November 9, 2016

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Attention: Mr. Adam Touet

Plaxton Jensen
Barristers and Solicitors
500, 402 - 21st Street East
Saskatoon, Saskatchewan
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Attention: Mr. Drew Plaxton

Dear Mr. Touet and Mr. Plaxton:

Re: LRB File Nos. 176-16; 181-16 – SEIU-West v. Voyager Retirement V Genpar Inc., c.o.b. as Caleb Village, Moose Jaw, Saskatchewan – Unfair Labour Practice Applications

LRB File Nos. 182-16; 185-16 - Voyager Retirement V Genpar Inc., c.o.b. as Caleb Village, Moose Jaw, Saskatchewan v SEIU-West – Unfair Labour Practice Applications

A. Introduction

[1] SEIU-West [the "Union"] commenced a series of applications seeking pre-hearing document production and further particulars from Voyager Retirement V Genpar Inc. [the "Employer"] respecting three (3) Unfair Labour Practice Applications, *i.e.* LRB File Nos. 176-16; 181-16 and 182-16. In addition, the Union brought an application for summary dismissal of LRB File No. 182-16, an Unfair Practice Application brought by the Employer against the Union.

[2] These various preliminary applications came before the Board comprised of Members John McCormick, Allan Parenteau and myself, as Vice-Chairperson on November 3, 2016. The Union was represented by Mr. Drew Plaxton. The Employer was represented by Mr. Adam Touet and Mr. Nicolas Conlon. After receiving written submissions from Union counsel and hearing oral argument from both counsel, the Board reserved its decision.

[3] In the Reasons for Decision that follow, the Board will consider first the Union's Application for Summary Dismissal respecting LRB File No. 182-16. Then the Board will address the Union's applications for pre-hearing document production and further particulars respecting the remaining unfair labour practice applications.

B. Application for Summary Dismissal – LRB File No. 182-16

[4] On October 27, 2016, the Union brought an Application for Summary Dismissal pursuant to section 32 of *The Saskatchewan Employment (Labour Relations Board) Regulations* [the "*Regulations*"] in respect of the Employer's Unfair Labour Practice application indexed as LRB File No. 182-16. The Union wanted this application to be heard by the Board, as opposed to being dealt with by an *in camera* panel, and served this application upon the Employer's counsel at least three (3) days prior to the hearing in accordance with subsection 32(5)(b) of the *Regulations*. As of the day of the hearing, the Employer had not filed a formal Reply to the Union's application.

[5] At the commencement of the hearing, Mr. Touet asked the Board to dismiss the Union's summary dismissal application on the basis of delay. He submitted that as the Employer's Unfair Labour Practice application had been filed with the Board on August 12, 2016, the Union had waited almost three (3) months to commence its' summary dismissal application. As a consequence, he urged the Board to dismiss this application outright. In the alternative, Mr. Touet asked that the Union's application be adjourned and the Employer allowed to file formal Reply.

[6] Mr. Plaxton took exception to the Employer's argument that the Union had delayed in filing its summary dismissal application. He pointed to subsection 32(5)(b) of the *Regulations* and emphasized that only three (3) days' notice prior to the hearing was required. The Union, he submitted, had complied with this statutory pre-condition.

[7] Respecting the Employer's alternative request for an adjournment, Mr. Plaxton did not oppose it strongly. He acknowledged that the Union's summary dismissal application could be dealt with at the continuation of this hearing scheduled for November 17, 2016.

[8] The Board adjourned briefly to consider the matter. At the conclusion of these deliberations, the Board made the following Order:

- That the Union's Application for Summary Dismissal be adjourned to November 17, 2016 to be considered at the outset of those proceedings.
- That the Employer file a formal Reply to the Union's Application for Summary Dismissal and any accompanying materials with the Board's Registrar on or before **November 9, 2016** .

[9] The Union also filed a Notice of Application for Disclosure and Production of Documents and Things and Particulars in relation to File No. 182-16. The Board heard oral argument from the parties respecting this particular application.

[10] After consideration, the Board determined that it would be premature to decide this particular application in view of the fact the Union's Application for Summary

Dismissal in respect of this particular unfair labour practice application remains outstanding. Accordingly, the Board will reserve its decision on the Union's Notice of Application for Disclosure and Production of Documents and Things and Particulars and release it at the same time the Board disposes of the Union's Application for Summary Dismissal.

