ELMWOOD RESIDENCES INC., Applicant v. SEIU-WEST, Respondent

LRB File No. 044-18; April 2, 2018

Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: Mike Wainwright and Aina Kagis

For the Applicant:	Brent M. Matkowski
For the Respondent:	Heather M. Jensen

Interim Application – Unfair Labour Practice – Employer applies for an order enjoining a controlled strike by Union members at group homes it operates in Saskatoon – Employer asserts that it provides an essential service to the public and the failure of the Union to negotiate an essential service agreement under Part VII of *The Saskatchewan Employment Act* prior to engaging in strike action constitutes an unfair labour practice.

Interim Application – Arguable Case – Board reviews evidence and determines that the Employer's arguments respecting the application of Part VII of *The Saskatchewan Employment Act* are novel and satisfy the "arguable case" threshold.

Interim Application – Balance of Convenience – Board finds the Union has engaged in a controlled strike and the labour relations harm to the Union were this strike action enjoined outweighs the labour relations harm to the Employer if it is not – Employer's application for interim relief dismissed.

REASONS FOR DECISION

OVERVIEW

[1] Graeme G. Mitchell, Q.C., Vice-Chairperson: Elmwood Residences Inc. [Employer] is a not-for-profit organization operating 11 group homes in the City of Saskatoon for physically or mentally challenged individuals who are assessed as being incapable of independent living. On February 20, 2018, pursuant to subsections 6-104 and 7-25 of *The Saskatchewan Employment Act*, SS 2013, cS-15.1 [*SEA*], the Employer filed an application alleging that SEIU-West [Union], the exclusive bargaining agent for its employees, committed

an unfair labour practice by taking strike action without first negotiating an essential services agreement, contrary to section 7-5 of the *SEA*. This Unfair Labour Practice application is designated as LRB File No. 043-18.

[2] That same day, the Employer also filed this application for interim relief. The interim application – LRB File No. 044-18 – was supported by three (3) affidavits: (1) Affidavit of Holly Michayluk dated February 20, 2018 [Michayluk Affidavit]; (2) Supplementary Affidavit of Holly Michayluk dated February 22, 2018 [Supplementary Michayluk Affidavit], and (3) Affidavit of Nicola Ogle dated February 23, 2018 [Ogle Affidavit].

[3] The Respondent filed its Reply to the Interim Application on February 27, 2018. In support of its Reply, the Respondent filed three (3) affidavits: (1) Affidavit of Cam McConnell dated February 26, 2018 [McConnell Affidavit]; (2) Affidavit of Jessica Eastveld dated February 26, 2018 [Eastveld Affidavit], and (3) Affidavit of Barbara Cape dated February 27, 2018 [Cape Affidavit].

[4] Simply put, the Union asserts that because the Employer does not provide essential services to the public, having an essential services agreement in place is not a statutory pre-condition for its members to engage in strike action against the Employer. As a result, since the Union had complied with the statutory requirements of the *SEA*, there is nothing to warrant the early intervention of this Board to curtail the limited strike activity currently being undertaken by its members.

[5] Alternatively, the Union asserts that if the Employer is found to deliver essential services, then this Board is without jurisdiction to decide this application. Rather, it is a matter for an essential services tribunal appointed pursuant to section 7-7 of the *SEA*.

[6] The Board heard the application for interim relief on February 27, 2018, at the conclusion of which we reserved our decision. As the Employer believed an early determination of its application was necessary, the Board undertook to provide a decision as soon as possible.

[7] On February 28, 2018, the Board issued its Order dismissing the Employer's application for interim relief with brief written reasons to follow. These are those reasons.

FACTUAL CONTEXT

[8] In order to put the Board's decision in context, a short summary of some of the relevant facts is warranted.

[9] The most recent collective agreement between the parties expired at the end of December 2015. Negotiations for a revised collective agreement began sometime in 2016. The Union contended that by late summer 2017 collective bargaining had reached an impasse.

[10] The Union advised the Minister of Labour Relations and Workplace Safety of this state of affairs, as required by subsection 6-33(1) of the *SEA*. The Minister appointed a conciliator. Both parties participated in conciliation sessions; however, no resolution of the dispute was achieved.

[11] In January 2018, the Employer for the first time asserted that the work performed by its employees qualified as an essential service to the public. As a result, the Employer took the position that before the Union could take any job action, it was necessary that the parties negotiate an essential services agreement.

[12] On or about January 27, 2018, the Employer contracted with a for-profit nursing service "Nurse Next Door" to deliver services typically provided to its residents by Union members.

