April 17, 2018

Plaxton Jensen
Barristers and Solicitors
500, 402 – 21st Street East
SASKATOON SK S7K 0B6

Attention: Ms. Heather Jensen

MLT Aikins
Barristers and Solicitors
1500 - 410 22nd Street East
SASKATOON SK S7K 5T6

Attention: Mr. Brent Matkowski

Dear Ms. Jensen and Mr. Matkowski:

Re: LRB File No. 043-18 – Elmwood Residences Inc. v SEIU-West

OVERVIEW

[1] Elmwood Residences Inc. ("Employer") is a non-profit corporation that operates 11 group homes in Saskatoon for physically and/or intellectually challenged individuals who are assessed as being incapable of independent living. SEIU-West ("Union") is certified to represent the in-scope employees at the Employer's group homes. On February 20, 2018, pursuant to sections 6-104, 7-5, 7-28 and 7-35 of *The Saskatchewan Employment Act* ("Act"), the Employer filed an application alleging that the Union committed an unfair labour practice by:

- Failing to bargain an essential services agreement, contrary to section 7-28 of the Act;
- Providing an illegal strike notice and engaging in a strike where there is no essential services agreement or decision of an essential services tribunal, contrary to section 7-5 of the Act;
- Failing to comply with Part VII of the Act, contrary to section 7-35 of the Act.

[2] During the course of the hearing of this application on March 22, 2018, the Employer proposed to enter into evidence several media articles, as proof that the Union had admitted in them that the Employer provides an essential service to the public within the meaning of Part VII of

the Act. The Union objected to the articles being admitted, on the basis that they were hearsay, unreliable and not relevant. The Employer countered that they contained admissions against interest and therefore were admissible as an exception to the hearsay rule.

[3] Rather than make an immediate ruling, the Board directed that written submissions on the issue be filed in advance of the continuation of the hearing on April 25, 2018. The parties filed very helpful submissions that the Board has considered in making its decision on this issue.

RELEVANT STATUTORY PROVISION

[4] The following provision of the Act applies to the admissibility of evidence:

> *Powers re hearings and proceedings*
> *6 -111(1) With respect to any matter before it, the board has the power:*
>
> > *(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the board considers appropriate, whether admissible in a court of law or not;*

RELEVANT LEGAL PRINCIPLES

[5] In Chapter 6 of Sopinka, Lederman & Bryant, The Law of Evidence in Canada, 4th Ed, the authors discuss the law of hearsay. The basic rule is that hearsay is not admissible. However, there are exceptions to that rule. At paragraph 6.165, the authors state:

> *The common law has always recognized an exception to the hearsay rule for declarations against pecuniary or proprietary interest. From a distillation of the relevant cases, the classical exception can be stated in the following terms:*
>
> > *The written or oral declarations of a person, since deceased, (or not otherwise available to testify at trial) which were against that person's pecuniary or proprietary interest at the time that he or she made them are admissible as evidence of the facts contained in the declarations provided that the declarant had complete knowledge of the facts stated.*

[6] Clause 6-111(1)(e) of the Act gives the Board wider discretion than a court to admit hearsay evidence. Morley R. Gorsky, et al., Evidence and Procedure in Canadian Labour Arbitration states as follows, at page 11-21:

> *Rather than disrupting witnesses and having the hearing bog down with frequent rulings on admissibility, arbitrators often take a liberal approach to admitting evidence, including hearsay, during the hearing.*
> *…*
> *…A common practice appears to be to admit hearsay evidence subject to objections and to postpone the determination of admissibility to the board's deliberations after the hearing. At that time as well, the weight to be accorded the admissible items will be decided.*

[7] However, Gorsky prefaced the second statement quoted above with the following caution:

> *A certain amount of hearsay will be admitted in the course of the hearing, though it might be preferable to disallow flagrant hearsay to which clearly no weight will be given. This is particularly advisable where undue time will be wasted by admitting the hearsay or where the party offering the hearsay may be lulled into a false confidence that persuasive evidence is being tendered.*

ANALYSIS AND DECISION

[8] The issue for the Board to determine is whether the media articles tendered by the Employer should be admitted into evidence at the resumption of the hearing. Do they meet the test of an exception to the rule against hearsay? Alternatively, are they sufficiently reliable that it would be appropriate for the Board to admit them pursuant to clause 6-111(1)(e) of the Act?

[9] Summaries of the parties' positions are outlined below.

The Union's Position

[10] In its written submission the Union argues that the articles are unreliable. The Union contends that if the content of the articles is relevant, the Employer should subpoena the Union representatives who allegedly made the statements to testify, to ensure that the evidence about what they said to the reporters is accurately before the Board. The Union goes on to say that, in any event, the media articles are not relevant, as they do not contain any admissions against the Union's interests.

The Employer's Position

[11] The Employer says that one of the central issues before the Board in the unfair labour practice application is whether Part VII of the Act applies, *i.e.*, whether Elmwood provides an essential service to the public. The Employer says that, in these media articles, the Union admits

that Elmwood provides an essential service to the public. The Employer says that the Board has broad discretion to admit hearsay evidence and that the appropriate approach is for the Board to admit the articles into evidence and determine their weight at a later time. They say that the media articles are reliable and relevant.

Decision of the Board

[12] Taking into account the submissions of the parties, the Board considered the necessity of admitting and relying on this evidence. Direct evidence, if available, is clearly preferable to hearsay evidence. The Board finds that the media articles do not meet the test of necessity. In this situation, direct evidence is readily available.

[13] Reliability requires that there be an opportunity to test the evidence. Rather than rely on a reporter's interpretation of what the Union representatives said, it is preferable to hear from them directly.

[14] Whether the Employer provides an essential service to the public is potentially an important issue in deciding the unfair labour practice application. While the Board has the discretion under clause 6-111(1)(e) of the Act to admit the media articles as evidence, it is choosing to exercise its discretion to disallow them.

[15] Rather than wait until the resumption of the hearing to provide a ruling on this issue, the Board is issuing its ruling now to give the parties an opportunity to take it into account in preparation for the resumption of the hearing. If the Employer is of the opinion that the content of the media articles is relevant to its case, it now has the opportunity to provide that evidence to the Board in a more reliable form.

ORDER

[16] For the purposes of the unfair labour practice application, LRB File No. 041-18, the Board makes the following Order pursuant to clause 6-111(1)(e):

1. The media articles will not be admitted as evidence.

Yours truly,

Susan C. Amrud, Q.C.
Chairperson