C. Applications for Document Production and Particulars – LRB Files No. 176-16 and 181-16

1. General Legal Principles

[11] The Union seeks pre-hearing disclosure of documents as well as further and better particulars of certain allegations set out in the Employer's Reply in both LRB Files No. 176-16 and 181-16. Each of these requests engages different considerations and different legal principles. It is useful, at the outset, to set out briefly the law relevant to each category.

(a) Principles Relating to Pre-hearing Document Disclosure

[12] Subsection 6-111(1)(b) of *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the "*SEA*") authorizes the Board to order the pre-hearing disclosure of documents. When making a determination under section 6-111(b), this Board has, at least since *International Brotherhood of Electrical Workers, Local 529 v Sun Electric (1975) Ltd., Alliance Energy Limited and Mancon Holdings Ltd.*, [2002] SLRBR 362, LRB File No. 216-01, adopted and applied criteria first identified by the Canada Industrial Relations Board in *Air Canada Pilots Association v Air Canada et al.*, [1999] CIRBD No. 3 ["*Air Canada*"]. See also: *Industrial Wood and Allied Workers of Canada, Local 1-184 v Edgewood Forest Products Inc. and C & C Wood Products Ltd.*, 2012 CanLII 51715 (SK LRB) at para. 12 *per* Chairperson Love.

[13] The *Air Canada* criteria are six-fold and provide as follows:

> *1. Requests for production are not automatic and must be assessed in each case;*
> *2. The information requested must be arguably relevant to the issue to be decided;*
> *3. The request must be sufficiently particularized so that the person on whom it is served can readily determine the nature of the request, the documents sought, the relevant time-frame and the content;*
> *4. The production must not be in the nature of a fishing expedition; that is, the production must assist a complainant in uncovering something to support its existing case;*
> *5. The applicant must demonstrate a probative nexus between its positions in the dispute and the material being requested;*

> *6. The prejudicial aspect of introducing the evidence must not outweigh the probative value of the evidence itself, regardless of any possible "confidential" aspect of the document.*

[14] Subsequently, the Board's adoption of these criteria received the imprimatur of the Saskatchewan Court of Queen's Bench in *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers et al. v Saskatchewan Labour Relations Board et al.*, 2011 SKQB 380 (CanLII); 210 CLRBR (2d) 35, at para. 144 *per* Popescul J. (as he then was).

[15] These are the principles, then, which govern this aspect of the Union's applications for pre-hearing document disclosure.

(b) Principles Governing Orders for Particulars

[16] On this aspect of these applications, Mr. Plaxton relied principally on three (3) previous decisions of the Board, namely: *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v WaterGroup Canada Ltd.*, LRB File No. 009-93, [1993] S.L.R.B.D. No. 21 ["*WaterGroup*"]; *P.A. Bottlers Ltd. v United Food Commerical Workers, Local 1400*, LRB File No. 017-97, [1997] S.L.R.B.D. No. 22 ["*P.A. Bottlers Ltd.*"], and *Amalgamated Transit Union, Local 615 v Saskatchewan Abilities Council*, LRB File No. 335-97, [1998] S.L.R.B.D. No. 10 ["*Saskatchewan Abilities Council*"].

[17] In *P.A. Bottlers Ltd.*, for example, the Board stated at paragraphs 5 to 8:

> *5. In [Saskatchewan Joint Board Retail, Wholesale and Department Store Union v WaterGroup Companies Inc., [1993] 1st Quarter Sask. Labour Rep. 252], the Board commented on the place of particulars in connection with the proceedings of the Board, at 257:*
>
> > *To this statement of the Board's long-standing practice on the issue, the Board would like to add that the need for particulars in the originating documents is especially important before tribunals like the Labour Relations Board which employ a summary procedure that does not provide for examinations for discovery or pre-hearing disclosure, and that permits relatively little time to prepare a defence. If the Board's hearings are to be conducted in accordance with the basic requirements of natural justice, a respondent is entitled to, and the Board must require, reasonable clarity and particularity in the originating documents.*
> >
> > *Failure to provide reasonable particulars in the initial application would justify the Board in dismissing the application, adjourning the application pending the provision of particulars, or proceeding with any part of the application which has been particularized and refusing to proceed with the remainder. It is absolutely no answer for an applicant to argue that the respondent "knows what the case is about." As part of a fair hearing, the respondent is entitled to have the allegations against it particularized in writing. It should not be forced to*

