BY EMAIL

Reply to: STEVEN ROGERS
telephone direct: 604.602.7996
fax direct: 604.602.9211
email: srogers@vslo.ca

assistant: Kelly Ma
direct line: 604.602.7990
email: kellyma@vslo.bc.ca

December 23, 2020

Labour Relations Board of British Columbia
6th Floor - 1066 West Hastings Street
Vancouver, BC V6E 3X1

Attention: Najeeb Hassan, Registrar

Dear Sirs/Mesdames:

Re: CAMOSUN COLLEGE FACULTY ASSOCIATION ("CCFA") – and – CAMOSUN COLLEGE ("Camosun") – Section 54 Complaint

We represent the CCFA and are authorized on its behalf to file this application.

NATURE OF APPLICATION

The CCFA alleges that Camosun has breached section 54 of the B.C. *Labour Relations Code* by introducing a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies, namely the indefinite switch to remote teaching and working from home affecting approximately 560 employees, without providing the statutory advance notice to the CCFA.

PARTIES

Applicant CCFA
Camosun College Faculty Association
Attn: Weldon Cowan, Staff Representative, Federation of Post-Secondary Educators
Young Building, Room 221
Camosun College
3100 Foul Bay Rd
Victoria BC V8P 5J2
P: (604) 873-8988
F: (604) 873-8865
E: wcowan@fpse.ca

Counsel for the Applicant CCFA
Victory Square Law Office LLP
Attn: Steven Rogers
710 - 777 Hornby Street
Vancouver, BC V6Z 1S4
P: (604) 684-8421
F: (604) 684-8427
E: srogers@vslo.ca

Respondent Employer
Camosun College
Attn: Sherri Bell, President
3100 Foul Bay Rd
Victoria BC V8P 5J2
P: (250) 370-3408
E: smedleyr@camosun.ca

FACTS

1. The CCFA is certified as the exclusive bargaining agent for a bargaining unit of approximately 400 faculty members at Camosun College.

2. On January 28, 2020, BC announced its first COVID-19 infection.

3. On March 5, 2020, Camosun's College COVID-19 Response Coordination Team decided to cancel all field schools immediately.

4. On March 13, 2020, Ms. Bell, Camosun's President, met with CCFA and the other unions to discuss their concerns and answer questions.

5. On March 14, 2020, Ms. Bell announced Camosun would be transitioning from face-to-face teaching to alternate instruction and assessments. Educators were asked to plan appropriate alternative delivery methods.

6. On March 18, 2020, the province declared a state of emergency. On the same day, Camosun's College COVID-19 Response Coordination Team emailed the Camosun community encouraging employees to work remotely subject to approval from their supervisor, and stating that additional resources would be forthcoming.

7. On March 27, 2020, CCFA President, Mr. Chris Ayles, sent a letter to Ms. Bell, and copying many members of Camosun's upper management, clarifying the CCFA's stance on a number of issues including workload, scheduled development, and work-from-home arrangement. Mr. Ayles extended an offer to continue consultation on these issues with Camosun and underlined the institute's obligations to consult under the *Code*.

8. On April 1, 2020, Dr. Frank Jankunis, CCFA Contract Management Committee Chair, emailed members about the shift to online teaching and urging them inform their managers if anything was not feasible or wise.

9. On April 2 and April 6 2020, CCFA met with Mr. John Boraas, VP Academic, and Ms. Barb Severyn, Executive Director of Human Resources, to discuss the letter Mr. Ayles sent on March 27, 2020. CCFA informed Camosun that the workload to shift to online was immense and they were worried about educators' ability to handle this burden. They also discussed the technical requirements of educators. Camosun relayed the financial concerns of the institute and the desire to support educators working from home.

10. By April 20, 2020, the CCFA was already fielding questions from their members about the fall semester. CCFA was receiving reports of educators working six days a week and foregoing their lunch breaks in order to manage their workloads.

