusion"?

Union's Position

[67] With respect to the first question, AUPE argues that despite the existence of a collective agreement provision specifically permitting contracting out, an employer is not entitled to exercise such a right during the bargaining freeze unless it is in accordance with past practice or undertaken in the regular course of business. AUPE urges this narrow interpretation of the

collective agreement exception contained in section 147(3)(c) of the *Code* is consistent with the purpose of the freeze, which it states is to prevent actions intended to destabilize the bargaining process. In support of this argument, AUPE relies upon *United Food and Commercial Workers, Local 503 v Wal-Mart Canada Corp.*, 2014 SCC 45 ("*Wal-Mart*"); *Public Service Alliance v Canada Revenue Agency*, 2017 FPSLREB 16; *Public Service Alliance of Canada v Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 11; and *AUPE v Shepherd's Care Foundation*, [2016] Alta. L.R.B.R. 33 ("*Shepherd's Care*"). AUPE argues the contracting out in this case is not in accordance with past practice or undertaken in the regular course of business, and is thus not permitted.

[68] With respect to the second question, AUPE argues there is no operational rationale for the contracting out. It suggests nothing has changed operationally for AHS between the 2013-2019 time period, when it did not contract out, and 2020, when it now seeks to. Rather, it suggests the impetus for contracting out is not operational but simply a reflection of the political preference of the Government of Alberta in favour of contracting out.

[69] With respect to the third question, AUPE argues the improper effect of AHS triggering the Article 40 process is that issues relating to the contracting out will no longer be dealt with as bargaining issues at the bargaining table. It states the Article 40 consultation process is narrowly focussed solely upon the financial and operational needs of the Employer, in contrast to discussions at the bargaining table where the parties engage in comprehensive good faith bargaining, as equals, in consideration of both the Employer's and employees' interests. Proceeding in this way, it argues, constitutes bad faith bargaining.

[70] With respect to the fourth question, AUPE argues the decision has clearly been made to contract out, and the Article 40 consultation process is a charade. By seeking to discuss the contracting out in a process where the result is a "foregone conclusion", AUPE argues the Employer seeks to avoid good faith bargaining of these issues.

The Employer's Position

[71] AHS urges the Board to focus its analysis on *AHS's* actions, rather than the actions, intentions or preferences of the Government of Alberta. The complaint is against AHS, and the question for the Board is whether AHS has bargained in bad faith or violated the freeze.

[72] With respect to the first question identified by the Board above, AHS argues the *Code* provides for an exception to the bargaining freeze for matters permitted by the collective agreement. The Collective Agreement here specifically permits contracting out. It argues the case law cited by AUPE does not support the interpretation that the section 147(3)(c) "collective agreement" exception only permits changes in accordance with past practice or undertaken in the regular course of business. It cites *City of Edmonton v CUPE Local 30*, [1995] Alta. L.R.B.R. 102 ("*City of Edmonton*"), in support.

[73] With respect to the second question, AHS argues there is clear evidence of an economic rationale for contracting out. It has identified two potential options to deal with aging capital infrastructure, and has consistently presented those options to successive governments seeking a decision, as the funding for capital projects over $5 million ultimately comes from the government. AHS has never been in a position to act on the economic rationale for contracting out until a decision was made by the government. It now has that ability. While the government

may have an ideological motivation for its decision to pursue contracting out rather than capital investment, that motive is irrelevant: AHS, the Employer against whom the complaint is brought, is simply acting in accordance with a valid economic rationale that flows from that government decision.

[74] With respect to the third question identified by the Board above, AHS argues it is entitled to rely on the Article 40 process and has done so. Meanwhile, it has conducted itself in accordance with its obligations to bargain in good faith by providing adequate disclosure and the opportunity for AUPE to discuss these matters. Bargaining does not preclude discussions in another forum permitted under the collective agreement.

