June 28, 2017

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Attention: Ms. Ronni Nordal

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Attention: Mr. David G. de Groot

Dear Madam & Sir:

RE: LRB File No. 078-17

Background:

1. The Saskatchewan Union of Nurses ("SUN") applies to the Board seeking intervenor status as either a direct intervenor or a public law intervenor with respect to a certification application filed by the Education, Service and Health Care Union, Local 306 ("Local 306") in which application, Local 306 seeks representational rights with respect to a unit of employees of the Town of Bienfait, Saskatchewan ('Bienfait").

2. The application was heard by conference call on June 26, 2017 in Regina by Kenneth G. Love, Q.C., Chairperson of the Board, sitting alone pursuant to section 6-95(3) of *The Saskatchewan Employment Act* (the "*SEA*").

3. The Board heard argument from counsel for SUN and Local 306. Mr. Daniel LeBlanc appeared with Ms. Ronni Nordal for SUN. Mr. David de Groot appeared for Local 306. Ms. Kaylee Mitchell kept a watching brief for Bienfait and Mr. Sasha Longo kept a watching brief for The Canadian Union of Public Employees Union. Mr. de Groot provided the Board with a letter outlining his arguments. Ms. Nordal presented oral arguments in respect to the SUN application for intervenor status.

Board Jurisprudence respecting the Granting of Intervenor Status

4. The Board's jurisprudence with respect to the granting of intervenor status is well settled. In *Communication, Energy and Paperworkers Union of Canada v. J.V.D. Mill Services*[1] ("J.V.D."), the Board adopted three forms of intervenor status as described by Shelia M. Tucker and Elin R.S. Sigurdson in an article entitled *Interventions in British Columbia, Direct Interest, Public Law and Exceptional Intervenors*[2]

5. The Board recognized three (3) forms of intervenor status; direct interest intervenors, exceptional intervenors and public law intervenors. The Board reviewed its prior jurisdiction to ensure that these classifications were inclusive of the form of status normally granted to persons seeking to intervene. The Board's decision in J.V.D. was upheld on judicial review.[3]

6. In J.V.D., the Board outlined the three (3) forms of intervenor status as follows:

[1] LRB File No. 087-10
[2] Canadian Journal of Administrative Law and Practice, Vol 23, No. 2, June 2010
[3] See *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers et al v. Communications, Energy and Paperworkers of Canada, J.V.D. Mill Services Inc. and Saskatchewan Labour Relations Board* [2012] SKQB 375 at para48-53

1. *Direct interest intervenors, who have "legal rights or obligations that may be directly affected" by the issue in dispute;*

2. *Exceptional intervenors, who have "legal rights or obligations that may be affected [by the issue in dispute], can establish the existence of special circumstances, and may be of assistance to the Board." The Board also held that "the granting of standing under this proviso should be used sparingly and only in clearly 'exceptional' circumstances";*

3. *Public law intervenors, who have "no legal rights or obligations that may be affected by the answer to the legal question in dispute, but can satisfy the court that its perspective is different and its participation may assist the Board."*

7. In respect of the criteria applied by the Board with respect to the granting of Public Law intervenor status, the Board looks to and follows the principles set out by the Saskatchewan Court of Appeal in its decision in *R. v. Latimer*[4]

8. The granting of intervenor status by the Board, or by the Courts, is discretionary. This discretion is exercised based upon considerations of fairness (to the applicant or the party seeking status) and/or the potential to assist the Board.[5]

Discussion and Analysis

9. SUN has asked that the Board consider adding them as an intervenor under the categories of either a direct interest intervenor or a public law intervenor. In each case, SUN asks that the Board allow that they be permitted to provide both evidence and arguments to the Board with respect to the status of Local

[4] [1995] CanLII 3921, 128 Sask. R. 195 at pp. 196-97
[5] See section 6-112(4) of the *SEA*

306 as "union" entitled to apply for and obtain bargaining rights on behalf of employees of an employer.

Direct Interest Intervenor Status

10. SUN argues in relation to its application for direct intervenor status that it is directly affected by the application because it holds existing rights to bargain for registered nurses within the Province of Saskatchewan and, in the event that Local 306 were to apply for bargaining rights for a group of employees that included registered nurses, its existing rights would be affected. Local 306 counters that such concerns are speculative and hypothetical as nothing in the current application impacts upon any bargaining rights possessed by SUN. In its arguments, SUN also noted that, if it were possible to allow a challenge to the status of Local 306 in the event that a conflicting application were made that it would not, at this time, seek the status that it is currently seeking.