11. On May 5, CCFA and Camosun met to discuss increasing problems with educators' workloads. Educators and the CCFA expressed frustration that issue was not being acknowledged by Camosun administrators at all levels. Camosun expressed tension between supporting educators properly and financial issues. Camosun said they would discuss it with the institute's top administrators.

12. On May 6, the parties again met. Camosun said they were working on completing a financial report for the government and they were preparing for partial return to campus.

13. On May 7, 2020, Mr. Boraas wrote to CCFA offering to meet about supporting educators in a manner "consistent with resourcing and the collective agreement."

14. On May 8, 2020, Mr. Ayles emailed Mr. Boraas about the meeting which had been canceled that day, and expressed an interest in continuing to discuss issues without prejudice or precedent.

15. On May 14, 2020, the parties met to discuss workloads. The parties discussed different solutions, such as reducing class size; however, CCFA expressed frustration that many deans were refusing requests to mitigate the effects of moving teaching online and that consultations were not resulting in any actual improvements.

16. On May 28, 2020, Ms. Severyn informed CCFA that Camosun would not be agreeing to CCFA's proposed variances that aimed to mitigate loss of work entitlements for term faculty members due to Camosun's pandemic response.

17. On June 5, 2020, the parties met to discuss these same variances. Camosun cited PSEA and internal constraints on variances.

18. On June 10, 2020, Mr. Ayles submitted a report to Camosun's Board of Governors ("BOG"). Mr. Ayles described the challenges educators experienced as they scrambled to convert their courses for remote delivery while working from home and under the stress of isolation and other personal responsibilities. He warned that educators were already showing signs of burnout and urged BOG to pursue all avenues to improve the situation.

19. On June 24, 2020, CCFA filed four Step 2 grievances relating to the workload.

20. On August 28, 2020, Ms. Severyn circulated a draft Temporary Remote Working Agreement to CCFA and other Camosun unions, and requested feedback.

21. On September 8, 2020, Camosun's fall semester started. Some educators taught in-person; however, most continued to deliver remote teaching while working from home.

22. On September 11, 2020, Mr. Ayles, along with other post-secondary union leaders, published a letter in the Victoria News calling on the Provincial Government to provide more funding to post-secondary institutes for COVID-19 relief measures.

23. On September 21, 2020, CCFA and other unions at Camosun met with Camosun to discuss the draft Temporary Remote Working Agreement. The unions expressed the opinion that the Agreement breached the collective agreements, appeared to ignore members' concerns, and did not reflect WorkSafe obligations. Camosun expressed a willingness to hear feedback and suggestions on the Directive.

24. On September 23, 2020, Ms. Severyn and Mr. Boraas wrote to Mr. Ayles stating that as CCFA has filed grievances relating to workload, Camosun could no longer discuss issues related to workload at the future meetings. Mr. Ayles responded on September 28, 2020 and stated he hoped the meetings would continue.

25. On September 28, 2020, CCFA filed a grievance relating to employee appraisals during the winter 2020 semesters, which CCFA alleges were negatively impacted by the COVID-19 pandemic and the shift to online teaching.

26. On October 13, CCFA submitted another workload grievance to Step 2.

27. On October 15, 2020, Camosun denied the four workload grievances filed on June 24, 2020; and on November 2, 2020, they denied the workload grievance submitted on October 13, 2020.

28. On November 9, 2020, Mr. Ayles submitted another report to Camosun's BOG. He relayed that his plea for help in the last report had gone unanswered, and that the burnout he warned about was now manifesting as contemplations of leaves of absence and early retirement. He informed BOG that the rate of grievance has increased substantially and that labour relations were deteriorating.

29. On November 30, 2020, CCFA advanced the workload grievances to Step 3 and Mr. Jankunis again extended an offer to meet to discuss the grievances without precedent and prejudice.

30. On December 2, 2020, Ms. Bell responded to Mr. Jankunis's offer to meet. She stated that while she was open to meeting:

> […] 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.

