October 21, 2016

MLT .
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Attention: Mr. Kevin Wilson, Q.C

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Attention: Mr. Rick Engel, Q.C.

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Attention: Ms. Ronnie Nordal

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Attention: Ms. Juliana Saxberg

Ministry of Justice
Government of Saskatchewan
820 – 1874 Scarth Street
REGINA, SK S4P 4B3

Attention: Ms. Barbara Mysko

Dear Sirs and Madams:

RE: LRB Files Nos. 218-16 & 227-16

Background:

[1] The Saskatchewan Government Employees' Union ("SGEU")[1] and the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ("RWDSU")[2] have both applied to the Board to be granted intervenor status in respect of an application made by the Saskatoon Public Library ("SPL")[3] to amend the certification Order made by the Board in respect of certain supervisory employees represented pursuant to that Order by the Canadian Union of Public Employees ("CUPE").

[2] The application by the SPL was one of a number of similar applications filed by other employers pursuant to section 6-11 of *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the "*Act*"). Portions of that section were delayed in coming into force until April 29, 2016. At the request of all of the Applicants and the Respondents, the Chairperson of the Board selected the application by the SPL as being the representative case which would allow the parties to seek a determination from the Board as to the application and interpretation of this provision. In all cases, the Respondents had challenged the constitutionality of the provisions and had provided notice regarding the constitutional question that had been raised.

[3] At the time of selection of the SPL case, as the first case to be adjudicated, both SGEU[4] and RWDSU[5] were engaged in applications where similar issues were raised. In the case of SGEU, that application had been brought by the Employer, as was the case in the SPL application. In the case of RWDSU, that application had been

[1] LRB File No. 218-16
[2] LRB File No. 227-16
[3] LRB File No. 135-16
[4] LRB File No. 171-16
[5] LRB File No. 045-16

brought to the Board by the Union. Subsequent to the determination that the SPL case would be the lead case, RWDSU withdrew its application.

[4] The statutory provisions in question deal with "supervisory employees", as defined in the *SEA*. While there are other issues in play in the applications, the primary questions that the parties wish to have adjudicated are the constitutionality of those provisions, as well as a determination of whether or not supervisory employees may be included or may remain within the same bargaining unit as non-supervisory employees.

Discussion and Analysis

[5] All of the parties were in agreement that the governing authority with respect to applications for intervenor status is this Board's decision in *Communication, Energy and Paperworkers Union of Canada v. J.V.D. Mill Services Inc.*[6] That decision clarified and rationalized the Board's jurisprudence and approach to granting of intervenor status in matters before the Board. The Board recognized three (3) classes of intervenor before the Board. Those are a Direct Intervenor, an Exceptional Intervenor and a Public Law Intervenor. Definitions of the characteristics of each of these classes of intervenor was adopted from an article published by Shelia M. Tucker and Elin R.S. Sigurdson entitled *Interventions in British Columbia: Direct Interest, Public Law & Exceptional Intervenors*[7].

[6] Both SGEU and RWDSU asserted in their applications that they should be granted direct interest intenvenor status. CUPE did not oppose the applications. SPL took the position that the participation of SGEU and RWDSU was unnecessary and would unnecessarily delay the proceedings. The Government of Saskatchewan did not

[6] LRB File No. 087-10
[7] Canadian Journal of Administrative Law and Practice, Vol 23, No. 2, June 2010.

oppose the granting of intervenor status as requested by the parties, but argued that the intervenors should be restricted to the provision of legal argument and that they not be allowed to call evidence or to cross examine witnesses.

[7] The definitions for the three (3) classes, as set out in *J.V.D. Mill Services* were as follows:

> 1. *The applicant has a direct interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be directly affected by the answer ("direct interest intervenor");*
>
> 2. *The applicant has a demonstrable interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be affected by the answer, can establish the existence of "special circumstances", and may be of assistance to the court [Board] in considering the issues before it ("exceptional intervenor"); and*
>
> 3. *The applicant has no legal rights or obligations that may be affected by the answer to the legal question in dispute, but can satisfy the court [Board] that its perspective is different and its participation may assist the court [Board] in considering a public law issue before it ("public law intervenor").*

Direct Intervenor Status

[8] When considering the granting of direct intervenor status, the Applicant must have a direct interest, i.e.: legal rights or obligations that may be directly affected by the answer to the questions posed by the litigation. That is, they must have a direct interest in the *lis* between the parties. Both SGEU and RWDSU argued that they did indeed have a direct interest in the questions being posed in the litigation insofar as they had an interest similar to CUPE in the outcome of the litigation.

