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December 4, 2018

Directed to: McNally Law Office - Richard McNally, Red Deer Catholic Regional Division No. 39 - Paul Mason, Field Law - Joel M. Michaud, The Alberta Teachers' Association - Chris Gibbon

RE: An Unfair Labour Practice Complaint brought by the Alberta Teachers' Association affecting the Red Deer Catholic Regional Division No. 39 – Board File No. GE-07659

[1] These reasons address an unfair labour practice complaint brought by the Alberta Teachers Association ("ATA") against the Red Deer Catholic Regional Division No. 39 ("RDCRS") under section 148(1)(a)(i) and (ii) of the *Labour Relations Code* (the "*Code*") relating to certain conduct and communications on the part of RDCRS. The matter was heard over the course of four days in Edmonton before a panel of the Board (Gray, Flannery, Kolba). RDCRS brought a motion for summary dismissal at the outset of the hearing which, after consideration, was orally dismissed by the Board.

[2] Chris Gibbon is an executive staff officer in Teacher Welfare at ATA and is the Representative Bargaining Agent ("RBA") concerning the negotiation and administration of the local bargaining agreement at RDCRS. Brice Unland was the president of ATA Local 80 at RDCRS at all material times. Karin Melnyk is the teacher welfare liason for teachers at RDCRS. Dr. Paul Mason is the superintendent at RDCRS. Dave Khatib is the associate superintendent of inclusive learning. Kathleen Finnigan is the associate superintendent, personnel and Rod Steeves is secretary-treasurer of RDCRS. All of these individuals, except Rod Steeves, testified at the hearing.

Background

[3] Pursuant to section 7 of the *Public Education Collective Bargaining Act*, SA 2015, c P-36.5 ("*PECBA*"), ATA is the exclusive bargaining agent for teachers, including principals, of RDCRS for both central and local bargaining. Principals, vice-principals and assistant principals are sometimes referred to as school-based administrators. Senior administrators, which include the superintendent, assistant superintendents and secretary-treasurer, are excluded from ATA's bargaining unit.

[4] Prior to the introduction of *PECBA*, ATA and RDCRS negotiated the terms of the RDCRS collective agreement directly. On January 1, 2016, *PECBA* came into force and altered the approach to teacher collective bargaining by establishing two levels of collective bargaining – a central or provincial bargaining level for all school districts and local levels for each school district. At the central bargaining table, school boards are represented by the Teachers' Employer Bargaining Association ("TEBA") established under section 15 of *PECBA*. Under section 14.1 of *PECBA*, all collective agreements include central terms and local terms. At the conclusion of central bargaining, local bargaining is carried on between ATA and individual school boards. Central bargaining addresses matters potentially having significant impacts on expenditures for one or more employers and matters dealing with issues

common to most employers: *PECBA,* section 9(1).

[5] The first Memorandum of Agreement ("MOA") between ATA and TEBA was entered into in May 2017 with a term running from September 1, 2016, to August 31, 2018. Significantly, Article 11 of the MOA established caps on instructional and assignable time for teachers. Instructional hours are capped at 907 hours per school year and assignable hours are capped at 1200 hours per school year. The concept of having a cap on instructional hours of work was not new to ATA or RDCRS as their two previous collective agreements covering the period from September 1, 2004, to August 30, 2016, capped instructional hours at 906 hours. Prior to September 2017, full-time teachers at RDCRS were assigned between 830 and 903 hours of instruction per school year. The cap on hours of work does not apply to principals.

[6] Article 12 of the MOA also provided for a means of calculating a part-time teacher's full-time equivalency ("FTE") by determining the ratio of the teacher's actual annual instructional time to the instructional time of a full-time assignment in the teacher's school.

[7] The MOA has been the subject of considerable discussion and clarification between TEBA and ATA. Joint Interpretation Bulletins were issued on August 25, 2017, September 11, 2017, and October 2, 2017, regarding various provisions in the MOA including Article 11.

[8] Prior to September 2017, there was considerable variance in instructional hours between RDCRS's teachers and between schools. However, the inequitable distribution of instructional time had never been raised as an issue by teachers or ATA.

[9] The dispute in the present case relates to RDCRS's interpretation and implementation of Article 11. In August and September 2017, returning RDCRS teachers began to complain to Mr. Unland about increases in their instructional and assignable time. He relayed their concerns to Mr. Gibbon who raised the issue with Dr. Mason in a telephone call on September 6, 2017. In the conversation, Dr. Mason advised Mr. Gibbon RDCRS was treating the 907/1200 cap on instructional and assignable hours as a target for teacher hours of work. According to Dr. Mason, teachers would be assigned 900 hours of instructional time on average and 1150 hours of assignable time on an annual basis. The targets left some room for unexpected events. Dr. Mason assigned the implementation of the new hours of work to principals.