[75] With respect to the fourth question, AHS argues any deficiency in the Article 40 consultation process is simply hypothetical: there has been no attempt by AUPE to engage in that process and no indication AHS has misled AUPE or misrepresented the process. Had AUPE participated, there could have been meaningful discussion of alternatives: AUPE did not participate. The fact the contracting out initiative appears likely to proceed, or that the ultimate decision-maker in government may have an ideological disposition towards contracting out, does not mean the consultation process is meaningless or improper.

Interpretation of the Collective Agreement Exception

[76] In any case considering the ability of an employer to contract out during the bargaining period, and its obligations towards the bargaining agent if considering doing so, it is important to situate ourselves in the relationship between the parties, reflected in the previous collective agreement.

[77] In some cases, the parties may have negotiated a "no contracting out" clause. In such a case, so long as the collective agreement remains in force, the employer has agreed, by contract, not to do so.

[78] In most cases, parties will not have agreed on any specific clause. In such a case, an employer must rely upon the management rights clause of the collective agreement as its authorization to act. The case law makes it clear there are important limitations on contracting out in such situations (see, for example, the summary of cases discussed in *AUPE v Optima Living Alberta Ltd.,* [2019] Alta. L.R.B.R. LD-090 at paras 45-54).

[79] Alternatively, parties may have negotiated a clause explicitly giving the employer the right to contract out. There are various reasons why parties might so agree. Such a clause may prescribe, and thus limit, the scope of the employer's power to do so. It may set parameters, advantageous to one or both parties, for a process for doing so. A union may have extracted some concession from the employer elsewhere in the collective agreement in exchange for the clause.

[80] In this case, AHS and AUPE have agreed on a collective agreement clause expressly permitting contracting out, subject to a specific process outlined in the collective agreement. This is not a case where an employer refers to the broad terms of a management rights clause as its authorization to act. The Board has before it a specific clause negotiated by two sophisticated parties.

[81] In the Board's view, the proper interpretation of section 147(3)(c) allows us to reflect this reality.

[82] Section 147(3) states:

> *If a notice to commence collective bargaining has been served pursuant to section 59(2), no employer affected by the notice shall, except*
>
> > *(a) in accordance with an established custom or practice of the employer,*
> > *(b) with the consent of the bargaining agent, or*
> > *(c) in accordance with a collective agreement in effect with respect to the bargaining agent*
>
> *alter the rates of pay, a term or condition of employment or a right or privilege of any employee represented by the bargaining agent or of the bargaining agent itself until the right of the bargaining agent to represent the employees is terminated or a strike or lockout commences under Division 13.*

[83] The Union urges an interpretation of the section 147(3)(c) exception that limits it to permitting changes in accordance with past practice or undertaken in the regular course of business, and relies in particular on the Supreme Court of Canada case of *Wal-Mart*.

[84] *Wal-Mart* is a case dealing with the statutory certification freeze pursuant to section 59 of the Quebec *Labour Code*. The first paragraph of section 59 states:

> From the filing of a petition for certification and until the right to lock out or to strike is exercised or an arbitration award is handed down, no employer may change the conditions of employment of his employees without the written consent of each petitioning association and, where such is the case, certified association.

[85] The Supreme Court recognizes, at paragraphs 29 to 37, the objective of the certification freeze is to maintain the status quo for the purpose of facilitating the certification and ensuring the parties negotiate in good faith. It limits the unilateral powers an employer would otherwise have to manage its business and, in that way, limits the influence the employer might have on the employee's just-exercised right of association.

[86] The Court goes on to find that continued employment is indeed a "condition of employment" subject to the freeze.

[87] The Court recognizes the wording of section 59, read literally and in isolation, would seem to have the effect of completely freezing an employer's business environment, a feature the Quebec Code shares with many other freeze provisions. In response, the Court discusses at paragraph 47 the section has been interpreted to leave the employer with its "general management power", but circumscribed such that it must be exercised "in a manner consistent with the rules that applied previously and with the employer's usual business practices before the freeze". The Court rejects the notion that, merely because the employer had greater powers pursuant to individual contracts of employment or the general law prior to certification, its

continued exercise of those unfettered powers is thus consistent with practices before the freeze. Such an approach would deprive the freeze of any meaning. The analysis must focus on how those powers were previously exercised in actual practice, and how the employer would have acted prior to the union's arrival. The Court finds a change can be found to be consistent with the employer's "normal management policy" if it is either consistent with its own past management practices or consistent with what a reasonable employer would have made in the same circumstances. This is referred to as the "business as usual" approach.

