August 7, 2015

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Attention: Mr. Peter Abrametz

Gerrand Rath Johnson LLP
700 – 1914 Hamilton Street
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Attention: Ms. Crystal Norbeck

Dear Sir and Madam:

RE: LRB File Nos. 266-14 & 267-14

Background:

The Saskatchewan Government and General Workers Union ("SGEU) filed two applications with the Board which allege that Lac La Ronge Indian Child and Family Services Inc. (the "Respondent") committed unfair labour practices, contrary to the Saskatchewan Employment Act[1] (the "*SEA*"). In the filing of those applications, the person who filed the applications did not sign the applications, nor were the applications properly sworn before a commissioner for oaths. The Respondent raised a preliminary objection to the Board's jurisdiction to hear the unfair labour practice applications on the basis that these applications were a nullity as a result of their not having been properly completed in the form prescribed in the Board's regulations[2].

The facts here are not in dispute. SGEU acknowledges that the applications were not properly completed by either the applicant or the commissioner for oaths. SGEU argues that the Board should exercise its discretion under section 6-112 of the *SEA* or under section 30 of the Board's regulations so as to permit the applications to proceed to hearing.

[1] S.S. 2013, c. S.-15.1

Issues:

The issues in this matter are:

1. Were the applications as filed by SGEU a nullity which cannot be cured by the Board under section 6-112 of the *SEA*?
2. Does the Board have jurisdiction to allow the applications to be amended or resworn?

Analysis and Decision:

Are the Applications a nullity?

1. The Respondents argue that the applications, as filed, are a nullity which cannot be cured by the Board's authority to allow parties to correct the error granted pursuant to section 6-112 of the *SEA*. SGEU argues that the Board has the discretion to allow the pleadings to be corrected. For the reasons which follow, we agree with SGEU and will permit the applications to be resubmitted.
2. In determining the effect of non-compliance or imperfect compliance with a statutory requirement, if the statute does not provide for the effect of non-compliance or imperfect compliance, the matter becomes one of implication having regard for the subject matter of the enactment, the purpose of the requirement, the prejudice caused by the failure and the potential consequences of a finding of nullity.[3]

[2] Chapter S-15.1 Reg 1
[3] See *Regina (City) v. Newell Smelski* [1996] CanLII 5084 (SKCA)

3. In *Newell Smelski*, the Saskatchewan Court of Appeal quoted with approval the decision of *Secretary of State v. Langridge*[4] and *Cote: The Interpretation of Legislation in Canada* (2nd ed)[5] as follows:

> *There is great deal of authority for this. By way of example, involving imperfect compliance with a time requirement, we might refer to Secretary of State v. Langridge [1991] 3 All E.R. 591 (C.A.) at p. 595. There Balcombe LJ drew upon de Smith's Judicial Review of Administrative Action (4th ed., 1980), at pages 142-143, in addressing the principles at work:*
>
> > *When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The court must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess "the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act." In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision, and the importance of the procedural requirement in the overall administrative scheme established by the statute. Furthermore, much may depend upon the particular circumstances of the case in*

[4] [1991] All E.R. 591 (C.A.)
[5] Pp. 202 to 207

> *hand. Although "nullification is the natural and usual consequence of disobedience," breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned.*

4. In *Newell Smelski*, the Saskatchewan Municipal Board had determined that it had jurisdiction to hear an appeal notwithstanding that it may have technically been filed late. The Court of Appeal supported that determination.
5. In our review of this preliminary matter, we must, therefore, look at the factors outlined above from that decision.
6. The first of those factors is the "whole scope and purpose of the enactment", being the *SEA* and the Board's regulations enacted pursuant thereto.
7. The Board is an independent, quasi-judicial tribunal established to summarily deal with disputes arising between unions and employers. It is based upon the *Wagner Act* model of collective bargaining which envisions a balance of collective bargaining between an independent and strong collective union and a sufficient management cadre to conduct collective bargaining. However, the overarching rational for the creation of the board was to provide a relatively informal and inexpensive way to deal with disputes without the necessity of referring those disputes to the Courts.
8. The *SEA* does not, itself, provide for the form in which applications are to be made to the Board. Those requirements are provided for in Form 11 of the Regulations. The Regulations require that the application be signed by the applicant and sworn before a Commissioner for Oaths or a Notary Public. In

the present case, SGEU acknowledges that the applications were not properly sworn.

9. The Respondents argue that the swearing of the application is fundamental in that it allows them to cross examine the deponent of the application and to subject the deponent to criminal sanctions for perjury or giving false evidence.[6] Furthermore, the Respondents argued that the applications are so "rife with deficiencies"[7] that they should be rejected by the Board.
10. SGEU argues that the requirement for applications to be sworn (because they are the equivalent of "pleadings" which commence a legal proceeding) is not a substantive requirement. They also argued that the application itself does not become evidence, like an affidavit. Also relying upon *Williams v. UFCW, Local 1400*[8], SGEU argued that this decision supported there argument since, in that case, Vice-Chairperson Schiefner's panel did not declare an improperly sworn application to be void, but instead, used the Board's authority to cure any defect in the proceedings.
11. We concur with Vice-Chair Schiefner that a defect such as this is not sufficiently material to justify the application being declared a nullity. As he noted in *Williams*, the legislature has seen fit to grant this Board a generous authority to cure technical defects or irregularities in an application by virtue of section 6-112 of the *SEA.*
12. The grant of the authority to cure technical defects or irregularities is consistent with the whole scope and purpose of the *SEA* as outlined above. The Board, as directed by the legislation, is to be accessible and informal to insure that the "real questions in dispute" are determined by the Board and are not frustrated by technical objections.

[6] Relying upon *Williams v. UFCW, Local 1400* [2014] CanLII 63996 (SKLBR) at paragraph 25
[7] Relying upon *IBEW, Local 2038 v. Croft Electric Ltd.* [2007] CanLII 68772 (SKLRB)
[8] Supra, note 6 at paragraph 24

13. The Respondent was asked during the hearing to outline the prejudice which it would suffer if the application were not declared to be a nullity. The response was that the defect would prejudice the Respondent's ability to cross-examine the applicant. This is not sufficient prejudice to have the Board nullify the proceedings.
14. In our remedy granted pursuant to the Order which accompanies this letter, we have directed that the application be properly sworn by SGEU. As a result, any prejudice, as outlined by the Respondent will be avoided.
15. Even if we had not come to the conclusion that the failure to properly swear the application rendered the applications a nullity, we would have exercised our discretion to permit the refiling of the Unfair Labour Practice applications outside of the time limit provided for in section 6-111 of the *SEA*. It is clear that SGEU formed the intention to file the Unfair Labour Practice Applications well in advance of the time limit prescribed. In our opinion, in this case, this would be sufficient reason for the Board to exercise its discretion to permit the Unfair Labour Practice applications to proceed.
16. An appropriate Order outlining the above will accompany these reasons.

Yours truly,

Kenneth G. Love Q.C.

Enclosure