[10] There was some dispute in the evidence as to whether Mr. Gibbon was advised of RDCRS's approach to Article 11 at the end of the previous school year. Mr. Gibbon recalled a discussion with Dr. Mason in July 2017 regarding evening school events which might be assigned to RDCRS teachers. His notes of this meeting are dated July 5, 2017. Mr. Gibbon did not recall any discussion during this exchange about RDCRS implementing the capped hours of work as a target. Dr. Mason and Ms Finnigan both claim to have discussed RDCRS's implementation of Article 11 with Mr. Gibbon late in the 2016-2017 school year. However, both were unclear on the exact date and agreed it might have occurred on July 5 along with the discussion regarding evening events. Mr. Gibbon's notes of the July 5 conversation do not record any discussion of RDCRS's approach to the implementation of Article 11. However, in a later email exchange on September 6, 2017, Mr. Gibbon appears to acknowledge having a conversation with Dr. Mason concerning RDCRS's plan to use the cap as a target in late June. For our purposes, we are satisfied some conversation occurred between Dr. Mason, Ms Finnigan and Mr. Gibbon concerning RDCRS's plan sometime in June or July 2017. Mr. Gibbon appears to have forgotten the conversation perhaps because his main focus, according to Ms Finnigan, was on the evening assignments.

[11] After their September 6 telephone conversation, Mr. Gibbon clarified the discussion in an email to Dr. Mason. Dr. Mason responded indicating Mr. Gibbon had captured the highlights of the conversation with the exception of the following two points:

- we [RDCRS] look forward to engaging in authentic conversations about how best to implement the direction of the MOA; and

- overall the vast majority of teachers have responded in a professional manner to the implementation of the MOA and wish to focus on teaching their students rather than participate in the potential contentiousness or rhetoric of this agreement (I did not use the word rhetoric in our telephone conversation).

[12] In his reply to Dr. Mason, Mr. Gibbon asked Dr. Mason if he could share the email exchange with the Local Executive. Dr. Mason asked Mr. Gibbon not to share the information with the Local Executive and explained when he asked Mr. Gibbon "why the questions" and "how is this information going to be used", Mr. Gibbon did not indicate it could potentially be shared with the Local Executive. Dr. Mason was not comfortable with the intent of the conversation changing after it occurred and suggested the Local Executive could seek an update about the matter from him or a member of the senior administration team. Mr. Gibbon respected Dr. Mason's request.

[13] On September 20, 2017, teacher representatives from RDCRS schools met for a Council of School Representatives' ("CSR") meeting. According to Mr. Unland, teachers who attended the meeting were extremely angry and frustrated by the manner in which RDCRS implemented Article 11. The teachers had understood Article 11 to establish a cap on instructional and assignable hours and did not expect it would be used to increase teachers' hours of work. CSR members understood senior administration was responsible for the controversial implementation of Article 11 and had instructed principals with respect to its implementation. After a lengthy discussion, Mr. Unland asked CSR members to list the positives and negatives about RDCRS's implementation of Article 11. The list included four positive comments and many negative comments. The negative comments included:

- Administration in buildings saying that this Memorandum is terrible and shouldn't have happened in the first place;
- Administration has discouraged/stopped teachers from talking about it openly as a staff
- Preps were reduced
- Supervision every day
- Slap in the face to teachers
- Animosity/anger amongst the staff about this
- Morale is low
- Staff is being told not to talk about it. Personal meetings with teachers after if they ask questions about it
- Preps and collaboration time have been cut while supervision has been increased
- People in leadership roles saying "You" signed this
- Redundant supervision – so many supervisors for no reasons

[14] On September 21, Mr. Unland shared a summary of the comments with Dr. Mason, who then shared some or all of the remarks with senior administrators.

[15] Around September 22, 2017, an anonymous email was sent to teachers encouraging them to attend an upcoming Board of Trustees' meeting on September 26 to address Article 11 issues. When Mr. Unland learned about the email, he took steps to clarify with Dr. Mason that the email did not emanate from the Local. Dr. Mason indicated teachers attending the Trustees' meeting would not be able to make a presentation as they had not followed the required procedures. As a result, Mr. Unland and Dr. Mason sent out a joint email to teachers explaining the Board of Trustees' procedures and offering teachers an opportunity to voice their concerns at a CSR meeting to be held on October 18. Dr. Mason agreed to attend at the end of the regular CSR meeting to hear and discuss teachers' concerns. In his portion of the email, Mr. Unland also suggested teachers could also raise their concerns at an upcoming Trustee Candidate Forum.

