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SOLICITOR-CLIENT PRIVILEGED

Via E-mail (bargainingteam2021@gmail.com)

JP Hornick, Chair
CAAT-A Bargaining Team
OPSEU
100 Lesmill Road
Toronto, Ontario
M3B 3P8

Dear Prof. Hornick:

Re: Work to Rule Phase III

You have requested our opinion regarding Phase III of OPSEU's work to rule campaign in the CAAT-A collective bargaining negotiations. Specifically, you have asked us to address whether members can engage in the activity described in OPSEU's Phase III work to rule document without interference or fear of reprisal by their employers. We have set out some general information below, but any particular concerns or factual situations that may arise should continue to be monitored and may require more specific advice.

Section 17 of the *Colleges Collective Bargaining Act, 2008* ("CCBA") sets out the legal requirements to engage in a strike, namely there is no collective agreement in place, 16 days have passed since the Ministry has issued what is known as a "no board" report, the members of the bargaining unit have voted in favour of a strike, and the union has provided at least five days' notice of the commencement of the strike. OPSEU provided a strike notice on December 12, 2021 and was in a legal strike position as of December 18, 2021.

Strike is defined by the *CCBA* as follows:

"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding or any concerted action or activity on the part of employees designed

to curtail, restrict, limit or interfere with the operation or functioning of a college or colleges, including without limitation,

- (a) withdrawal of services,
- (b) slow-down in the performance of duties,
- (c) the giving of notice to terminate employment; (“grève”)

The definition of strike is broad, and includes a full strike, a partial strike, a work to rule campaign, or any other form of concerted/coordinated activity designed to interference with the operation or functioning of a college.

An important aspect of the strike definition is that the activity must be done by employees in combination, in concert, or pursuant to a common understanding. This means that individual employees cannot simply decide for themselves not to engage in particular aspects of their work, and such individual one-off actions would not fall within protected strike activity. While not specifically required by the statute, a written document from the union setting out the scope of the strike action is helpful in demonstrating that individual employees are acting in accordance with a common understanding as required.

OPSEU’s strike action to date consists of a “work to rule” campaign involving several planned stages. Stage 1 of the work to rule campaign commenced December 18, 2021, and we understand OPSEU plans to commence the third stage of the campaign as early as this week. Each stage of OPSEU’s campaign has been described in writing to clearly communicate the expectations and direction of the union for its members.

The direction to engage in a strike, and the nature of the strike action, are matters for the union to determine. The College Employer Council (CEC) and the Colleges have no role to play in determining the nature, timing, or scope of a union’s strike activity, and are not required to agree with or approve the union’s actions.

Strike activity is inherently disruptive to normal practices and necessarily puts pressure on the employer’s operations. Protected strike activity may include engaging in work activities in a way that is inconsistent with normal practices. For example, the union may decide to direct members not to upload documents to an online learning management system platform, and instead make those documents available in other ways, such as by email. Similarly, the union may decide to direct members to provide grades in hard copy instead of electronically in a spreadsheet. These are types of concerted/coordinated activities that are designed to interfere with the operation or functioning of a college, and therefore may fall within the scope of protected strike activity. The fact that Colleges may have pre-existing practices of how such documents should be delivered, even if reduced to writing in the form of a policy, does not preclude the union from directing its members to engage in a strike activity by performing these duties in a manner that is disruptive to operations, in order to put pressure on the employer to engage in negotiations.

The *CCBA* protects OPSEU and its members in the collective bargaining campaign and strike action in several important ways. Section 53 of the *CCBA* provides that the Council, an employer, or a person acting on their behalf, may not interfere with the administration of a trade union. For example, the Council and the Colleges may not interfere with the right of members to choose to demonstrate support for their union's position during contract negotiations, or attempt to deter them from engaging in the strike activity directed by their union.

There are further prohibitions against discriminating against a person because of the exercise of rights under the *Act*, or seeking by intimidation, threat, or penalty to refrain employees from the exercise of rights under the *Act*, or engaging in intimidation and coercion in the exercise of rights under the *Act*. For example, the Council and Colleges may not discipline members for their decision to participate in a strike under the *Act*. To date we are not aware of any instances of formal discipline against individual union members for engaging in strike activity. Any specific allegations of misconduct giving rise to discipline in the strike context will require careful review and should be referred for further analysis.

We understand that in an earlier stage of the campaign, some Colleges have taken the position that members cannot engage in aspects of the work to rule campaign that are alleged to violate individual College policies, and have implied that members may be disciplined as a result. This is currently the subject of an unfair labour practice complaint filed by the union before the Ontario Labour Relations Board. In our view, any direction by the Council or a College not to engage in strike activity that has been clearly defined by the union, and any threats by the Council or a College in relation to the exercise of protected strike activity, may be the subject of a further unfair labour practice complaint, and should be carefully reviewed.

Ordinarily employees are required to comply with a direction from their employer even if they disagree with it. This is referred to as the "work now, grieve later" rule. There are some exceptions to that rule, for example where the direction would endanger health and safety, or require the performance of an illegal act. There is also some arbitral authority for the principle that an employee may refuse a direction where complying with the order and grieving later would leave them without a meaningful remedy. We may argue that in the strike context, ordering employees not to engage in strike activity contrary to the clear direction of their union, would be disruptive to the union's right to engage in a strike and the members' rights to support their union, and would deprive the union and its members of any meaningful remedy. Put another way, an employer cannot circumvent the rights of the union and its members to engage in a protected strike by simply directing employees to perform their work in their usual manner. While there is limited case law on this topic, we would be prepared to argue that an attempt to deprive the union and its members from the right to participate in a lawful and clearly-defined strike should be recognized as an exception to the normal expectation of "work now, grieve later". Any specific factual situations where this concern arises will need to be carefully reviewed.

Generally speaking, employees who fully withdraw their services are not entitled to be paid by their employer. Employees who are continuing to perform their duties, albeit in a manner disruptive to typical practices and operations, would normally continue to be paid, notwithstanding

that the manner of performance of their duties puts pressure on their employer's operations. Similarly, employees in a 'work to rule' campaign who are performing their duties to the strict requirements of the collective agreement, would normally continue to be paid. This would include employees who decline to attend meetings not specifically required by the collective agreement, while continuing to perform other duties. Any instances of non-payment or reduced payment of employees' wages should be carefully reviewed in order to determine whether the employer is penalizing or threatening employees for the exercise of their rights in a manner inconsistent with the *CCBA*.

We trust that this opinion addresses your questions regarding the union's strike activities. As the campaign continues, particular factual circumstances will likely require careful consideration and more specific advice. Please feel free to reach out as needed.

Sincerely,



Christine Davies
CD:sw/cope 343

c.c. Eric O'Brien (*via E-mail*)
Heather Petrie (*via E-mail*)
Chris Donovan (*via E-mail*)
Jean-Michel Corbeil (*via E-mail*)

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