[13] On February 14, 2018, Mr. McConnell on behalf of the Union, wrote to Ms. Colleen Stenhouse, the Employer's Executive Director to advise her of the Union's intentions to withdraw certain services.[1] This correspondence reads as follows:

> *Dear Colleen:*
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> *This letter is notice of strike action that SEIU-West members employed at Elmwood Residences Group Homes will commence on the 16th of February, 2018 at 6:00 p.m. at Elmwood Group Homes in Saskatoon, Saskatchewan. SEIU-West members employed at Elmwood Residences Group Homes will not provide services to transport or escort residents to, from, or at the following activities:*
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> - *Motor Sport Spectacular* — *16 February 2018*
> - *S0S 5 Pin Bowling* — *17 February 2018*
> - *Motor Sport Spectacular* — *17 February 2018*

[1] Michayluk Affidavit, at para. 27 and Exhibit "L".

- *Swimming at Lakewood Civic Centre* *18 February 2018*
- *Church at Kinsmen Manor* *18 February 2018*
- *Photo Club* *19 February 2018*
- *Art Club at MFC* *20 February 2018*
- *SOS Basketball at MFC* *20 February 2018*
- *SOS Swimming at Harry Bailey Aquatic Centre* *21 February 2018*
- *SOS Soccer at MFC* *21 February 2018*
- *Yoga at MFC* *22 February 2018*
- *SOS Floor Hockey at MFC* *22 February 2018*
- *Blades Game at Sasktel Centre* *23 February 2018*
- *Phoenix Dance at Kinsmen Manor* *23 February 2018*
- *Swimming at Parkridge Centre* *24 February 2018*
- *SOS 5 Pin Bowling* *24 February 2018*
- *Paw Patrol at TCU Place* *24 February 2018*
- *Church at Kismen Manor* *25 February 2018*
- *Blades Game at Sasktel Centre* *25 February 2018*
- *SOS Walk Club* *26 February 2018*
- *Songs and Stories at Kinsmen Manor* *26 February 2018*
- *Last Art Club at MFC* *27 February 2018*
- *SOS Basketball at MFC* *27 February 2018*
- *SOS Swimming at Harry Bailey Aquatic Centre* *28 February 2018*
- *SOS Soccer at MFC* *28 February 2018*
- *Church at St. Mary's Church* *28 February 2018*

Effective at 6:00 p.m. on the 16th of February, 2018, SEIU-West members employed at Elmwood Residences Group Homes will not escort or provide transportation for residents of Elmwood Group homes to or from any resident's place of employment.

SEIU-West members will continue to provide all other services and to work as directed by the Employer. In the event that further withdrawals of services are planned SEIU-West will provide further strike notices. [Emphasis added.]

[14] At the hearing, neither party presented any evidence to indicate the Union had served additional strike notices on the Employer.

RELEVANT STATUTORY PROVISIONS

[15] The provisions of the SEA most relevant on this application read as follows:

6-103(1) *Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*

(2) Without limiting the generality of subsection (1), the board may do all or any of the following:

. . . . .

(d) make an interim order or decision pending the making of a final order or decision.

> . . . . .
>
> ***7-2****(1) This Part applies to every public employer, every union and every employee.*
>
> *(2) This Part prevails if there is any conflict between this Part and:*
>
> *(a) any other Part of this Act;*
> *(b) any other Act, regulation or law; or*
> *(c) any arbitral or other award or decision.*
>
> . . . . . .
> ***7-5*** *Notwithstanding Part VI, no public employer shall engage in a lockout and no union shall engage in a strike unless there is:*
> *(a) an essential services agreement between the parties; or*
> *(b) a decision of the tribunal pursuant to section 7-8 or 7-10.*
>
> . . . . .
>
> ***7-28****(1) It is an unfair labour practice for a public employer or a union to fail or refuse to engage in collective bargaining with a view to concluding an essential services agreement.*
>
> . . . . .
>
> *(4) Part VI applies, with any necessary modification, to an unfair labour practice pursuant to this section.*

APPLICATION FOR INTERIM RELIEF

A. Relevant Legal Principles

[16] In a recent decision involving the same union – *SEIU-West v Variety Place Association Inc.*[2] [*Variety Place*] – this Board enunciated the operative test at paragraph 28:

> t*he test for determining if interim relief should issue was set out by the Board in Hotel Employees Union, Local 206 v. Canadian Income Properties Real Estate Trust [[1999] Sask. LRBR 190; LRB File No.131-99, at p. 194] as follows:*
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> > *The Board is empowered under ss. 5.3 and 42 of the Act to issue interim orders. The general rules relating to the granting of interim relief have been set down in the cases cited above. Generally, we are concerned with determining (1) whether the main application reflects an arguable case under the Act, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result if it is granted. (see Tropical Inn, supra, at 229). This test restates the test set out by the Courts in decisions such as Potash Corporation of Saskatchewan v. Todd et al., [1987] 2 W.W.R. 481 (Sask. C.A.) and by the Board in its subsequent decisions. In our view, the modified test, which we are adopting from the Ontario Labour*

[2] 2017 CanLII 43922, LRB File No. 098-17 (SK LRB)