[16] On September 25, 2017, the Local convened a meeting of its Economic Policy Committee which Mr. Gibbon attended in his capacity as the Local's RBA. He described the mood of teachers at the meeting as angry. They were displeased with the increases in their instructional and assignable time and were asking what ATA was going to do about it. Following the meeting, Mr. Gibbon wrote to Dr. Mason on October 12, 2017, outlining ATA's concerns regarding RDCRS's implementation of Article 11 of the MOA. The "Re" line in the letter stated "Pre-Grievance Issue" and the last paragraph of the letter stated:

> Please advise if the Division has instructed school administrators to increase instruction and assignable times for the 2018/18 school year and respond to this letter no later than 2017 10 20. The date of your response will trigger the timelines in the grievance process.

[17] While Mr. Gibbon claimed the "Re" line was a clerical error, the tenor of the letter, particularly the concluding paragraph made it clear ATA was contemplating filing a grievance relating to RSC's implementation of Article 11. Sometime later, ATA did file grievances concerning Article 11 but the grievances were not placed into evidence before the Board.

[18] Following receipt of Mr. Gibbon's letter, Mr. Steeves, secretary-treasurer, contacted Mr. Gibbon by telephone. The conversation was summarized in a later email from Mr. Steeves to Mr. Gibbon. In the email, Mr. Steeves asserted any grievance related to the issue was out of time as ATA was aware of the issue at least since September 6, 2017. Mr. Steeves also asserted Mr. Gibbon had a conversation with Dr. Mason and Ms Finnigan concerning RDCRS's implementation of the cap as a target in June 2017 which Mr. Gibbon denied. The collective agreement requires a grievance to be filed within 20 days of the date of the incident. Mr. Gibbon indicated he did not respond to Mr. Steeves' email because the relationship by then was fairly strained and he did not want to engage in a war of words.

[19] On October 4, 2017, Mr. Unland emailed CSR members regarding the upcoming forum with Dr. Mason to address instructional and assignable time on October 18 starting at 6 p.m. He asked the CSR members to inform their colleagues and strongly suggested members attend both the forum and the upcoming Trustee "meet and greet" evening on October 5. An election for trustees was about to take place and it was anticipated that candidates for the trustee positions would be in attendance.

[20] In his testimony, Mr. Unland indicated he was concerned about the October 18 meeting with Dr. Mason and asked if trustees would also come to the meeting. Dr. Mason informed him they would not attend the meeting. Mr. Unland understood Dr. Mason would be the only senior administrator in attendance. Mr. Unland also discussed the format and purpose of the meeting

with Dr. Mason in advance and let him know he was concerned teachers might speak too freely. Dr. Mason assured him he would come to listen to teachers' concerns and would not "whack" anybody. Although some teachers raised concerns about discussing their concerns with Dr. Mason for fear of repercussions, Mr. Unland trusted Dr. Mason's word and assured his members there would be no repercussions.

[21] The meeting with Dr. Mason was cancelled when Mr. Unland became aware of an email forwarded by associate superintendent, Dave Khatib, to seventeen of the eighteen RDCRS principals encouraging their attendance at the October 18th meeting. In the email, Mr. Khatib stated:

> Hello everyone,
>
> I'm probably contravening some type of professional conduct by sending you this email, but I'd like to make you aware of a CSR meeting taking place tomorrow that will center on 907/1200.
>
> At 6:00 p.m. tomorrow (Oct. 18) in the ND Amphitheater, Paul and I have been invited to speak to the Local ATA about the rationale behind upholding the instruction and assignable time mandate of the recently signed MOA.
>
> Since this is an open meeting of ATA Local 80, of which you are all members of, it might be a good idea for you (and/or your VP/AP) to be there. If the idea of assignable and instructional time is a hot issue in your school, and you have some vocal detractors who may be embellishing what is really happening, I would highly recommend that you attend the meeting.
>
> Paul shared some teacher comments with you from the last CSR meeting:
>
> - "I'm supervising an empty hallway"
> - "There are 8 teachers in one classroom"
> - "I've lost half my preps"
> - "We have no collaboration time"
> - "I'm being asked to do more outside supervision"
>
> While it seems that many teachers are dealing with 907/1200 in a positive way, there are a few who are not. Again, I would highly encourage you to attend the meeting in case there are some "alternative facts" about your school community are [sic] raised.
>
> This message will self-destruct in 10, 9, 8, . . .