SUBMISSION

Applicability of Section 54

31. Section 54 of the *Code* provides:

> 54(1) If an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies,
>
> (a) the employer must give notice to the trade union that is party to the collective agreement at least 60 days before the date on which the measure, policy, practice or change is to be effected, and
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> (b) after notice has been given, the employer and trade union must meet, in good faith, and endeavour to develop an adjustment plan, which may include provisions respecting any of the following:
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> (i) consideration of alternatives to the proposed measure, policy, practice or change, including amendment of provisions in the collective agreement;
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> (ii) human resource planning and employee counselling and retraining;
>
> (iii) notice of termination;
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> (iv) severance pay;
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> (v) entitlement to pension and other benefits including early retirement benefits;
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> (vi) a bipartite process for overseeing the implementation of the adjustment plan.
>
> (2) If, after meeting in accordance with subsection (1), the parties have agreed to an adjustment plan, it is enforceable as if it were part of the collective agreement between the employer and the trade union.
>
> (3) Subsections (1) and (2) do not apply to the termination of the employment of employees exempted by section 65 of the Employment Standards Act from the application of section 64 of that Act.

32. Section 54 is mandatory, and it is separate and distinct from obligations in the collective agreement.

33. This section requires a “broad and liberal interpretation” when assessing whether a particular employer action is a “measure, policy, practice or change that affects the terms,

conditions or security of employment" (for simplicity, a "change");[1] s. 54(1) is not constrained to any particular type of changes.[2]

34. Any number of factors may be relevant when determining whether a change is caught by this section, including the workplace or industry practice and the employer's subjective intentions in light thereof;[3] or whether the change was typical for that workplace.[4] It is not relevant that the employer's motivation underpinning the change is valid or made in good faith.[5]

35. The obligations under s. 54 are ongoing, so while an initial change may not trigger s. 54, the character of a change may evolve over time, thereby triggering s. 54 at a later date;[6] and employers must factor their s.54 obligations into their decision-making process.[7]

36. In the case at hand, Camosun's decision to cancel all face-to-face teaching and replace it with remote teaching, and to have their educators work from home was a change within the meaning of s. 54. This change was highly unusual, both in the context of the employment relationship between Camosun and their educators, but also in the context of the post-secondary industry.

37. As the pandemic evolved over the months that followed and Camosun prepared for the 2020 summer and fall semesters, Camosun ought to have factored in the s. 54 notice obligation and, at the very least, consulted with the CCFA about how these further changes could be implemented in a way that complied with the Collective Agreement and minimized impact on employee workload and stress.

38. These further decisions constitute changes within the meaning of s. 54 and demonstrate a further breach of Camosun's notice and consultation obligations.

39. Section 54(1) also requires that, for a change to be caught by the section, it must affect a "significant number of employees to whom a collective agreement applies." Whether the number of affected employees is significant is affected by the percentage of affected employees relative to their bargaining unit, the real number of affected employees, and the impact of the change on the employees who continue to work.[8]

40. In previous s. 54 decisions, groups as small as only 37 employees, representing 4.5% of the unit has been considered significant.[9] CCFA's entire bargaining unit of 560 was

[1] *Pacific Press v. C.E.P., Local 115-M,* [1996] B.C.L.R.B.D. No. 374 ("*Pacific Press*"), at 112
[2] *Wolverine Coal Partnership and USW, Local 1-424, Re,* [2015] B.C.W.L.D. 5173 ("*Wolverine Coal*"), at 115
[3] *Tolko Industries Ltd. and USW, Local 1-2017*, Re, 2020 BCLRB 57, 2020 BCLRB 57 ("*Tolko*"), at 38
[4] *Wolverine Coal,* at 125
[5] *Wolverine Coal*, at 90
[6] *Tolko*, at 59-60
[7] *Wolverine Coal*, at 135
[8] *Pacific Press*, at 113
[9] *Pacific Press,* at 114

affected by the changes introduced by Camosun. The number of affected employees is clearly a significant number of employees within the meaning of s. 54.

41. In this case, the changes implemented by Camosun in response to the pandemic added an entirely new set of duties on its employees and increased workload significantly by moving teaching of courses to an online format. This caused additional stress and effectively imposed longer hours on each of the approximately 560 members of the CCFA bargaining unit, which continued and/or was exacerbated by the changes imposed in each subsequent semester.