> *Relations Board's decision in Loeb Highland, supra, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*

[17] In *Variety Place*, the Board further clarified that decisions on interim relief applications decided under *The Trade Union Act* remain relevant under the *SEA*. This is because "there is no difference between the authority granted to the Board to grant interim relief which was found in section 5.3 of *The Trade Union Act* and the authority provided in section 6-103(2)(d) of the *SEA*."[3]

B. Onus

[18] In applications such as this one, the onus rests upon an applicant.[4] As a consequence, an applicant must prove its case on a balance of probabilities, *i.e.* "whether it is more likely than not that an alleged event occurred"[5]. Furthermore, in order to satisfy the 'balance of probabilities' standard of proof, the evidence must be "sufficiently clear, convincing and cogent."[6]

C. Application for Interim Relief

[19] As set out earlier, this Board's jurisprudence identifies two (2) parts to the test for interim relief under the *SEA*. The first part requires the Board to assess whether the main application, in this case the Employer's unfair labour practice application brought pursuant to section 7-25, demonstrates an arguable case. The Board has often stated that this is not a rigorous standard.[7] Rather, it requires an applicant to demonstrate only that it is more likely than not the main application manifests an arguable case.[8]

[20] The second part of the test for interim relief asks whether the balance of convenience favours the issuance of an interim order. This aspect of the inquiry is analogous to the test for injunctive relief utilized by superior courts in the civil context. In *Saskatchewan Joint*

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[3] *Ibid*., at para. 31.
[4] *UNIFOR, Local 609 v Health Services Association of Saskatchewan*, LRB File No. 189-16, 2016 Carswell Sask 597, 2016 CanLII 74279 (SK LRB)
[5] *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, at para.49 *per* Rothstein J.
[6] *Ibid*., at para. 46.
[7] See, especially: *Saskatchewan Government and General Employees' Union v The Government of Saskatchewan*, 2010 CanLII 81339; LRB File No. 189-10 [*SGEU*] (SK LRB)

Board, Retail, Wholesale and Department Store Union v Aaron's Furniture[9] [*Aaron's Furniture*], for example, the Board stated:

> *[26] This factor [i.e. balance of convenience] is similar to the requirement that an applicant for interim relief must show that the labour relations harm in not issuing the interim order outweigh the labour relations harm in issuance of the requested order. At common law, this is generally regarded as the requirement to show irreparable harm if the interim order is not made.*

1. Has the Employer Demonstrated an Arguable Case?

[21] The Union and the Employer part company on the question of whether the Employer's unfair labour practice application demonstrates an arguable case. At the risk of over-simplification, the Employer asserts that the Union committed an unfair labour practice pursuant to subsection 7-28(1). This provision states that it is an unfair labour practice for "a union to fail or refuse to engage in collective bargaining with a view to concluding an essential services agreement".

[22] The Employer submits that it offers an essential public service and invokes *Saskatchewan Federation of Labour et al. v Government of Saskatchewan*[10] [*SFL*] in support this submission. The Union, it follows, must negotiate an essential services agreement with it before the Union can lawfully take strike action as required by subsection 7-3(1) of the *SEA*. Not only have the parties failed to achieve an essential services agreement, no negotiations have yet taken place in an attempt to achieve such an agreement. As a consequence, the Employer contends that the Union has committed an unfair labour practice as defined in subsection 7-28(1).

[23] The Union, on the other hand, disputes the premise that the Employer is providing an essential service to the public. It contends that the Employer only raised the issue of essential services in January 2018, in an attempt to thwart the Union's right to engage in strike action. As a result, since the Employer had not previously asserted that it provided an essential service, and as the Union had followed the statutory process set out in section 6-33 of the *SEA* when impasse is reached, the Board should conclude that the Employer is estopped from now advancing the essential services argument.

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[8] *Ibid*., at para. 31.
[9] 2016 CanLII 1307, 282 CLRBR(2d) 281, LRB File Nos. 265-15 & 268-15 (SK LRB)
[10] 2015 SCC 4, [2015] 1 SCR 245, at paras. 83-84.

[24] Alternatively, the Union submits that this Board lacks jurisdiction to determine whether the Employer is providing "an essential service to the public" as that term is understood under Part VII of the *SEA*. Rather, it contends the only body authorized to make such a determination is an essential services tribunal constituted pursuant to section 7-7.

[25] In assessing whether the Employer has demonstrated an arguable case, it is important to recollect this Board's admonition in *SGEU* as follows:

> *[31] In the first part of the test, the Board is called upon to give consideration to the merits of the main application but because of the nature of an interim application, we do not place too fine a distinction on the relative strengths or weaknesses of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case". [Emphasis added.]*[11]

[26] In spite of the strenuous arguments presented by counsel for the Union, the Board is of the view that the Employer has satisfied its burden on this aspect of the inquiry for the following reasons.