[22] Mr. Unland had not invited Mr. Khatib to the meeting. He knew principals would interpret Mr. Khatib's email as a directive to attend the meeting. Given the contents of the email, he felt he could no longer guarantee his members a safe and open environment in which to express their concerns. Mr. Unland doubted principals would go against Mr. Khatib's directive. Mr. Unland was also concerned that teachers would not speak up or raise their concerns with Dr. Mason if principals were present at the meeting. He had experienced such reluctance on the part of teachers in previous ATA meetings when principals were present. Based on the contents of Mr. Khatib's email to principals, Mr. Unland concluded administration was planning on attending the October 18 meeting with an agenda that did not align with people being able to speak freely without repercussions. As a result, Mr. Unland cancelled the forum with Dr. Mason.

He indicated a meeting would be arranged in the future with ATA representatives from Teacher Welfare and Member Services to discuss Article 11 issues. In the normal course of ATA meetings, while principals are entitled to attend, very few do attend.

[23] Mr. Unland informed Dr. Mason of the cancellation by telephone. He did not explain the reasons but indicated Dr. Mason was not implicated in the reasons.

[24] Mr. Gibbon was shocked by the contents of Mr. Khatib's email. He could not recall another instance of a senior administrator encouraging principals to attend an ATA meeting. He noted principals are not covered under Article 11 and felt their attendance at the meeting could result in divisions between principals and teachers. He was also concerned matters might be raised in unprofessional manner and could escalate into professional conduct complaints. Mr. Khatib's email, in his view, attempted to pit principals against teachers over the implementation of Article 11.

[25] In response to questions asked by the Board, Dr. Mason acknowledged Mr. Khatib discussed his plans to send the email in question in Dr. Mason's presence. Dr. Mason states he told Mr. Khatib he (Dr. Mason) could not be involved in those conversations. Dr. Mason did not want to weigh in for or against the idea. He confirmed it was not part of Mr. Khatib's job description to tell principals to attend an ATA meeting. Dr. Mason acknowledged he did not inform Mr. Unland about Mr. Khatib's intentions to attend the meeting.

[26] In his testimony, Mr. Khatib explained he wrote the email to create clarity in the discussion around instructional and assignable hours. He used similar language ("highly recommend that you attend" and "highly encourage you to attend") as was used by Mr. Unland in his email to CSR members encouraging ATA members to attend the forum with Dr. Mason and the Trustees' Meet and Greet ("I strongly suggest you attend both events"). He thought the email would be treated as private and confidential by principals.

[27] Mr. Khatib claims to have obtained the bullet point statements listed in his email from the list of positive and negative concerns given to Dr. Mason by Mr. Unland in September. On cross-examination, however, he admitted the bullet points were not taken directly from Mr. Unland's document. For instance, there is no mention in Mr. Unland's documents to "supervising an empty hallway". Mr. Khatib claimed his opening and closing statements in the email were meant to be humorous.

[28] In response to the email, one principal replied saying:

> Sounds like a reasonable request. Wear your Kevlar . . .I pray it's not my people. They have been pretty chill so far.

[29] After cancelling the October 18 meeting, Mr. Unland arranged a meeting with ATA representatives from Teacher Welfare and Member Services for October 30 at 6 p.m. Only members of the Association were invited to attend. Dr. Mason requested to attend but Mr. Unland told him it would not be appropriate. The purpose of the meeting was to review the MOA, to discuss proper ways to communicate teacher concerns regarding assignable and instructional time to avoid *Code* of Conduct issues, and to provide factual and appropriate information on the MOA to teachers.

[30] Later, on October 26, Mr. Unland emailed CSR members to advise that the October 30 meeting was changed to a Bargaining Unit General Meeting ("BUGM"). Mr. Gibbon requested

the change to permit a membership vote on whether to seek mediation in order to resolve local negotiations. The BUMG status of the meeting ensured only bargaining unit members could attend the meeting.

[31] October 30 was an early dismissal day at RDCRS with professional development starting at 2:20 p.m. During the professional development time, teachers were required to watch a video prepared by Dr. Mason. Both the written script and video were entered into evidence. Mr. Unland was surprised by the video and found some of the information presented by Dr. Mason to be inaccurate. One example he gave was Dr. Mason's claim that the MOA defined a full-time teacher as working 907 instructional hours and 1200 assignable hours. Mr. Unland noted the MOA contains no definition of a full-time teacher. Dr. Mason's comments on this topic caused a lot of confusion for members who attended the BUGM meeting later. Mr. Unland also thought Dr. Mason presented information in a misleading fashion making it appear RDCRS was not an outlier in its manner of implementing Article 11 when Mr. Unland knew there was only one other school district taking the same approach. He also objected to comments at the end of the video which implied ATA agreed with RDCRS's approach. No discussion was permitted at the end of the video.

