Government of Saskatchewan

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Attention: Mr. David Stack Q.C.

Civil Law Division, Ministry of Justice
900 – 1874 Scarth St.
REGINA, SK
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Attention: Ms. Lisa Renner

Dear Sir and Madam:

RE: LRB File No. 067-18

Background:

[1] Mr. Dennis Terry ("Terry"), a former employee of SaskEnergy Incorporated ("SaskEnergy"), filed a complaint with the Director, Employment Standard with respect to a short-term incentive payment ("STI") which he claimed was due to him following the termination of his employment with SaskEnergy. The Director agreed with his claim and issued a wage assessment in his favour against SaskEnergy. SaskEnergy appealed the wage assessment to an Adjudicator pursuant to section 2-75 of *The Saskatchewan Employment Act* (the "*SEA*"). The Adjudicator upheld the wage assessment by his decision dated February 8, 2018. SaskEnergy appealed against the Adjudicator's decision on March 12, 2018 pursuant to section 4-8 of the *SEA*.

[2] The Director of Employment Standards raised a preliminary objection before the Board, arguing that the matter was now moot, as a result of the matter having

been resolved through a settlement with Terry as well as the granting of a general release by Terry in favour of SaskEnergy. The Director argued that the Board should decline to hear the matter. The preliminary application was heard by me, sitting alone pursuant to section 6-95(3) of the *SEA*, on October 11, 2018. At the hearing, the application was found to be moot and Vice-Chairperson Love concluded that there was no live dispute between the parties such that the Board should exercise its discretion to hear the matter notwithstanding that it is moot.

[3] Terry did not attend the hearing of this matter, nor did he make any submissions with respect to the preliminary issue.

Does a dispute exist between the parties?

[4] There is no dispute between Mr. Terry and SaskEnergy related to his termination. That was the original lis and the issue which gave rise to the original complaint to the Director of Employment Standards. By its resolution of the dispute between the parties, SaskEnergy has resolved this original lis which was the rationale for the decision of the Adjudicator. That dispute has now become moot.

[5] SaskEnergy has argued that the dispute is broader than a dispute merely between SaskEnergy and Mr. Terry. It argues that the decision, by the errors which it claims the Adjudicator made, impacts upon all crown corporation employees covered by the Short Term Incentive ("STI") program, and may have impact upon other private sector employers who have similar STI programs.

[6] The Director argues that the decision is not one that requires the Board to exercise its jurisdiction to hear notwithstanding that the original complaint is now settled. The Director argues that the Board should decline to hear the dispute.

Analysis:

[7] In *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.* [2013] 222 C.L.R.B.R. (2nd) 107, 2012 SKCA 131 (CanLII), 358 D.L.R. (4th) 313, the Court of Appeal confirmed that this Board had the right to decline to decide a matter which, for whatever reason, has become moot. The Honourable Madam Justice Jackson, speaking on behalf of a unanimous court said the following:

> *The Board's role is to decide live disputes, not those of no practical significance or those of a merely hypothetical mature, except perhaps in extraordinary circumstances, which is a matter for the Board in the exercise of discretion.*

[8] *Borowski v. Canada (Attorney General)* [1989] 1 SCR 342, 1989 CanLII 123 (SCC) outlines 3 criteria by which the exercise of discretion to hear a moot appeal should be considered. These are"

1. Does and adversarial relationship continue to exist?
2. Is the expenditure of Judicial resources justified?
3. Awareness of the proper law-making function.

[9] In this case there is no longer any adversarial relationship between the parties as the dispute has been resolved. Nor is it a case where other parties have sought to intervene due to any particular impact the decision may have upon them. Nor is it a situation where there are residual issues, or other outstanding decisions which will be impacted by this decision. Accordingly, the first criteria cannot support the exercise of the Board's discretion.

[10] The second criteria also mitigates against the use of scarce Board resources in the determination of a unique fact situation which has been resolved.

SaskEnergy argues that the Board should expend their resources to correct a decision which is wrong in law, a point we will deal with under the third criteria.

[11] As noted above, SaskEnergy takes the position that the decision of the adjudicator was wrong in law and should not be permitted to stand. It argues that the Board's role in appeals on questions of law mitigates towards correction of such errors, which left uncorrected would provide uncertainty in the law. But for the following factors, this may have been a sufficient rationale for the exercise of our discretion to hear and determine the appeal by SaskEnergy.

[12] SaskEnergy argues that it, and other crown corporations, which utilize the STI program as a component of its remuneration package for its employees, will be impacted, going forward, if the decision is left to stand. We do not agree with this concern for several reasons. Firstly, the Adjudicator's decision is constrained by its facts to dealing with the particular STI program under consideration as well as the particular facts involved in Terry's termination. The STI program is also within the full control of either SaskEnergy or the Crown Investments Corporation to amend or modify to avoid any similar decision in the future. Furthermore, any concerns related to the Adjudicator's decision could be addressed by legislative action, if warranted, to avoid any future reference to the Director of Employment Standards in cases like Terry's.

[13] Based upon the criteria set out in Borowski, I do not find that there is any extraordinary circumstances in this case which would justify the hearing of this moot dispute.

Decision and Order:

[14] The Appeal will be dismissed. An appropriate Order will accompany these Reasons.

Yours truly,

Kenneth G. Love, Q.C.
Chairperson