[9] While a significant interest, having a common interest in litigation is not a direct interest whereby rights and interests will be directly affected. This is not a

situation which arises out of the same fact pattern (and in the case of RWDSU a significantly different fact pattern insofar as the initial application came not from the employer, but from the union and, more significantly, that the application was subsequently withdrawn).

[10] The parties have not asserted a common fact scenario in their cases to that which exists in the SPL case. Nor can we determine, at this stage of the proceedings, that the facts are so similar in their cases as to be indistinguishable from the facts in the SPL case. This case will not determine the outcome of their cases. It may establish an interpretation of the law which may be applicable to their cases, but will not be determinative of their cases. As such, they do not have a direct interest in the *lis* between the parties in this case such that they have a direct interest and cannot, therefore, be accorded direct interest intervenor status.

[11] No claim has been advanced by either SPL or CUPE as against SGEU and RWDSU in this case. Nor has SGEU or RWDSU made any direct claim as against SPL or CUPE. They do not have a direct stake in the decision.

Exceptional Intervenor Status

[12] From our analysis above, it is clear that SGEU has a demonstrable interest in the outcome of the litigation. RWDSU may have had a similar demonstrable interest prior to the withdrawal of their application to the Board. Additionally, however, in order to be granted exceptional intervenor status, SGEU and RWDSU must demonstrate "special circumstances" and that they can be of assistance to the Board in determining the answer to the questions posed.

[13] There were no special circumstances demonstrated in this case. SGEU and RWDSU are impacted by the provisions not unlike every other party governed by the

provisions of the *SEA.* They are not unique insofar as the impact these provisions may have on a union or the members of a union. There are legions of other unions upon whom these provisions will have an impact.

[14] Undoubtedly, SGEU and RWDSU can assist the Board in its deliberations regarding the interpretation and constitutionality of the provisions under consideration. For that reason, and based upon our analysis of the factors set out below, the Board declines to grant the SGEU and RWDSU status as exceptional intervenors, but will grant them status as public law intervenors.

Public Law Intervenors

[15] In a recent decision[8] of the Saskatchewan Court of Queen's Bench, Mr. Justice Brown reviewed the new Queen's Bench rule regarding the granting of intervenor status in proceedings before that Court. At paragraph [41] he says:

> *[41] The granting of intervenor status is discretionary and should be exercised sparingly. Within the ambit of that discretion, CIFFC as an applicant seeking to be made an intervenor in this Queen's Bench matter pursuant to Rule 2-12 should be prepared to address the following:*
>
> > *a. A sufficient interest in the outcome of the matter must be shown such that their involvement is warranted. An outcome that adversely affects them may well be considered sufficient to meet this criterion;*
> >
> > *b. There must exist the reasonable prospect that the process will be advanced or improved by their addition as an intervenor. This includes demonstrating that, as an intervenor, they will bring a new perspective or special expertise to the proceedings that would not be available without their participation. Merely echoing*

[8] *Government of Saskatchewan, Ministry of Environment v. Saskatchewan Government Employees Union* [2016] CanLII 250 (SKQB)

> *the position of one or more of the parties indicates they will not provide the requisite value;*
>
> *c. As an intervenor they cannot seek to increase the number of issues the parties themselves have included in the proceeding;*
>
> *d. Adding them as an intervenor must meet the goals and objectives identified by Rule 1-3 such that the issues raised by the litigation will be heard with reasonable dispatch and the matter will not be overwhelmed with procedure by virtue of their inclusion as an intervenor;*
>
> *e. Adding them as an intervenor must not unduly prejudice one of the parties;*
>
> *f. The intervention should not transform the court into a political arena; and*
>
> *g. The court is not bound by any of these factors in determining an application for intervention but must balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the proceeding.*

[16] The Board does not have a practice rule similar to Queen's Bench Rule 2-12 which was being considered by the Court in this decision. These factors, however, are similar to the factors considered by this Board in its determinations regarding the granting of public law intervenor status, which were derived from the factors outlined by the Saskatchewan Court of Appeal in *R. v. Latimer*[9].