[88] The Court then states at paragraph 60:

> The mechanism codified in s. 59 is by no means specific to Quebec, as it exists in all provinces of Canada and at the federal level ... In all the general labour relations schemes in Canada, therefore, although the employer does not lose its right to manage its business simply because of the arrival of a union, it must, from that point on, exercise that right as it did or would have done before then ...

[89] The Union draws upon this paragraph, arguing section 147(3) of the *Code* has the same purpose, and that Supreme Court's statements mean that section, including its "collective agreement" exception, must be interpreted as incorporating the "business as usual" approach.

[90] It is important to note that *Wal-Mart* is dealing with a certification freeze, and the words of paragraph 60 of *Wal-Mart* specifically refer to certification freezes ("because of the arrival of a union"). The "business as usual" approach is entirely consistent with the certification freeze provision contained in section 147(1) of the *Code*, and the Board's certification freeze case law: see, for example, *UFCW, Local 401 v European Cheesecake Factory Limited*, [1993] Alta. L.R.B.R. 239; *CEP Local 1118 v Southam Inc.*, [1999] Alta. L.R.B.R. 237.

[91] The Board finds nothing in the Supreme Court's analysis in *Wal-Mart* supporting the proposition that, in cases where a union is in place and the parties have negotiated a prior collective agreement, the bargaining freeze precludes any non-"business as usual" change regardless of the express terms of the collective agreement. The Supreme Court was not considering a statutory provision containing a "collective agreement" exception or the policy considerations arising from express collective agreement terms. Similarly, the two *PSAC* cases relied on by the Union involve a statute with no "collective agreement" exception.

[92] In the Board's view, the Union's proposed interpretation would undermine both the wording and intention of the section 147(3)(c) collective agreement exception. The section clearly states employers may alter the terms of employment during the bargaining freeze if doing so in accordance with the collective agreement. If, as in this case, the employer is acting in accordance with a very specific term of the agreement, freely negotiated into the collective agreement by the parties in prior bargaining, permitting the alteration is not contrary to a system of free collective bargaining: rather, it recognizes and gives effect to the bargain reached in the previous round. As outlined above, there are various reasons why parties might have so agreed. The section 147(3)(c) exception to the freeze recognizes the possibility of such a freely negotiated prior agreement between the parties.

[93] The Board has already considered and rejected the notion the "business as usual" test applies to section 147(3)(c). In *City of Edmonton* at page 115, the Board stated:

> The final exception is that the employer acted according to the collective agreement. Counsel for Local 30 argued that the business as usual test applies here also - the collective agreement exception only covers those activities which are characterized as business as usual. To accept this approach would require interpreting the three exceptions as dependent rather than independent, which interpretation the wording of the statute does not support. Section 145(3) uses the term "or" between the three exceptions, which we interpret to be disjunctive. If the collective agreement exception incorporates the business as usual qualifier, then so should the union consent exception, a position which would restrict the union's ability to represent its members. This is not a position we find is supported by the wording of the legislation.
>
> The interpretation proposed by Local 30 is also not supported by the policy behind the statutory freeze. The freeze is aimed at unilateral changes to employment conditions that subvert employee support for the bargaining agent. There is no policy reason to prohibit changes that are not unilateral, but have the agreement of the bargaining agent. Logically, the union should be able to agree to such a change ad hoc when the change is implemented, or in advance in the collective agreement. Further, the union should be able to give such consent whether or not there is a previous history of such changes in the workplace.

