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August 15, 2018

via email only

Alberta Labour Relations Board
#501, 10808 – 99 Avenue
Edmonton, AB T5K 0G5
Attention: Bill Johnson, Chair

Dear Mr. Johnson:

Re: Division 14.1 – Enhanced Mediation Directive dated May 25, 2018; An application for Board assistance in settling the terms of a first collective agreement brought by Canadian National Federation of Independent Unions affecting Parkland Community Living and Supports Society – Board File No. GE 07808

I am pleased to report that both parties have ratified the Memorandum of Agreement that was reached through our Enhanced Mediation in early June. As the process is new - and discussion is underway in the labour relations community regarding how it might best be approached - the parties and I offer the following comments:

First, it should be understood that in approaching the process, I was not aware of the experience of any other mediator in conducting Enhanced Mediations around the province. In fact, I first became aware of the existence of another mediator's experience at the labour conference the day following the conclusion of our process.

Second, in *CFNIU v. PClass*, the parties had <u>not</u> participated in a section 65 process prior to their enhanced mediation. This is a key distinction from the parties in *AUPE v. Well Being Services.* When parties have <u>not</u> been through a section 65 process, the enhanced mediation is the first opportunity to have the assistance of a neutral third party in resolving their dispute.

From speaking with Don Mitchell, it is becoming increasingly common for parties to proceed directly to enhanced mediation, and bypass the section 65 process, so as not to participate in mediation twice. Therefore, the situation faced by the mediator in *AUPE v. Well Being Services* – that of parties who have already tried mediation without success; have polarized positions, and an acrimonious relationship – in other words parties that may need a more

formalized process to resolve their issues in an enhanced mediation - may be the exception, rather than the norm.

At our first introductory meeting, the two spokespersons stated they did not want an overly proscriptive process. They each had a clear understanding of the other party's position on the outstanding issues, and felt what was needed was "fresh eyes" to assist them in finding a mutually agreeable solution. The parties did not feel the more formalized method of preparing and presenting briefs was necessary – nor what is contemplated by the legislation.

Rather than following any established process, we developed a process that was flexible and responsive to the needs of *these* parties and we believe this was key to our success. The parties and I developed our process in consultation prior to the enhanced mediation beginning, and after I gained some understanding of the background to their dispute. In *CNFIU v. PClass* the parties had a good working relationship and this was also an important factor to the success we achieved.

As the parties had not yet been through a section 65 process, we approached the enhanced mediation as a mediation, first and foremost, rather than as an interest arbitration by another name. I asked that the parties provide some materials to me in advance of meeting and they did so by joint submissions, prior to the start of the enhanced mediation. I did not seek formal briefs ahead of time, nor conduct detailed research into interest arbitration principles (with which I am familiar and which is readily available should further research be necessary). While both parties had significant research on comparables regarding wages, this was not provided ahead of time, but was used as the mediation process was ongoing.

Our process was alive to the time sensitivities inherent in such a mediation, and the ways in which an enhanced mediation differed from a section 65 mediation process, including the directive that the Mediator write Recommendations, (which is only permissive in a section 65 process). Both parties were prepared to move into a more formal presentation of their positions on outstanding issues on the final day of the mediation, should it be necessary for me to write Recommendations, but this was ultimately not required.

A less formal process served the interests of these parties well. The parties in *CNFIU v. PClass* are in agreement that - had we used a more formal approach, such as that taken in *AUPE and Well Being Services* - we would not have been successful in achieving a Memorandum of Agreement as our result. As I was also the section 65 mediator in the *AUPE v. Well Being Services* dispute, I have a unique perspective on why that might be the case, and the limitations of trying to develop – or promote - any particular process for enhanced mediation.

As roster mediators, we are not directed or encouraged by Mediation Services to follow any particular process in our work. In fact, the *Code* itself recognizes

that our mandate is broad: we are directed to try to resolve the dispute, "in any manner the mediator considers fit" (section 65(3)). This jurisdiction has not been changed in the recent amendments to the *Code* which have added "enhanced mediation" to Division 14.1. There are good reasons for such a broad jurisdiction. As mediators, we are expected to be dynamic and flexible in our process, to be responsive to the needs of the parties and to be a facilitator of communication. We are not directed or trained in any particular form of dispute resolution and each of our processes is unique. Many of us have extensive experience across both the public and private sector. While several of the mediators conducting enhanced mediations are also arbitrators - which lends a *gravitas* to the process and allows the parties to understand how their positions may ultimately be viewed by an interest arbitrator - that is not universally the case.

As demonstrated by *AUPE v. Well Being* and *CNFIU v. PClass*, the process may require different skills from a mediator, and different processes to aid success, depending on the particular dispute. While an enhanced mediation has some flavor of an interest arbitration should a mediator be required to write Recommendations, (and in this way could be considered as a "hybrid" process between mediation and interest arbitration), in my view mediators should be encouraged to continue to bring their own judgment to bear on developing the appropriate process, rather than encouraged to follow any particular process that one mediator has found successful, in the context of one particular dispute.

While an enhanced mediation may alleviate the need for first contract arbitration, in our view expectations should not be set up for the parties in the labour community that the process is akin to an interest arbitration, or should necessarily be approached in the same manner. In addition to constraining a mediator's ability to be adaptive and responsive, such expectations could promote polarization and hardening of positions, work against an effective mediation process developing at the early stages (especially if a section 65 process has not yet been used) and add unnecessary cost to the parties of preparing extensive briefs and opening statements.

In my view, the Board should encourage enhanced mediators to continue to "read" and adapt their processes to the particular needs of the parties, as we do in section 65 mediations. From speaking to other mediators casually, it appears that each of us who are conducting enhanced mediations is using our own judgment and processes to help the parties achieve success, rather than following any particular process or guideline. We will be discussing enhanced mediation for the first time as a Mediator Roster group at our upcoming annual meeting in September

An enhanced mediator does walk a fine line that is distinct from a section 65 mediator, as an enhanced mediator "must" write Recommendations, and must therefore be particularly cautious in maintaining their neutrality in any evaluative statements. As the process is new, one of the issues which we did not fully understand was what use might be made of Recommendations by the

Board, if they are written. In our view, this is an area where the labour relations community could benefit from clarity. While the parties assumed any Recommendations would be influential before an ultimate interest arbitrator, it was not clear if that was in fact the case, or what use might be made of it by the Board.

We hope these comments may be helpful in discussing the experience of enhanced mediation as a new process.

Best Regards,

Cheryl Yingst Bartel
/cyb

cc : Pemme Cunliffe, Employer Representative for Parkland Community Living and Supports Society;
cc : Ryan Ermet, Bargaining Agent, Canadian National Federation of Independent Unions
cc : Don Mitchell, Executive Director, Mediation Services