[32] Mr. Unland noted the method of communication via video was unprecedented. With the exception of school opening, Dr. Mason typically communicates with teachers through emails, Division News or through messages delivered by school administrators.

[33] In the video, Dr. Mason explained his reasons for communicating with teachers through the video as follows:

> I had originally hoped to share this information with you about 907/1200 at the meeting organized at Notre Dame for Oct. 18th. But as we know this meeting was cancelled unexpectedly that afternoon.
>
> When I became aware of the Oct. 30th meeting at the Heartland Room I asked the organizers if I could be included to speak and share what I am about to share with you in this video about 907/1200 because I believe it is important for you to hear both sides of this issue, be able to ask questions, and form your own conclusions. This is a topic that is important to us because we care as a school division. Unfortunately my request to appear at the Oct. 30th meeting was not granted because this meeting had become a bargaining unit meeting.

[34] In addition, Dr. Mason expressed the desire of trustees to speak directly to teachers about the issue:

> I would also like to express on behalf of our Board of Trustees that the decision to move towards 907/1200 was made in team and that they would like to continue discussions about this item with teachers in our school division. However, because we are currently engaged in negotiations they do not feel it is appropriate to do this at this time as it is a conflict of interest. Please know that once negotiations are complete the Board would welcome the opportunity to sit down with staff and discuss 907/1200.

[35] In explaining the decision to use 907/1200 as a "target" for teachers' hours of work, as opposed to a "cap", Dr. Mason explained:

> Once the MOA was approved last year obviously we had been given a new model of how we are suppose to operate as a school division. And as I mentioned with my opening address at St. Joe's this year I think one thing we would all agree with is this new MOA has caused changes for our school division in how we have traditionally done things – especially when it comes to how many hours of instruction and assignable time equate to a full time teacher. Prior to the MOA being approved last year full-time teachers in our school division worked between 830 and 903 hours of instruction. Quite a large discrepancy between and within school sites and this also became abundantly clear when you begin to consider what constituted part-time FTE between schools. For example, 75 FTE at a school where 830 hours of instruction is the norm is quite different from .75 FTE at a school that has 903 hours of instruction.
>
> Therefore to reduce the discrepancy in hours of instruction and better balance the workload between teachers not only between schools but also within schools as well, the decision was made to move towards a more uniform approach with regards to instructional and assignable hours. The MOA defined a full time teacher as 907/1200 and the decision was made to implement this new standard.
>
> (Emphasis in original script)

[36] In the video, Dr. Mason explained RDCRS felt it was vulnerable to a grievance given the discrepancies between teachers related to their hours of work. He explained the changed approach to the cap on instructional time had not occurred under the old collective agreement which set a cap at 906 hours of instructional time because the agreement was a "temporary measure that we were never certain could exist beyond last year". The "cap" of 906 hours had been included in the two previous collective agreements covering the period from 2004 to 2016.

[37] Finally, Dr. Mason commented:

> As the Board has been kept up to date about the implementation of 900/1150 Barnett House has also been advised of our roll out of this throughout this process. As the year unfolds I would encourage you to continue to ask Montfort and Barnett House any questions you may have.
>
> . . .
>
> I would encourage any staff member that would like to meet to further discuss this topic to please feel free to email me and we will set-up a meeting time.

[38] Barnett House refers to the head office of ATA and Montfort House refers to the head office of RDCRS.

[39] In his evidence, Dr. Mason explained he was encouraged to prepare a video for staff to explain RDCRS's position on 907/1200 by senior administrators and school-based administrators at their monthly meeting. Initially, he was reluctant to do so but after thinking about the matter overnight, he decided to make the video. On Sunday, October 29, he sent an email to all RDCRS administrators asking them to show the video to their staff the following Monday. After the video was presented, he asked for feedback from the principals. Those who responded generally reported a positive or no response from teachers.

[40] The ATA BUGM meeting commenced later in the day on October 30 after teachers and principals had viewed Dr. Mason's video. According to witnesses, the meeting was very well attended. Mr. Unland indicated there were 50 to 60 members at the meeting. Ms Melnyk, the teacher welfare liason for staff at RDCRS, thought the numbers were higher estimating that approximately 100 to 150 members were in attendance. One of the principals in attendance estimated in a text message to Dr. Mason that there were 150 to 200 members in attendance. Mr. Unland and Ms Melnyk agreed there was a considerable and unusual turn-out of principals. Mr. Unland estimated there were 15 school administrators in attendance. Unlike other members who took seats, the administrators stood at the back of the room along a wall.