[94] Nothing in the Board's subsequent case law surrounding section 147(3)(c) alters that finding. As referred to above, the Board has dealt with a number of cases where it considered the limitations on employers relying upon management rights clauses to fall within the collective agreement exception. The *Shepherd's Care* case relied upon by the Union is one such case. The Board at paragraph 43 of *Shepherd's Care* specifically notes it is not a case containing either an express prohibition on contracting out nor an express provision permitting it. *Shepherd's Care* analyzes the factors considered by the Board and the courts when dealing with contracting out in those circumstances, and finds the employer's decision to contract out all or substantially all of the bargaining unit work violated section 147(3). We note the contracting out in the present case does not reach the extent considered in *Shepherd's Care*, which was of all or substantially all of the bargaining unit work, to the extent it jeopardized the integrity of the bargaining unit.

[95] The Board is satisfied section 147(3)(c) permits an employer to rely upon an express contracting out provision of the collective agreement during the bargaining period, and the section does not incorporate a further requirement the change be "business as usual". The contracting out provision agreed by the parties in this case does nothing to incorporate such a requirement, nor to suggest it cannot be utilized during a bargaining period.

Is There an Operational Justification for the Contracting Out?

[96] AHS approached and argued this case on the basis its collective agreement right to contract out must be exercised in good faith and it must have a good faith operational justification for doing so. AUPE argues there is no more justification now than in prior years when AHS did *not* contract out, and the actual impetus for the change is the ideological inclination of the government.

[97] The evidence shows AHS has a good faith operational justification for its decision to contract out. The KAIZEN report provides ample evidence of the problem AHS has faced for many years concerning its laundry capital. AHS sought funding from successive governments to spend the money necessary to repair and replace its laundry capital or, if such funding was not forthcoming, permission to contract out the services. It received no permission to do either until February of 2020. Once permission was given to pursue one of the options, AHS acted immediately to solve the problem it had identified for many years. AUPE may not agree with the justification or may assert there are other options to be considered (none of which are in evidence before us). But that is not the relevant question here, nor is the Board considering whether the contracting out is, or is not, the best choice.

[98] The Board agrees with AHS that the government's purported ideological inclination to allow AHS to pursue the contracting out rather than provide the capital funding is not relevant. The question before us at this stage of the analysis is whether AHS itself had a good faith justification, and its justification is clear from the evidence.

Does Utilizing the Collective Agreement Process Constitute Bad Faith Bargaining?

[99] The crux of the Union's position on this issue is that the Employer is required to discuss these matters at the bargaining table. It suggests by triggering a different collective agreement process during bargaining, the Employer subverts the bargaining process through which these matters ought to be discussed, and thus breaches its duty to bargain in good faith.

[100] Service of a notice to bargain triggers the duty to bargain in good faith, and imposes obligations during that period on employers making *de facto* decisions concerning changes that would have a significant impact on the employees in the unit. The *Shepherd's Care* case sets out those obligations and the rationale for them in useful detail, and we quote them at length:

> [17] Section 60 of the *Code* imposes a duty, when a notice to commence collective bargaining has been served, to engage in good faith bargaining and make every reasonable effort to reach a collective agreement. The duty has been interpreted to include an obligation to disclose relevant information. The reason for imposing such a duty was discussed in [*City of Edmonton*] at page 110:
>
> > The duty to bargain involves an obligation to meet, to bargain in good faith, and to make every reasonable effort to enter into a collective agreement. Part of the obligation to bargain in good faith is the requirement to disclose pertinent information so that both parties can intelligently appraise proposals. This blends with and promotes the goal of full and open discussion between the parties.
> >
> > A duty to disclose information typically arises in two cases. In the first, the union requests relevant information at the bargaining table, thereby creating an obligation on the employer to respond honestly. See: U.N.A. v. A.H.A et al [1994] Alta. L.R.B.R. 250. Here, Local 30 made no request to the City about the reorganization, so the obligation did not arise.

> The second case arises where the employer makes a de facto decision that will have a significant impact on the employees in the unit. Such a decision creates an affirmative duty on the employer to disclose that decision to the union in negotiations, even though the union has not asked about it. See: UFCW Local 280-P v. Gainers Inc. [1986] Alta. L.R.B.R. 529 at 550/551.

