December 15, 2017

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Attention: Ms. Heather Jensen

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

Dear Madam & Sir:

RE: LRB File No. 169-17

Background:

1. Workers United Canada Council (the "Union") applied to the Board to certify a group of employees of Amenity Health Care LP ("Amenity"). The Union made 3 separate applications in respect of various units of employees of Amenity. Those employees worked at a Tim Horton's franchise location in Canora, Saskatchewan.

2. Amenity filed an unfair labour practice application against the Union alleging, *inter alia*, that certain supporters of the Union organizing drive interfered with, restrained, intimidated, threatened and/or coerced employees of Amenity contrary to section 6-63(1)(a) and (h) of *The Saskatchewan Employment Act* (the *"SEA")*. The unfair labour practice application also alleged that the Union was also guilty of an unfair labour practice by interfering with, restraining,

intimidating, threatening and/or coercing employees of Amenity contrary to section 6-63(1)(a) and (h) of the *"SEA"*.

3. The Union responded to the unfair labour practice application by requesting that the application be summarily dismissed. A panel of the Board reviewed the summary dismissal application *in camera*, and found that the application was not eligible to be dealt with through the Board's *in camera* dismissal process and referred the application to a *viva voce* hearing before a panel of the Board.

4. A panel of the Board (Love, Werezak, Sommervill) heard the application for summary dismissal on December 12, 2017. The Board received written submissions from the parties and heard oral arguments. The parties also provided the Board with case authorities which we have reviewed and found helpful. For the reasons that follow, we decline to summarily dismiss the unfair labour practice application and dismiss the summary dismissal application by the Union.

The Test for Summary Dismissal:

5. Following comments from the Court of Queen's Bench, the Board reformulated its test for summary dismissal in *International Brotherhood of Electrical Workers, Local 529 v. KBR Wabi*[1]

[1] *International Brotherhood of Electrical Workers, Local 529; International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870; Construction and General Workers' Union, Local No. 180; International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771; United Association of Journeyman & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179; International Union of Painters and Allied Trades (AFL-CIO-CLC), Local 739; United Brotherhood of Carpenters and Joiners of America, Local 1985 and United Brotherhood of Carpenters and Joiners of America, Millwright Union, Local 1021 v. KBR Wabi Ltd., Construction Workers Union, Local 151, KBR Canada Ltd., and KBR Industrial Canada Co. [2013] CanLII 7314 (SKLRB),, LRB File Nos. 188-12, 191-12, 192-12, 193-12, 198-12, 199-12, 200-12 & 201-12*
at para. [79]

> ***[79]*** *Taking all of this into consideration, we adopt the following as the test to be applied by the Board on the exercise of its authority under s. 18(p) of the Act.*
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> *1 In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
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> *2. In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*

6. At this stage of the proceedings, the Board does not look at the relative strength or weakness of the case as presented. All that is required to satisfy this requirement is that, "assuming the plaintiff proves everything alleged in his claim, there is nevertheless no reasonable chance of success".[2]

7. In *KBR Wabi*, the Board discussed what may be considered to be an arguable case. At paragraphs [98]-[99], the Board says:

> ***[98]*** *What amounts to an arguable case has been extensively reviewed by the Courts. They have used the term somewhat interchangeably with "no reasonable chance of success", having a "cause of action that might succeed," no "prima facie" case" or "a reasonable possibility of success at trial." Tied to that was a requirement that the Court would assume that the "plaintiff proves everything alleged in his claim" in making its determination.*
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> ***[99]*** *In the Board's recent decision in Tercon, supra, the Board was also dealing with applications for summary dismissal of applications by various unions that alleged that the Construction Workers Union, Local 151 was a company dominated organization. In that case, quoting from the Board's jurisprudence in P.A. Bottlers Ltd o/a P.A. Beverage Sales and Sascan Beverages v. U.F.C.W., Local 1400 and the Alberta Board's decision in Vikon Technical Services at paragraphs 162 and 163, the Board said:*

[2] See Sagon v. Royal Bank of Canada [1992] CanLII 8287 SKCA

[162] In P.A. Bottlers Ltd., the Board alluded to its earlier comments in the WaterGroup case and placed those comments in the context of other factors which must also be considered by the Board, at 251:

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 Ad which have allegedly been violated. The Board has linked this requirement with the capacity to provide a fair hearing to a respondent.

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 in 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.

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 the 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 foul 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.