[41] Mr. Gibbon presented information on the MOA and on assignable and instructional time. Mr. Unland and Ms Melnyk both testified Mr. Gibbon's presentation was factual and straightforward. Mr. Gibbon was asked a question about whether a requirement to call parents concerning attendance issues fell within the definition of "assignable" time. In responding to the question, he recalled that as a teacher he had never called parents concerning attendance as the issue was dealt with by the school secretary.

[42] Mr. Gibbon's attendance remark became a bone of contention for some principals in attendance and they proceeded to rake him over the coals at the conclusion of the meeting. While Mr. Gibbon tried to explain he was talking about calling parents about attendance issues, the principals understood him to be referring to teachers' professional obligations to discuss concerns with parents. In his testimony, Mr. Gibbon remarked he had never been treated with such aggression and hostility at an ATA meeting. Ms Melnyk was also quite astounded by the tone used by the principals toward Mr. Gibbon and the aggressive nature of their interaction with him. She described the scene as being like a nest of vipers.

[43] The attitude of principals in attendance was also demonstrated in a text message sent by a principal to Dr. Mason during the ATA meeting on October 30. In the text message, the principal disclosed bargaining issues, expressed her dislike for and frustration with Mr. Gibbon, and reported to Dr. Mason on the discussion around seeking mediation for the local agreement. The following exchange then occurred between the principal and Dr. Mason:

> Principal: I may have unleashed on CG afterwards. Hoping I still had a job tomorrow.
>
> Dr. Mason: You will always have a job with us.
>
> Principal: Truly – I may have REALLY unleashed . . .thanks for letting me know.

[44] At one point in the text message exchange, the principal asks Dr. Mason if he minds getting the updates and indicates she is "feeling frustrated with CG" to which Dr. Mason responds with the comment "He's a joy. Don't mind the updates". In his evidence, Dr. Mason admitted he should have exited the conversation and agreed it was improper to have a conversation with the principal concerning the ATA's meeting.

[45] All agreed the initials "CG" referred to Chris Gibbon.

[46] Following the ATA meeting, some principals who attended the meeting reported their concerns about Mr. Gibbon's presentation to Ms Finnigan. According to Ms Finnigan, the principals in question were upset with Mr. Gibbon describing RDCRS as having "low morale". She testified her view of morale at RDCRS was considerably different than the image painted by Mr. Gibbon. On cross-examination, however, Ms Finnigan acknowledged the "low morale" was

mentioned as an issue at the CSR in September, 2017, and she was keeping track of "hot spots" in the school district. The "hot spots" were schools where teachers were asking questions and raising issues regarding Article 11's implementation.

[47] In addition, Ms Finnigan testified the straw that broke the back for principals attending the meeting was Mr. Gibbon's comments concerning teachers not having to talk to parents about pupil attendance. Ms Finnigan also had concerns about Mr. Gibbon advising a new teacher that her attendance at ATA's New Teachers' Conference was assignable time. She did not speak directly to Mr. Gibbon concerning this remark but left it to the principal who raised the matter to contact Mr. Gibbon. Additionally, she was upset with him concerning an issue raised by the Co-ordinator of Early Learning who indicated Mr. Gibbon stated at the ATA meeting that time spent planning community outings should be "assignable" time.

[48] Rather than raise the concerns directly with Mr. Gibbon, Ms Finnigan and Mr. Steeves, with the knowledge of Dr. Mason, wrote a letter to the President of ATA complaining about Mr. Gibbon's "unprofessional conduct". They avoided writing to Mr. Gibbon's direct supervisor as she had previously been the RBA for staff at RDCRS and senior administration did not consider they had a positive relationship with her.

[49] Needless to say, relations between the Local President, Mr. Unland, and Dr. Mason changed as a result of the above conflict. They stopped having their normal meetings and there was some frustration about how they would move forward. An attempt at restoring normalcy occurred at the end of June when Mr. Unland attended a lunch meeting with Dr. Mason to introduce the new Local President to Dr. Mason. Mr. Unland now holds the position of past president and has little interaction with Dr. Mason. Dr. Mason confirms he has a strained relationship with Mr. Gibbon.