[18] The rationale behind the duty was further explained in *CEP, Local 255G v. Central Web Offset Ltd. et al.*, [2008] Alta. L.R.B.R. 289 at para. 139 ("*Central Web*"):

> The rationale for this rule is that the Union is entitled to bargain on the basis of the enterprise as it will be in the immediately foreseeable future, not as it was before the management decision. To not disclose a management decision with a major impact on the bargaining unit is tantamount to a misrepresentation. And it is a misrepresentation that can deprive the Union of the ability to negotiate about the real issues in the workplace - perhaps to address issues that might influence the decision to close, perhaps (and more likely) to bargain about the implications of the closure. In the worst case, a failure to make disclosure can result in a collective agreement that will immediately become irrelevant.

[19] Given that the purpose of disclosure is to promote informed bargaining around significant decisions, it is not surprising that the jurisprudence requires more than mere disclosure. When employers disclose significant decisions after notices to bargain have been served, unions must be provided with an opportunity to digest the information disclosed and to respond to it in bargaining with the employer before the employer communicates its decision directly to the affected employees ...

...

[23] We agree that context is relevant but reject the arguments for why the Employer's conduct did not amount to bad faith bargaining. First, the duty to bargain is a continuing duty that begins with service of the notice to bargain. In *Central Web*, at para. 141, the Board said:

> ...The duty to bargain in good faith is a continuing duty, not an intermittent one. Bargaining sometimes occurs with long gaps between meetings, as for example during a strike or lockout. Yet bargaining may be urgent if a closure or other major management initiative affecting the bargaining unit is about to happen. It would undermine the legislative goals of industrial peace and full, honest and rational discussion of terms and conditions of employment if an employer could use a leisurely bargaining schedule, adopted in ignorance of the looming management decision, to avoid its obligation to disclose that decision to the trade union.

[24] The notices to bargain had been served and the duty was in place. If the Union knew the Employer was about to contract out entire bargaining units or significant parts of them, it most likely would have moved more quickly to get to the bargaining table. The fact that formal bargaining had not begun is not relevant.

[25] Second, the duty applies to all major decisions, whether they are permissible under the collective agreement or not. Employers have no unilateral ability to alter terms and conditions of the collective agreement at this stage of bargaining so the duty must apply to important decisions that are permissible under the collective agreement.

[26] The Employer's witnesses candidly admitted that they had no intention of discussing contracting out with the Union. They thought it would be a waste of time. So they sprung it on the Union on September 3 and told the affected employees on September 4. The failure to give the Union time to digest the decision and respond was intentional. There was no urgency of this kind to this decision. The decision making process was put on hold in August while Pray was on holidays. Implementation of the decision could have been put off for a week or two while the Union considered the information and responded. Employers can't avoid the duty to engage in rational discussion by simply saying that they don't think the union will have anything useful to say. The Employer's conduct was disrespectful of the Union's role as exclusive bargaining agent. In the eyes of its members, particularly those who remained employed and whose collective bargaining terms were still to be negotiated, the Union would naturally appear uninformed and ineffectual. The power-point presentation shown to the employees one hour after the Employer first met with the Union about its decision indicated that the Union had "been advised". This suggests the Employer knew that it had a duty to advise the Union of a decision of this magnitude. It is unlikely that the audience would have assumed that the Union has been advised only 24 hours before.