11. Local 306 is an entity which has not, as yet, been determined to be a union as defined in the *SEA*. The process adopted by the Board when a previously unknown entity seeks representational rights in Saskatchewan was described by the Board in *Canadian Staff Union v. Canadian Union of Public Employees*[6] as follows:

> ***[11]*** *The jurisprudence of this Board is to compel an applicant seeking to represent a group of employees, that has not previously been certified in this Province, to establish its status and, in particular, it's standing to be certified to represent employees for the purpose of collective bargaining. See: Health Sciences Association of Saskatchewan v. University Hospital, [1965-74] Dec. Sask. L.R.B. Volume III, LRB File No. 225-72. Simply put, an applicant organization must satisfy the Board that it is a trade union with the meaning*

[6] [2011] CanLII 61200 (SKLRB), LRB File No. 077-11 at para. 11

> *of The Trade Union Act. In this regard, it should be noted that this is not an enquiry into the relative strength or tenacity of the applicant organization in terms of achieving particular collective bargaining goals or its adherence to particular ideological beliefs. In this exercise, the Board is simply concerned with whether or not the organization is dedicated to advancing the interests of its members by means of collective bargaining and that its internal structure possess certain hallmarks of organizational legitimacy associated with a trade union. See: Board of Education Administrative Personnel Union v. Board of Education and Regina Collegiate Institute, [1978] June Sask. Labour Rep. 44, LRB File No. 380-77. See also: Regina Musicians Association, Local 446 v. Saskatchewan Gaming Corporation, [1997] Sask. L.R.B.R 273, LRB File No. 012-97.*

It is this process that SUN wishes to involve itself in.

12. To be granted status as a direct interest intervenor, the applicant must have "legal rights or obligations that may be directly affected by the decision which the Board is required to make on the application as presented. The legal rights which SUN seeks to establish in this case are not, in my opinion, sufficient to ground a claim of direct interest as required under the Board's jurisprudence regarding direct interest intervenors.

13. In its decision in *Construction Workers Union (CLAC), Local 151 v. Tercon Industrial Works Ltd. et al.*[7] the Board said at paragraph 36:

> ***[36]*** *For the reasons succinctly stated by this Board in Health Sciences Association of Saskatchewan v. Regina District Health Board, [1995] 3rd Quarter Sask. Labour Rep. 131, LRB File Nos. 025-95 & 118-95, the first and third arguments provide no basis for a claim of a direct interest. For the reasons stated by this Board in J.V.D. Mill Services #1, supra and J.V.D. Mill Services #3, supra, the second argument provides no basis for a claim of a direct interest in the within*

[7] [2012] CanLII 2145 (SKLRB), LRB File Nos. 097-10, 098-10, 116-10, 117-10, & 134-10

> *proceedings. Simply put, a claim of standing based merely on the idea that a particular trade union has a pre-emptive or presumptive entitlement to bargain on behalf of certain kinds or groups of employees is not recognized by this Board. A claim of standing as a direct interest intervenor must flow from the potential that the subject proceedings could have a direct impact on the party seeking standing (for example, through the potential imposition of legal obligations upon them or an impact on certification rights they currently hold or are seeking to obtain). None of the proposed intervenors could establish this threshold.*

14. This quotation is apt to these proceedings as well. Here, we are being asked to provide direct interest intervenor status to SUN on the basis that (a) they have representational rights for registered nurses in the Province of Saskatchewan and (b) Local 306 might (or might not) seek at some time in the future to represent registered nurses for collective bargaining.

15. In *Health Sciences Association of Saskatchewan v. Regina District Health Board*[8] the Board was also dealing with a request for intervenor status by SUN in respect to a certification application made by Health Science Association of Saskatchewan. In that case, SUN claimed to have an interest by virtue of having filed a competing certification application, evidence of which was disregarded by the Board. Even with that degree of direct interest, the Board declined to award SUN intervenor status. At page 135, the Board said:

> *In more general terms, we are not persuaded that either the Saskatchewan Union of Nurses or the Saskatchewan Government Employees' Union has an interest in the applications which would justify according them intervenor status. Both requests for intervenor status represented the assertion of a kind of proprietary claim of the kind which we do not think is consistent with the evolution which has occurred in the collective bargaining structures in the health care field in this province.*