Relevant Statutory Provisions

[50] The present complaint alleges breaches of section 148(1)(a)(i) and (ii) of the *Code* which provide:

> *148(1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall*
>
> *(a) participate in or interfere with*
>
> *(i) the formation or administration of a trade union, or*
> *(ii) the representation of employees by a trade union,*
>
> …

[51] RDCRS relies on section 148(2)(c) as its defence. Section 148(2)(c) provides:

> *148(2) An employer does not contravene subsection (1) by reason only that the employer*
>
> *…*
>
> *(c) expresses the employer's views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.*

Decision

[52] In *United Nurses of Alberta v. Alberta Healthcare Assn.*, [1995] Alta. L.R.B.R. 373 ("*AHA*"), the Board set out its analytical approach to employer speech and its intersection with section 148(1) and (2) [then 146(1) and (2)] as follows at 386:

> The prohibition in section 146 [now section 148] that concerns us is of interference with the representation of employees by a trade union. Unlawful participation is not alleged. UNA and its constituent locals are trade unions. We need to address what constitutes representation and what conduct amounts to interference with that representation. If interfering conduct involves employer expressing its views, we must test it against the protection afforded by s. 146(1) [now section 148(2)]. We must ask whether the employer used coercion, intimidation, threats, promises or undue influence in expressing those views thus robbing it of its protection.
>
> What does "representation" cover? The term takes its colour from other sections in the legislation that define the role of a trade union. Employees have the right to select a trade union and, by invoking the mechanism of certification, give that trade union the right to represent employees in the bargaining unit.

[53] In the present case, ATA's representation rights arise under section 7 of *PECBA*:

> 7 ATA is the bargaining agent for each bargaining unit and
>
> (a) has exclusive authority to bargain collectively with TEBA on behalf of all the employees in the bargaining units and to bind the employees in any agreement with respect to central terms, and
>
> (b) has exclusive authority to bargain collectively with each employer on behalf of the employees in each bargaining unit with respect to local terms, and to bind the employees by a collective agreement.

[54] The RDCRS teachers also enjoy rights provided under section 21 of the *Code*:

> *21(1) An employee has the right*
>
> *(a) to be a member of a trade union and to participate in its lawful activities, and*
>
> *(b) to bargain collectively with the employee's employer through a bargaining agent.*

[55] In *Firestone Energy Corp. (Re)*, [2009] Alta. L.R.B.R. 134 ("*Firestone*"), the Board described the scope of the section 148(1) at para. 277:

> It may also be said that s. 148(1) protects these employee rights at all stages of the employee-union relationship: the initial establishment of a trade union ("formation"), the dealings between union and employees relating to the internal governance of the union like meetings, election of officers, finance, and so on ("administration"), and the exercise of all aspects of the union's bargaining agency in collective bargaining and collective agreement administration once bargaining rights have been established ("representation").

[56] The line between permissible and impermissible employer speech can be discovered "by asking whether such communications in reality represent an attempt to bargain directly with the employees. If the employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside of the protection provided to freedom of expression": *AHA* at p. 389, quoting from *Operative Plasterers' and Cement Masons' Int'l Assn. Local 172 v. A.N. Shaw Restoration Ltd. et al*, [1978] 2 CLRBR 214 at 219.

[57] Speech which disparages the Union or its officers, or intends to drive a wedge between employees and their union has also been found to constitute interference and is not protected under freedom of expression: see *A.T.A. v. North Central School District*, [1992] Alta. L.R.B.R. 397 at 402-3; *Assn. of Banff Centre Support Employees v. Banff Centre*, [1997] Alta. L.R.B.R. LD-034 at 26.

[58] The question posed in this complaint is whether RDCRS's communications concerning its approach to the interpretation of Article 11 went beyond the permissible limits set by section 148(1)(a)(i) and (ii). In assessing this issue, the Board's analysis must be contextual. The comments made must be understood in the context of the entire communication taking into account the surrounding circumstances: *Force Electric Ltd.* at paras. 59 and 60.

[59] ATA argues RDCRS crossed the line from permissible speech to impermissible speech with (1) Mr. Khatib's October 17, 2017, email to principals; (2) Dr. Mason's October 30, 2017, video; (3) the text message exchange between a principal and Dr. Mason; and (4) Ms Finnigan's and Mr. Steeves' complaint letter to ATA's President. RDCRS counters by arguing the communications did not unduly influence teachers and represented RDCRS's opinions and interpretations of the MOA.

[60] We will assess each communication at issue.

(1) Mr. Khatib's October 17, 2017, email to principals:

[61] In the present circumstances, ATA was engaged in meetings with its members to discuss Article 11 and RDCRS's decision to implement it in a manner that was controversial. ATA members were upset both with RDCRS for its actions and ATA for its inability to challenge the implementation. ATA was attempting to manage the issues for its members and was also engaged at the central bargaining table working out the interpretative issues arising from the central agreement. ATA's activities are at the core of its representational status, being related to both collective bargaining and collective agreement administration. The activities also related to the ATA's internal governance, including its rights to hold meetings with its members without employer interference.