[27] In *Canadian Union of Public Employees v. Sunnycrest Nursing Homes Limited*, [1982] OLRB Rep. February 261, the employer subcontracted out one-quarter of the bargaining unit's work during collective bargaining of a first-contract. The Ontario Board commented on the value of imposing a duty on an employer in such circumstances to discuss such decisions at the bargaining table:

> 40. We do not think the duty to bargain about a major subcontracting decision imposes an unreasonable or unfair burden upon the employer involved. It does not unduly restrain him from formulating or implementing an economic decision to terminate a phase of his business operations, nor does it obligate him to yield to a union's demand that the subcontract should not be let, or should be let on terms inconsistent with management's business judgment. The duty to bargain is not an obligation to agree. It is a requirement to engage in a full and frank discussion with the employees' representative, and make a bona fide effort to

> explore alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and his employees. If such efforts fail, the employer remains free (absent other unfair labour practice considerations based upon anti-union animus) to go forward with his decision. But experience has shown that candid discussion about mutual problems by labour and management frequently result in their resolution with attendant benefit to both sides. A union confronted by a proposed loss of jobs can often make a useful contribution to the decision-making process. The recent bargaining in the automotive industry provides a good example. Business operations can profitably continue, and jobs may be preserved. And as Professor Cox has observed:
>
> > "Participating in [collective bargaining] debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strength or weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions. The cost is so slight that the potential gains easily justify legal compulsion to engage in the discussion". (See: Cox, *The Duty to Bargain in Good Faith,* 71 Harv. Law Rev. 1401.)
>
> In our view, prior discussion of decisions of this nature is all that the Act contemplates. But it commands no less.

[28] We agree with the Ontario Board's comments. It is contrary to the duty to bargain imposed in the *Code* for an employer to unilaterally implement a decision to contract out all or substantially all of the bargaining unit's work after a notice to commence collective bargaining has been served without a frank and full discussion with the union, simply because it perceives the discussion will be "futile". The purposes of imposing the duty – to facilitate rational discussion and to respect the union's exclusive bargaining status – are thwarted if an employer can unilaterally implement significant changes once notice to bargain has been served without discussion with the union.

[101] The Board agrees with the above comments. It is of fundamental importance that significant changes under consideration during the bargaining period be open for full and frank discussion between the parties.

[102] The Union's primary objection is that discussions pursuant to Article 40 is not a "meeting of equals", as it says the bargaining table would be. It says the Article 40 process focusses solely upon the financial and operational needs of the Employer rather than considering both the Employer's and employees' interests.

[103] In assessing this argument, we need to consider the two types of discussions which might result from disclosure of a contracting out initiative. The first may be whether the employer should proceed with the contracting out at all – the "exploration of alternatives" referred to in *Shepherd's Care*. The second is whether, in the event it does proceed, steps should be taken to ameliorate the impact of the contracting out on employees.

[104] Dealing with the first issue, the concerns expressed by the Union are inherent in the nature of the discussions, and are not truly a product of their venue. The Employer has a collective agreement right to contract out here. The purpose of the full and frank discussion referred to above is not to make an employer's decision subject to agreement between the parties. While the Union must be given an opportunity to express its position, including potential alternatives which might dissuade the Employer from proceeding, the decision remains entirely the Employer's (subject to other unfair labour practice considerations). An employer in this circumstance may base its decision on financial and operational needs.

[105] The second type of issue is somewhat different. Contracting out may open other avenues of discussion between the parties concerning changes to the terms of the collective agreement and attempts to mitigate the consequences to employees. In these discussions, the parties are certainly on a different, and more equal footing, as indeed the parties must agree on any terms or changes in terms.

[106] Article 40 of the Collective Agreement contemplates both types of discussions under its ambit: see Articles 40.04 and 40.05.

[107] It bears repeating this is a case where sophisticated parties have negotiated a specific process for discussions about contracting out. It places an obligation on the employer to disclose and consult even if the parties are not in a bargaining period. It outlines topics to be disclosed and discussed. It sets out a specific timeline for disclosure and consultation which, as a product of the parties' agreement, must be taken as constituting a reasonable period for disclosure and discussion. It provides a dispute mechanism concerning the application of the consultation process.

[108] The Board does not accept the argument AHS undermined the necessity for full and frank discussion of these issues by proceeding as it did. The Article 40 process facilitates that requirement, in a manner agreed to by the parties. It was AUPE's choice not to participate in the forum contemplated in the Collective Agreement.