[8] [1995] 3rd Quarter Sask. Labour Rep. 131, LRB File Nos. 025-95 & 118-95

16. Nor is a hypothetical interest in the outcome of the proceedings sufficient to permit direct interest intervenor status to be awarded in this case. Any such claim is dependent upon the fallacious assertion that SUN maintains a proprietary claim on a certain segment of the population who seek to be represented. That, in my opinion, flies in the face of both the freedom of choice afforded employees under the *Canadian Charter of Rights and Freedoms* and the protection of those freedoms as enacted in the *SEA.*

17. To be awarded direct interest intervenor status requires that the applicant have a direct interest in the result. No such interest exists in this case. The application for direct interest intervenor status is denied.

Public Interest Intervenor

18. In the alternative, SUN seeks public interest intervenor status. Again, for the reasons which follow I cannot grant public interest intervenor status to SUN.

19. SUN argues that their participation will assist the Board to determine if Local 306 is a union within the meaning of the *SEA* and therefore entitled to represent employees for collective bargaining. Local 306 argued that the Board needs no such assistance. Local 306 described the process suggested by SUN as being a peer review process proposal.

20. The requirements of the *SEA* in respect to the definition of "union" as contained in section 6-1(1)(p) are not extensive. In a somewhat circular definition, a "union" is defined as:

> *(p) "union" means a labour organization or association of employees that:*

> *(i) has one of its purposes collective bargaining; and*
>
> *(ii) is not dominated by an employer.*

21. "Labour organization" is defined in section 6-1(1)(k) to mean:

> *(k) "labour organization" means an organization of employees who are not necessarily employees of one employer that has collective bargaining among its purposes.*

22. The determinations required before the Board can accept an organization of employees as a "union" is well known to the Board. In this case there is no allegation that Local 306 is a dominated by Bienfait, or that it does not have collective bargaining amongst its purposes.

23. In the circumstances of this case, the Board can see no assistance which is required or which could be given to the Board by SUN in reaching the conclusions required of it. Accordingly, in the exercise of the Board's discretion the request by SUN for standing as a public law intervenor is denied.

24. While SUN argued that none of the Latimer factors would be offended in the event public law intervenor status were granted. SUN argues that the process will not be unduly delayed by their participation. Local 306 argued the contrary.

25. Delay has already been occasioned by this application and by other applications, one of which was withdrawn. The originating application was filed with the Board on April 27, 2017. A reply was filed by Bienfait on May 8, 2017. SUN also applied to intervene on May 8, 2017. The Canadian Union of Public Employees also applied to intervene on May 11, 2017, but their application was subsequently withdrawn. On May 30, 2017, the Saskatchewan

Joint Board, Retail, Wholesale and Department Store Union also sought intervenor status[9]. In the 2015 – 2016 fiscal period, the average time for the processing of a certification application from date of application to final order was 47 days.[10] This application has already gone on for a greater period than that average and the Board has yet to schedule a hearing for the certification application. Clearly, additional delay has been occasioned by the intervenors.

26. Granting of intervenor status will also, in my opinion, expand the "*lis*" between the parties. Of necessity, the "*lis*" will be expanded by virtue of issues being raised which were not raised by Bienfait in its reply. The only issue raised by Bienfait in its reply is an issue related to a "supervisory employee". Bienfait and Local 306 are both competent to deal with this issue and need no assistance from SUN in relation to that issue. Nor, in fact, is it an issue which SUN seeks to address should it become an intervenor.

27. Local 306 argued that the application by SUN are attempts by SUN to delay and frustrate the application by Local 306 and is an attempt by SUN to turn the dispute into a political arena. Certainly, there is a danger that the events which transpired following amendments to the then *Trade Union Act* which allowed the Christian Labour Association of Canada's local 151 to seek representation of employees in the construction sector are revisited.

28. The Latimer factors mitigate as well towards the request for intervenor status to be denied.

[9] By agreement by the parties, this application was postponed.
[10] See the Annual Report of the Labour Relations Board 2015 -2016

Decision and Order:

29. The Application for intervenor status by SUN is denied. Our formal order dismissing the application will accompany these letter reasons.

Yours truly,

Kenneth G. Love, Q.C.
Chairperson

KL

cc: Sasha Longo, CUPE
Andrea C. Johnson, Miller Thomson LLP