42. The numerous, persistent, and drastic changes brought in by the employer in response to the COVID-19 pandemic fundamentally changed the terms and conditions of employment of a significant number of employees to whom the collective agreement applies. Consequently, these changes clearly fall within the scope of s. 54 of the *Code* and are not exempted from its application by s. 54(3) or otherwise.

Section 54 obligations

43. Once s. 54 is triggered, two separate obligations arise. First, the employer must provide 60 days notice of the change (s. 54(1)(a)).

44. The notice requirement under s. 54(1)(a) is triggered "when the decision by the employer to effect the change has crystallized. Accordingly, the obligation will arise when the decision is reasonably certain and before the change actually occurs and may arise before a formal decision is made by an employer."[10] Notice under s. 54(1)(a) does not need to meet any particular formal or technical requirements, so long as it is sufficiently clear and specific.[11]

45. In this case, the obligation to provide notice first arose in March 2020 when Camosun began cancelling field schools in anticipation of worsening pandemic conditions and when all teaching was moved online and educators started working from home.

46. As the obligation to provide notice is an on-going obligation, the obligation to provide notice further arose throughout the summer and fall of 2020 as Camosun developed its remote learning plans for the summer and fall semesters.

47. Camosun never provided s. 54 notice to CCFA and CCFA has not received formal notice for any changes that may be implemented for the winter 2021 semester.

48. The Labour Relations Board held in *University of British Columbia v. C.U.P.E., Local 116* that in exceptional circumstances which are outside the employer's control, the

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[10] *Pacific Pool Water Products Ltd. v. CAW-Canada, Local 3014,* 2000 CarswellBC 3073 ("*CAW*"), at 37
[11] *Money's Mushrooms Ltd. v. Retail Wholesale Union, Local 580*, [2005] B.C.L.R.B.D. No. 80 ("*Money's Mushrooms*"), at 40

employer may be "relieved" of their notice obligation under the *Code*.[12] This must be determined on a case-by-case basis.[13]

49. In the recent decision *BC Ferry Services Inc. and BCFMWU (Workforce Adjustment), Re*, the COVID-19 pandemic was found to be an exceptional circumstance as contemplated by *UBC*; [14] however, as the obligations under s. 54 are ongoing, this does not exempt the employer from the notice requirements of the *Code* for the continued duration of the pandemic. Wherever possible, notice must be provided.[15]

50. CCFA submits that even if Camosun is relieved of their obligations to provide the full 60 days notice for the change in March because of the pandemic, they nevertheless should have provided as much notice as was possible, and they should have provided notice as they anticipated additional changes.

51. The second requirement once s. 54 is triggered is that the employer and the union must meet to discuss in good faith the effects of the plan and ways in which may be mitigated (s.54(1)(b)). Unlike the notice obligations, there is no similar discretion to excuse the employer from their obligation to consult with the union.[16]

52. There is no requirement for the parties to agree;[17] instead, the primary goal is to provide the union a "meaningful opportunity to be heard"[18] and for the parties to consider alternate scenarios[19] in order to mitigate the negative effects of the change.[20]

53. In this case, the parties have met consistently since March 2020 for various labour relations purposes. Importantly, however, these meetings did not constitute good faith consultation about the changes as required by s. 54(1)(b).

54. Camosun has repeatedly agreed to meet with the union to discuss educator concerns but has either dismissed those concerns as unfounded or disregarded proposed solutions to mitigate the effects of its pandemic strategy on educators, even when proposed solutions had no or minimal financial implications and even when proposed solutions adhered to the terms of the Collective Agreement. Camosun also failed to propose its own solutions to workload and job security problems identified by the CCFA. Camosun's decision to move most teaching online and have educators work from home had severe effects on the educators and no good faith effort was made to mitigate these effects.