[62] Mr. Khatib's email to principals related directly to a matter of internal operations of ATA. Mr. Khatib encouraged principals to attend the CSR meeting with Dr. Mason and incorrectly

stated he had been invited to speak at the meeting. He directed principals to participate in the meeting to counter "vocal detractors who may be embellishing what is really happening". He also suggested principals address "alternative facts" about their schools which may be raised by teachers.

[63] The email communication represents an intentional effort on the part of Mr. Khatib to interfere in an ATA meeting which had been carefully designed by Mr. Unland to provide a safe environment for teachers to express their opinions and experiences to Dr. Mason without fear of retaliation. In the course of doing so, he set up divisions between principals and teachers by directing principals to counter teachers' opposition to RDCRS's application of Article 11. As a result of Mr Khatib's intervention, Mr. Unland was forced to cancel the meeting.

[64] The Board finds Mr. Khatib's communication to principals through the email in question interfered both with the representation of teachers by ATA and ATA's administration, contrary to section 148(1)(a)(i) and (ii).

[65] We must now address the defence of fair speech set out in section 148(2)(c) of the *Code*. Was the email expression of RDCRS's views and if so, was it devoid of coercion, intimidation, threats, promises or undue influence. In *AHA* at p. 392, the Board concluded to "express one's views" is different from "to use communication to influence". The Board finds this is an apt description of Mr. Khatib's email – that is, he was using the email to influence or cause principals to attend the October 18 meeting in order to quell dissent among ATA members with regard to Article 11 issues. The Board finds the email communication was not an "expression of Mr. Khatib's views or those of RDCRS". In these circumstances, the free speech defence is not available to RDCRS.

(2) Dr. Mason's October 30, 2017, video

[66] ATA agrees RDCRS was within its rights as employer to explain its approach to the implementation of Article 11 directly to teachers in its district. However, in communicating its position, RDCRS needed to exercise this right judiciously and not use it to undermine ATA's bargaining role: see *AHA*, p. 388 citing *USW v. Radio Shack*, [1979] CLLC ¶ 16,003 (Ont. L.R.B.).

[67] ATA complains the video stepped over the line from permissible communication to impermissible communication because of its timing, contents, and the manner of communicating, including its captive audience approach.

[68] RDCRS argues the video was an expression of the views and opinions of RDCRS and did not unduly influence ATA members.

[69] The video outlines RDCRS's reasons for implementing Article 11 in the manner it did and to the extent the video presented RDCRS's views and arguments, it is unobjectionable. ATA may disagree with RDCRS's arguments and interpretations but those are matters of normal discourse between parties to a collective agreement. Unlike the facts in *AHS,* the video did not evince an attempt on the part of RDCRS to bargain directly with teachers over the content of the MOA, which had already been negotiated. While the video encourages direct meetings between staff and head-office administrators, we do not find the invitations were intended to disparage the Union or undermine its role with teachers. For these reasons, we dismiss the Union's complaints concerning the video.

(3) Dr. Mason's text message communications with a principal.

[70] While Dr. Mason did not initiate the text messaging, as the Employer's representative, he ought to have ended the conversation when it became clear the principal in question was reporting on events arising at ATA's BUGM meeting on October 30. Rather than discourage such reporting, Dr. Mason encouraged it and the principal's inappropriate unleashing on Mr. Gibbon. The exchange with respect to Dr. Mason's view of Mr. Gibbon was highly inappropriate and sought to sow dissention among ATA members. By participating in the text message, Dr. Mason directly interfered with ATA's BUGM meeting contrary to section 148(1)(a)(ii) of the *Code*. As with the two issues addressed above, the communication does not constitute "an expression of opinion" and is not subject to the free speech defence set out in section 148(2)(c).

(4) Ms Finnigan and Mr. Steeves' November 13, 2017, letter to Mr. Jeffrey, President of ATA

[71] Ms Finnigan admits principals who attended the BUGM reported back to her on Mr. Gibbon's presentation. She then relied on their unsubstantiated allegations and forwarded a letter of complaint directly to Mr. Jeffery, ATA President. The letter cannot be seen in any other light except as an attempt on the part of RDCRS to have Mr. Gibbon removed as the RBA at RDCRS. We conclude the letter was an attempt on the part of RDCRS to interfere with the administration of ATA and its selection of spokespersons, contrary to section 148(1)(a). Again, the letter was not an "expression of opinion", but an attempt to influence ATA's internal administration.

Remedy

[72] For the reasons stated, the Board:

(1) declares that RDCRS interfered with the administration of ATA and the representation of its members contrary to sections 148(1)(a)(i) and (ii) of the *Code* by engaging in conduct and communications set forth above; and

(2) orders RDCRS to cease engaging in such conduct.

Gwen J. Gray, Q.C., Vice-Chair