Sufficient Interest

[17] As noted above, both SGEU and RWDSU have a significant interest in the outcome of this litigation. This interest is shown particularly insofar as SGEU is

[9] [1995] CanLII 3921, 128 Sask. R. 195

concerned in that they have a similar application pending before the Board. RWDSU has also been forced to consider this issue by virtue of its application to this Board.

[18] SPL argued that the interest of SGEU and RWDSU was not unique insofar as they were impacted in the same manner as other trade unions and their members as a result of the legislative changes. However, they need only have a sufficient interest in the outcome of the litigation. In our assessment, that sufficient interest has been demonstrated.

A reasonable prospect that the process will be advanced by their participation

[19] This factor is also one considered by this Board in its determination of whether or not public law intervenor status should be granted. However, as pointed out by Mr. Justice Brown, this participation should bring a new perspective or special expertise that would not be available without their participation. As he points out, "[M]erely echoing the position of one or more of the parties will not provide the requisite value".

[20] Both SGEU and RWDSU made efforts to show that their participation would bring a new and different perspective to the arguments principally because of their experience having dealt with similar constitutional matters in other cases. While we are not convinced that CUPE is not capable of advancing all necessary arguments, on balance, based upon the restrictions which we will place on participation by SGEU and RWDSU, are prepared to exercise our discretion in favour of their participation notwithstanding our concerns in this area.

No increase in the *Lis*

[21] If SGEU and RWDSU are allowed to introduce evidence or to cross-examine witnesses, there is a danger that the *lis* between the parties will be widened. The SPL case arises out of a discrete set of facts which will be presented to the Board by SPL and CUPE. These parties do not need or require the assistance of either SGEU or RWDSU to introduce facts or challenge testimony of witnesses at the proceedings. SGEU suggested in its arguments that it might be necessary to introduce facts in relation to the constitutional issue. We do not agree. CUPE is capable of ensuring that any facts necessary to the constitutional determination are introduced and before the Board for consideration.

Participation not to unduly prejudice one of the parties

[22] SPL argued that it would be impacted by an additional burden if SGEU and RWDSU were granted intervenor status. They argued that SPL was a public body whose resources were limited. SPL further argued that they should not be burdened by additional costs associated with the participation of the additional parties.

[23] There is some merit in the arguments advanced by the SPL. However, it was known to them going in, that this would be the first case to test the new provisions of the *SEA*. The parties requested that the Chairperson of the Board review the pending cases on this issue and chose one to proceed first. In that respect, the SPL has gotten the short straw and others may now sit back and watch as their case unfolds. However, insofar as their being the first case to advance, there was the possibility of many other employers and unions seeking to get their "two bits worth" in. Two (2) possible intervenors out of a much larger number who could have sought to intervene are not prejudicial. That is particularly true given the restrictions on participation which the Board will impose.

Will the proceedings transform into a political arena

[24] Both SGEU and RWDSU argued that their participation would not transform the proceedings into a political arena. Neither SPL nor the Government of Saskatchewan addressed any such concern to the Board. We are of the view that the parties will be respectful of this issue.

Balance of Convenience, efficiency and social purpose

[25] As noted by Mr. Justice Brown, the authority to grant intervenor status is discretionary and the Board is not bound by any of the above noted criterion insofar as the grant of status is concerned. The Board may, in the consideration of its discretion, place such weight on these factors so as to preserve scarce resources, the convenience of the parties, the efficiency of proceedings, as well as the social purpose in moving the case forward with only the persons directly involved in the proceedings.

Decision and Order:

[26] As noted above, we have determined to grant Public Law Intervenor status to both SGEU and RWDSU, subject to the following restrictions:

a) Neither SGEU nor RWDSU shall be permitted to call evidence or to cross-examine witnesses;

b) SGEU and RWDSU may not bring or introduce any legal argument with respect to any issue other than:

1. The Constitutionality of the provisions of the *SEA* concerning "supervisory employees";

2. The statutory interpretation of the provisions of the *SEA* concerning "supervisory employees"; and

3. The jurisdiction of the Board with respect to including or retaining "supervisory employees" within the same bargaining unit as non-supervisory employees.

c) Any such arguments shall be supplemental to, rather than supportive of, any arguments advanced by CUPE.

[27] This is a unanimous decision of the Board. The Board's Order granting this status will be included with this letter decision.

Yours truly,

Kenneth G. Love, Q.C.
Chairperson