[109] With respect to the second type of issue – the "remedial" issues – it would be fair to say such issues could appropriately be raised at the bargaining table, parallel to the Article 40 process, had bargaining been taking place. The key is for the union to have a reasonable opportunity to discuss such issues between disclosure and implementation. An employer need not wait until the conclusion of a collective agreement to proceed if that disclosure and reasonable opportunity for discussion has taken place: see, for example, *HSAA v Peace Regional Emergency Medical Services*, [1998] Alta. L.R.B.R. 460 at paras 27-29. Here, as referenced above, the parties agreed in advance, and knew in this case, what the timeline for discussions would be. In the face of the agreed to pause in bargaining, AUPE could have proceeded with discussions on these issues pursuant to the Article 40 process already agreed

between the parties, with the results of those discussions flowing into bargaining once it recommenced.

[110] Instead, it is clear AUPE implemented a strategy of simply waiting for bargaining to reconvene, and refusing to engage in discussion in any other venue until that time. That strategy was not consistent with the agreement previously reached by the parties, and it is not bad faith bargaining for AHS to have proceeded in the face of AUPE not participating in the discussion.

Does AUPE's contention the consultation is a "foregone conclusion" affect our decision?

[111] In essence, AUPE argues the Article 40 consultation process is no process at all: that the contracting out in these circumstances is a foregone conclusion. Does this argument undermine the Board's conclusion the process provides for full and frank discussion in compliance with the duty to bargain in good faith, or that the contracting out process in this case is actually occurring "in accordance with the collective agreement"?

[112] We agree with the Employer's submission that discussions on these types of issues will commonly take place where the decision being discussed appears almost inevitable: as noted in *IAFF, Local 4794 v Rocky View County*, [2013] Alta L.R.B.R. 63, the obligation to disclose in the context of good faith bargaining, and thus the trigger for even having these discussions in most cases, is a *de facto* decision already having been made. Despite this, the discussion process remains valuable for the reasons discussed in *Shepherd's Care*.

[113] Much was made of Mr. Chies' hypothetical answer that the ultimate decision maker concerning any alternatives presented would probably be the Minister of Health, thus tying the consultation process to the government and its preference for contracting out services. Of course, given that Mr. Chies clearly views the problem as an aging capital problem, and given the government's inevitable participation in any solution involving capital spending over $5 million, that answer from Mr. Chies is unsurprising. The government's decision whether or not to spend money on that capital, on whatever basis it might decide the issue, is the inescapable background to this dispute. Mr. Chies was clear his role, and that of AHS, would have been to review any alternatives presented, and to present his findings and make recommendations about them.

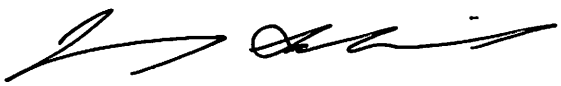
[114] In the end, however, the Board has no basis in this case to assess the efficacy of the consultation process, because it was never utilized. AUPE had the opportunity to submit alternatives. It did not do so. The Board declines to assume the process would not have had value of the nature discussed in *Shepherd's Care*.

Conclusion

[115] Accordingly, the Board dismisses AUPE's complaint in its entirety.

[116] Mr. Chies was asked whether, given ongoing bargaining delays and extensions arising from the COVID-19 pandemic, there was a possibility AHS might further extend the 90 day consultation window under the Article 40 process. He forthrightly answered there was always the potential more time might be given to the process, and AHS would need to consider the issue at the time.

[117] Given the dismissal of AUPE's complaint, the Board has no basis to make any direction of the parties. The Board would simply comment that, to the extent possible, there would seem to be good labour relations sense in having continuing and timely consultation between the parties, particularly on the "remedial" types of issues discussed above. Depending on the timing of when any contracting out may be finalized, such remedial issues may well remain live for discussion at the bargaining table when bargaining recommences. However, to the extent possible, some continuation of the Collective Agreement consultation process may provide a mechanism for those inevitable discussions to happen in a more timely fashion. The Board hopes the parties will consider that possibility.



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