55. In a pandemic, when health orders and information about the virus are constantly changing, proper consultation is more important than ever; many employees are facing the

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[12] *University of British Columbia v. C.U.P.E., Local 116*, [1994] B.C.L.R.B.D. No. 371 ("*UBC*") , at 108
[13] *Mount Polley Mining Corp. and USW, Local 1-2017, Re (2018)*, 22 C.L.R.B.R. (3d) 216 (B.C. L.R.B.), at 22
[14] *BC Ferry Services Inc. and BCFMWU (Workforce Adjustment), Re*, 2020 CarswellBC 2762 ("*BC Ferries*"), at 89
[15] *CAW*, at 41
[16] *BC Ferries*, at 81
[17] *CAW*, at 39
[18] *BC Ferry Services Inc. and BCFMWU, Re,* 2020 BCLRB 52*,* at 27
[19] *U.F.C.W*, at 35 and 36
[20] *Health Employers Assn. of British Columbia v. H.E.U.*, 2004 CarswellBC 3327, [2005] B.C.W.L.D. 4120, at 62

greatest upheaval of their careers during a time of elevated anxiety overall. In most cases, employees and their unions are in the best position to identify the impact on them and to provide alternate solutions to their employers during complicated employment situations arising from the pandemic.

56. Arbitrator Hall in the recent *BC Ferries* decision noted that "the unprecedented nature of the [global pandemic] reinforce[s] the need to recognize the primary purpose of the provision and to ensure the [union] had an opportunity for input through good faith discussions." [21] Camosun, however, has not engaged with CCFA in good-faith discussions about alternate courses of action which may have mitigated the negative effects on members of the changes imposed by Camosun.

57. The application of s. 54 of the *Code* in these circumstances is consistent with the purposes of the *Code*. As set out by the Board in the leading *case Pacific Press*:

> ... Section 54 is an important substantive addition to the *Code* designed to advance the purpose set out in Section 2(1)(b). Section 54 is particularly important to achieve the purpose of encouraging cooperative participation between employers and trade unions in resolving workplace issues, among other things.
>
> *Pacific Press,* at 112

58. The Board in *UBC* held "the section contemplates a cooperative model of labour relations, which recognizes the valuable contribution which unions and employees may make to the decision-making processes which affect their working lives. [22]The Board later held in *Wolverine Coal* that s. 54 is a "substantive provision designed to advance the purposes in Section 2."[23] Section 2 reads:

> 2 The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that
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> > (a)recognizes the rights and obligations of employees, employers and trade unions under this Code,
> >
> > (b)fosters the employment of workers in economically viable businesses,
> >
> > (c)encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
> >
> > (d)encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,

[21] *BC Ferries,* at 89
[22] *UBC*, at 98
[23] *Wolverine Coal,* at 85

(e)promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,

(f)minimizes the effects of labour disputes on persons who are not involved in those disputes,

(g)ensures that the public interest is protected during labour disputes, and

(h)encourages the use of mediation as a dispute resolution mechanism.

59. For the foregoing reasons, we submit that s. 54 clearly applies to the remote teaching and work from home conditions imposed by Camosun and further submit that Camosun breached its obligations under this important provision of the *Code*. The Board exercising its jurisdiction under s. 54 of the *Code* in this matter supports the purposes of the *Code* to encourage cooperative dispute resolution and the settlement of disputes.

REMEDY

60. The CCFA submits that it is appropriate in this context to make a remedial order that Camosun pay the affected employees in lieu of notice under s. 54: see *Money's Mushrooms*, at 50.

61. As a remedy, the CCFA seeks the following orders and declarations:

(a) an Order requiring Camosun to make whole all employees who were not provided sufficient notice of a significant change affecting the terms, conditions or security of their employment, nor opportunity to discuss those changes;

(b) an Order requiring Camosun to consult with the CCFA about the implementation and continuation of these changes going forward; and

(c) such other orders that the Board may consider appropriate.

SERVICE

62. A copy of this application is being served on Camosun by email at the address above, concurrent with this application.

Yours truly,

VICTORY SQUARE LAW OFFICE LLP
per:

Steven Rogers
Law Corporation
SR/km, cc: Client, Sherri Bell, President