> *guess which of its interactions with the applicant are the subject of the application.*
>
> *6. The Board has thus made it clear that it is necessary for an applicant to state with some precision the nature of the accusations which are being made, both in terms of the specific events or instances of conduct which are considered objectionable, and of the provisions of the Act which have allegedly been violated. The Board has linked this requirement with the capacity to provide a fair hearing to a respondent.*
>
> *7. On the other hand, the Board must balance the requirement for a fair hearing with other values which are also of pressing importance to the Board, including those of expedition of the hearing of applications, and maintaining relative informality in Board proceedings. Whatever might be the case in a civil court, the nature of the proceedings before this Board cannot accommodate extensive pre-hearing or discovery processes without running the risk that the ability to respond in a flexible and timely way to issues which arise in the time-sensitive context of industrial relations will be seriously impaired.*
>
> *8. We do not interpret the requirement for the provision of sufficient particulars, in any case, to contemplate a complete rehearsal of evidence and argument in exchange between the parties prior to a hearing. What is necessary is that an applicant make it clear what conduct of the respondent is the subject of their complaint and how this conduct, in the view of the applicant, falls afoul of the Act. In assessing the degree to which an applicant has met this requirement, the Board must be guided not only by our desire to ensure a fair hearing but by the demands placed upon us by the objectives of efficacy and timeliness in our proceedings. [Emphasis added.]*

[18] In *Saskatchewan Abilities Council*, the Board had before it an application by the Employer for further particulars respecting allegations made by the Union that a member of the Employer's management team, Mr. Paul Jasper, had uttered "anti-union comments" to a Union member, and had "coerc[ed] and intimidat[ed]" one of its' shop stewards. The Employer wanted better particulars of those alleged incidents. The Union opposed this application saying no further particulars were warranted.

[19] The Board stated in respect of the Employer's request as follows:

> *27 Given only the information contained in paragraph 4 of the application, it may not be possible for Mr. Jaspar to identify the material transactions or statements. The description of the statements as "anti-union" and "intimidating and coercive" with nothing further is simply too vague. What one person perceives to be intimidating may leave no impression on the memory of another, and further reasonable detail is required in order for the Employer to identify the crucial statements. With respect to paragraphs 4(d), 4(e) and 4(f) of the application, this must include the time when and place where the statements were made and the conversation took place with as much exactitude as possible, and a*

> *reasonably clear and concise description of the nature and content of the impugned statements themselves to the degree necessary to enable identification of the transactions in question.*

[20] The Board then cited its previous decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Westfair Foods Ltd.*, [1995] 2nd Quarter Sask. Labour Rep. 288, LRB File Nos. 246-94 and 291-94, ["*Westfair Foods*"] at 292. There former Chairperson Bilson stated:

> *We cannot accept the argument of counsel for the Union that his obligation is only to outline the general nature of his allegation to the Employer in response to a request for particulars. Such a response must make it clear exactly what case the opposing party has to meet, and this includes allusion to facts which will be used in support of that case. Counsel for the Union was not obliged to give a detailed rundown of the evidence he would call. He should, however, have indicated what basic facts he would use to make out his allegation of discrimination, including the identity of employees whose circumstances would form part of his case. In our view, it would be inconsistent with the rules of procedural fairness to provide anything less. [Emphasis added].*

[21] These various authorities set forth the principles we must employ when assessing the Union's request for further particulars in this matter.

2. LRB File No. 176-16

[22] The Union's Notice of Application for Disclosure and Production of Documents and Things in relation to this Unfair Labour Practice application pertains to pre-hearing document production only. Just prior to the hearing of these applications, Mr. Touet forwarded under cover of a letter dated November 2, 2015 a series of documents as well as particulars in relation to certain of the paragraphs for which the Union sought further particularization. The Board has reviewed that material.

[23] During the course of his oral submissions, Mr. Plaxton advised the Board that he believed that this documentation satisfied most, but not all, of his formal requests for pre-hearing document disclosure. In particular, the following two (2) requests for document production, he asserted, remain unsatisfied:

1. *All non-management employee payroll records disclosing rates of pay (and any changes to same), hours of work and start date of employment, if applicable, from 1st of March, 2016 to present.*

2. *A copy of all schedules and/or other documents indicating hours and times of work by all non-management employees at Caleb Village Moose Jaw (Voyager Retirement V Genpar Inc.) from the 1st of March 2016 to present.*

[24] The documents listed in these paragraphs are potentially quite voluminous. While Caleb Village is not a large workplace, the Union's request seeks these documents in respect of all but three (3) employees. In *Air Canada*, *supra*, for example, the Canadian Industrial Relations Board stated at paragraph 29 that the greater the number of documents for which disclosure is sought the greater the restrictions on a party's right to unlimited pre-hearing discovery. This Board in *Service Employees International Union (West) v Saskatchewan Association of Health Organizations* (2012), 210 C.L.R.B.R. (2d) 229, 2012 CanLII 18139 (SK LRB) ["*SAHO*"] emulated this approach at paragraph 44.