[163] In addition, the Alberta Labour Relations Board, in the case of Vikon Technical Services supra, articulated a helpful policy explanation for the need for an applicant to provide reasonable particulars in support of his/her application:

Before turning to the particulars given in this case it is useful to make some general observations on the need for particulars in applications, before this Board. When a party commences an application or complaint before us they must give particulars of what they are applying for, or why they are complaining. What this means is that in their initial correspondence they should set out in plain English a set of allegations of fact which, if accepted as true, would establish that the section of the Act in question may apply, or have been violated. They are not required to prove their allegations in the initial application, they must just make them. It is not enough to recite the section in question and then say some other person has

> *violated it. The Board, when reading a complaint, should get a clear understanding of when, how, and by whom, the Act was violated. When receiving an application the Board should get a clear understanding of how the facts alleged justify the use of the section of the Act referred to, and justify the granting of the order or remedy sought.*
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> *This requirement for particulars is not a request for a "legalistic" approach. A layman, reading a complaint or application should be able to get a clear understanding of what the matter is about and why the Board is being asked to use its powers. Most sections in the Labour Relations Act are not complex. The particulars should make it clear why the facts referred to make the section or sections of the Act applicable. This is not an onerous task. Applications that lack these basic particulars will not be accepted initially, and will not be processed further.*
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> *We insist on particulars in order to ensure fairness to all parties. We have broad powers given to us by the Legislature. The exercise of these powers may cause major inconvenience to the party complained against. Answers must be given, officer's investigations cooperated with, records that would otherwise be confidential disclosed, hearings attended, and lawyers sometimes retained. We will only enter into or continue this process when there is an allegation that, if true, would lead us to believe that the legislation might apply or have been violated. If an applicant cannot even allege facts that would, if proven, result in a Board order or remedy, then there is no justification for the process being started*

The Parties Arguments:

8. The Union argued forcefully that the application, on its face, did not allege sufficient facts upon which the Board could conclude that there had been an unfair labour practice committed by the Union. The Union carefully dissected the application and the allegations contained therein to demonstrate that no arguable case had been made out in the application. In its arguments, the Union pointed to the power imbalance that should be considered between the employee's seeking to have the benefit of unionization and the employer's ability to impact the employee's economic welfare.

9. The Employer argued that the Union had the burden of proof in respect of their application for summary dismissal and it was incumbent upon the union to

show that the application failed the test outlined above. It also argued that the application gave rise to an arguable case that an unfair labour practice had been committed by the Union.

Analysis and Decision:

10. It is not necessary for the applicant, in making its unfair labour practice application, to demonstrate that it will be successful at the final hearing of the matter; they need only show that there is sufficient case made out that the case is arguable.

11. The Board most recently reviewed its authority to summarily dismiss applications in *Lyle Brady v. International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 771*[3]. In that case, the Board relied upon its earlier jurisprudence in *KBR Wabi.* It noted that the power to summarily dismiss applications should be used only where it is "plain and obvious" that the application cannot succeed. It quoted from paragraphs [104] – [106] of *KBR Wabi* as follows:

> ***[****104] The Saskatchewan Court of Appeal in Sagon v. Royal Bank, in addition to establishing the test for striking statements of claim for disclosing no reasonable cause of action, cautioned that the Court's power to strike on this ground should only be exercised in "plain and obvious cases where the court is satisfied that the case is beyond doubt.*
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> *[105] In Odhavji Estate v. Woodhouse, the Supreme Court relied upon the test set out by Wilson J. in Hunt v. Carey Canada Inc. as follows:*
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> > *. . . assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the*

[3] 2017 CanLII 68781 (SKLRB)

> *action is certain to fail because it contains a radical defect . . . should the relevant portions of a plaintiff's statement of claim be struck out . . . .*
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> *[106] The Court then went on to say at paragraph 15:*
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> > *The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also Attorney General of Canada v. Inuit Tapirisat of Canada, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735.*

12. The Union advocates for a much higher standard than that set out above. It is not necessary that the application allege sufficient facts to demonstrate that the applicant will be successful in its application. It need only provide sufficient allegations, which, if proven, give rise to an arguable case.

13. It is not "plain and obvious" to us that this application must fail. On its face, the allegations and facts set out in the unfair labour practice application, accepted as proven, certainly give rise to an arguable case. Accordingly, the application for summary dismissal is dismissed.

14. This is a unanimous decision of the Board.

Yours truly,

Kenneth G. Love, Q.C.
Chairperson