[27] First, on the evidence before us, it cannot be said with assurance that the Employer provides an essential service to the public. This is an issue that should not be decided on this slim record. It requires a more fulsome evidentiary basis, and a more searching inquiry by the Board than is possible on an application for interim relief which by definition, if not practice, is a summary procedure.

[28] Part VII of the *SEA* is new legislation and to date has not been scrutinized or interpreted by this Board. As a result, we should be cautious about summarily dismissing a question that is worthy of more careful scrutiny. The Board acknowledges that if the panel that hears this matter determines the services provided to the Employer's residents may properly be characterized as an essential service, it may lose jurisdiction; however, this will be an issue for that panel to determine.

[29] The Union also advanced an estoppel argument. The Union asserted that because the Employer, in late 2017, had proceeded through the conciliation process set out in section 6-33 of the *SEA* without any indication it offered an essential service, it could not now, at this late stage, advance such a claim. In essence, at law it was estopped from doing so.

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[11] *Ibid*., at para. 31.

[30] The Board acknowledges that there is evidence which might support the Union's estoppel argument; however, it is our view that this question should not be resolved solely on the basis of the affidavit evidence before us. As well, in light of the novelty of the argument respecting the application of Part VII of the *SEA* in these circumstances, the Board considers it more appropriate that this question should also be resolved by the panel hearing the formal unfair labour practice application.

2. Does the Balance of Convenience Support the Granting of Interim Relief?

[31] The Employer asserts that balance of convenience clearly favours it because the harm to its residents could be potentially catastrophic should this Board deny its application for interim relief. This argument is put most starkly at paragraph 100 of the Employer's Brief of Law. It reads as follows:

> *Support and care is crucial to the well-being of the residents. Elmwood is a non-profit organization, and the distress and harm which may be caused to residents as a result of unlawful strike activity cannot be cured or compensated with a monetary award after the fact. The residents rely entirely upon the care and support provided by Elmwood and are not capable of independent living. A withdrawal of care and support poses severe danger to the residents and the public, as the residents are not capable of independent living. Withdrawal of services by the Union risks the residents being forced to live independently, something they are not safe to do.* ***Many residents rely upon Elmwood for every daily and bodily function, and would die without care****. [Emphasis in original.]*

[32] The Union challenges this position. First, it asserts that the strike action which its members are taking is limited, and will in no way imperil any of the residents they serve. Second, the Union emphasizes that there is no direct evidence to support the Employer's assertion the strike is placing the well-being of the residents in any danger. Indeed, counsel for the Union pointed to the Eastveld Affidavit as deposing that the residence was operating as usual.[12] Simply put, the strike is a controlled one.

[33] On the evidence before us, the Board has determined that the balance of convenience favours the Union, and, as a consequence, the Employer's application for interim relief must be dismissed, for the following reasons.

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[12] Eastveld Affidavit, at paras. 10–12.

[34] First, it is important to recognize that in the circumstances of this case, the Union has the right to strike. It has followed the appropriate processes set out in sections 6-32 and 6-33 of the *SEA*. In addition, by following those processes, the Union enjoys the protection of its right to strike found in section 2(*d*) of the *Canadian Charter of Rights and Freedom* as recognized by the Supreme Court of Canada in *SFL*[13]. It follows, therefore, that careful consideration must be given not to impair the Union's exercise of its right to strike absent compelling reasons for doing so.[14]

[35] Second, the strike action undertaken by the Union in the circumstances of this case is very circumscribed. The services which union members are withdrawing mostly pertain to transporting residents to and from recreational activities. It is true that the Union's notification of strike action also indicated its members would not be driving certain residents to their places of employment; however, no evidence was lead to indicate that there were not alternative ways for a resident to get to his or her work.

[36] What is significant for purposes of determining whether interim relief is warranted, in the Board's view, is that the catastrophic consequences predicted by the Employer are not demonstrated on the evidence presented to us. There was no evidence which persuaded us that the Employer's anxieties about the residents' physical needs or well-being being adversely affected by the Union's limited strike action were well founded. Indeed, there was evidence to the contrary, namely, the Union undertook to continue caring for the residents as they had prior to taking this strike action.

[37] Accordingly, for these reasons, the Board is satisfied that the balance of labour relations harm to the Union strongly outweighs the labour relations harm to the Employer were we to issue an interim order staying the Union's strike action, pending the final disposition of the underlying unfair labour practice application. As a result, the Employer's application for interim relief is dismissed.

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[13] *Supra* n. 10.
[14] See: *SFL*, *supra* n. 10, at paras. 79-80. See also: *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation et. al.*, [2000] SLRBD No. 34, at para. 10.

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

DATED at Regina, Saskatchewan, this **2nd** day of **April, 2018**.

LABOUR RELATIONS BOARD

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