[25] The Board considered this request, reviewed the Employer's Reply to this application and concluded that in the circumstances of this case it is over-broad and disproportionate. To begin, the Board considers the time-frame to be unjustified. It seems to us that were we inclined to grant this request (which we are not), it would be appropriate to order disclosure only from March 1, 2016 to September 15, 2016, the date of the certification order.

[26] Second, seeking the production of all of these documents without further particularization suggests the Union is embarking on a "fishing expedition" something which this Board has discouraged in previous rulings. In particular, we adopt the following passage from *SAHO*, *supra*:

> *While pre-hearing discovery and production of documents may be the norm in civil litigation, such procedures are not the norm in proceedings before tribunals, such as this Board. To which end, <u>while a certain degree of "fishing" is permissible in a request for pre-hearing production of documents (i.e.: to seek out evidence in support of an allegation under the Act), it has not been the practice of this Board to grant broad-spectrum, non-specific or infinite production Orders</u> to in essence, compel the kind of pre-hearing discovery of documents that occurs in civil courts. [Emphasis added.]*

[27] Accordingly, for these reasons the Union's Notice of Application for Disclosure and Production of Documents and Things in relation to LRB No. 176-16 is dismissed.

3. <u>LRB File No. 181-16</u>

[28] The Union's Notice of Application for Disclosure and Production of Documents and Things in relation to this particular Unfair Labour Practice application requests both pre-hearing document production and an order for further particularization of certain allegations set out in the Employer's Reply dated August 25, 2016.

(a) <u>Application for Pre-Hearing Document Production</u>

[29] Applying the principles and analysis discussed above, the following chart sets out the Board's disposition of the various requests for pre-hearing document production made by the Union:

Union Request	**Disposition**
Copies of all job descriptions for non-management employees at Caleb Village Moose Jaw (Voyager Retirement V Genpar Inc) that were in place prior to the union undertaking its organizing drive in the workplace and any documents evidencing if or when these job descriptions were communicated to employees.	These documents were voluntarily disclosed to the Union under cover of Mr. Touet's letter dated November 2, 2016.
Copies of job descriptions described in the employer's reply as they were in place before and after the application for certification was filed.	These documents were voluntarily disclosed to the Union under cover of Mr. Touet's letter dated November 2, 2016.
Copies of all-management employee payroll records disclosing rates of pay (and any changes to same), hours or *[sic]* work and start date of employment, if applicable, from the 1st of March 2016 to present.	For the reasons set out in paragraphs 24-26 above, this request lacks particularization and is over-broad. It is dismissed.
Copies of all schedules and/or other documents indicating hours and times of work by all non-management employees at Caleb Village Moose Jaw (Voyager Retirement V Genpar Inc.) from the 1st of March to present.	In subparagraphs (p) and (q) of its Unfair Labour Practice Application, the Union references an employee named Ms. Jolina Kennedy. The Board directs that all schedules and/or other documents indicating hours and times of work by Ms. Kennedy at Caleb Village Moose Jaw (Voyager Retirement V Genpar Inc.) broken down by month from March 1, 2016 to September 15, 2016 be disclosed to the Union.
Copies of all notices or other communication from the employer or others on its behalf to employees at Caleb Village Moose Jaw (Voyager Retirement V Genpar Inc.) as referred to in the employer's reply filed to the application within and/or otherwise concerning union representation or other representation on behalf of employees and/or affecting terms and conditions of employment.	In the opinion of the Board, these documents were voluntarily disclosed to the Union under cover of Mr. Touet's letter dated November 2, 2016.
Copies of all policies and procedures in place in the workplace prior to and after the union applied for certification as referred to in paragraph 47 of the employer's reply and otherwise including the non-solicitation policy referred to in paragraph 54 of the employer's reply.	In the opinion of the Board, these documents such that exist have been voluntarily disclosed to the Union under cover of Mr. Touet's letter dated November 2, 2016.

(b) Application for Further Particulars from the Employer

[30] The particulars requested by the Union are as follows:

> *1. In relation to paragraph 46 of [the Employer's Reply]:*
> *a) When the employer says Mr. Johnson refused to communicate with fellow employees and management.*
> *b) When it is the employer says Mr. Johnson abruptly hung up the telephone when contacted by fellow employees.*
> *c) When and how the employer says Mr. Johnson refused to perform employment duties encompassed in his job description.*
> *d) When the employer says Mr. Johnson was absent during his shift.*
>
> *2. In relation to paragraph 47, copies of all policies and procedures the employer says Mr. Johnson contravened and particulars of how the employer says these policies and procedures were contravened.*
>
> *3. Particulars of the communications referred to in paragraph 51 of the employer's reply, including who allegedly communicate this information to the employer.*
>
> *4. In relation to paragraph 58 of the employer's reply, particulars of other instances when the employer mailed notices and information to employees' homes as set out in the said paragraph or otherwise.*

[31] Respecting the Union's first request, the Board concludes that no further particulars should be ordered. In his letter dated November 2, 2016 at page 6, Mr. Touet provided further particulars to Mr. Plaxton respecting these specific allegations. The Board reviewed this information in light of the directions set out in *P.A. Bottlers Ltd.*, *supra* and *Westfair Foods*, *supra*, set out above. The Board concludes that taking this additional information into account it is not necessary, at this time, to order further particulars.

[32] Respecting the Union's second request, the Board concludes that no further particulars should be ordered. The Employer's various written policies already disclosed to the Union, including the job description for the "Maintenance Person and Transit Driver", and the additional information provided at pages 6 and 7 of Mr. Touet's letter dated November 2, 2016, in the Board's view, provide sufficient factual basis for the Union to prosecute this aspect of its Unfair Labour Practice.

[33] Respecting the Union's third request, the Board concludes that the Employer must disclose the name of the employee referenced in paragraph 51 of its Reply. The Employer

has made an allegation that "an employee informed the General Manager, Audrey Mack, that SEIU-West had told the employees it was expecting to win the certification vote and would enter the workplace on Monday, August 8, 2016". This fact is significant to the Employer and appears to be central to its defense against the Union's allegations that it restricted access to the workplace.

[34] Caleb Village is not a large workplace and Ms. Mack should know the name of the employee who furnished her with this information. At no time, did Mr. Touet suggest that the Employer did not know the identity of this individual or revealing his or her identify could jeopardize the employee's safety in the workplace. In these circumstances, the following statement from *Westfair Foods*, *supra*, at page 292 is apposite:

> *Counsel for the Union was not obliged to give a detailed rundown of the evidence he would call. He should, however, have indicated what basic facts he would use to make out his allegation of discrimination, <u>including the identity of employees whose circumstances would form part of his case</u>. In our view, it would be inconsistent with the rules of procedural fairness to provide anything less. [Emphasis added]*.

[34] Accordingly, the Board orders that the Employer disclose to the Union the identity of the employee referred to in paragraph 51 of its Reply.

[35] Finally, respecting the Union's fourth request, the Board concludes that no further particulars should be ordered. It is the contents of the notice in question and whether they contravene subsection 6-62(1)(a) of the *SEA* that is the issue. That can only be assessed once the impugned notice is entered into evidence. In the Board's opinion the fact that the Employer may have mailed notices to employees on previous occasions bears little relevance to that question.

D. <u>Board's Final Order</u>

[36] For the foregoing reasons, the Board orders:

- That the Union's Application for Summary Dismissal in respect of LRB File No. 182-16 be adjourned to November 17, 2016. The Employer is to file with the Registrar of the Board any and all of its materials in response to this application on or before November 9, 2016.

- That the Employer's application to summarily dismiss the Union's Application for Summary Dismissal in respect of LRB File No. 182-16 is dismissed.

- That the Union's Notice of Application for Disclosure and Production of Documents and Things and Particulars in respect of LRB File No. 182-16 is

reserved and will be released at the same time as the Board's Decision respecting the Union's Application for Summary Dismissal in that matter.

- That the Union's Notice of Application for Disclosure and Production of Documents and Things and Particulars in respect of LRB File No. 176-16 is dismissed.

- That the Union's Notice of Application for Disclosure and Production of Documents and Things and Particulars in respect of LRB File No. 181-16 is allowed in part. The Employer must provide to the Union:

    - All schedules and/or other documents indicating hours and times of work by Ms. Jolina Kennedy at Caleb Village Moose Jaw (Voyager Retirement V Genpar Inc.) broken down by month from March 1, 2016 to September 15, 2016, and
    - The name of the employee referred to in paragraph 51 of the Employer's Reply to LRB File No. 181-16.

[37] This is a unanimous decision of the Board.

Yours very truly,

Graeme G. Mitchell, Q.C.
Vice-Chairperson