March 28, 2018

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Attention: Mr. Drew Plaxton, Q.C.

MLT Aikins
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1600 – 520 – 3rd Avenue
Calgary, Alberta
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Attention: Ms. M. Jean Torrens

Dear Mr. Plaxton and Ms. Torrens:

Re: LRB File Nos. 171-17 & 232-17 – *United Food and Commercial Workers, Local 649 v Federated Co-operatives Limited*

OVERVIEW

[1] United Food and Commerical Workers, Local 649 [Union] has commenced two (2) unfair practice applications against Federated Co-operatives Limited [FCL] for allegedly creating new out-of-scope positions without consultation with, let alone the consent of, the Union. The first application designated LRB File No. 171 – 17 was filed with this Board on August 24, 2017. The second application designated LRB File No. 232-17 was filed on November 9, 2017.

[2] FCL objected to these applications, in particular the first application, for reasons of delay. FCL relies upon the statutory time period set out in subsection 6-111(3) of *The Saskatchewan Employment Act, SS 2013*, cS-15.1 [*SEA*]. This particular sub-section stipulates that "the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation" [emphasis added].

[3] In addition, FCL relies upon this Board's jurisprudence respecting undue delay generally – a comprehensive review of which can be found in *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060 (SK LRB) [*Hartmier*], at paragraphs 93-120 – to defeat the Union's unfair labour applications.

[4] A hearing on FCL's preliminary objection was held in Saskatoon on January 26, 2018 before a board comprised of Members Maurice Werezak and Laura Sommervill, and myself as Vice-Chairperson. At that hearing, FCL called one (1) witness, Mr. Matthew Boyko. At the conclusion of Mr. Boyko's examination-in-chief, Mr. Plaxton requested an adjournment to prepare his cross-examination, and, in addition, asked the Board to issue a production Order requiring FCL to produce a large quantity of documentation which he asserted was necessary for his preparation.

[5] Rather than make an immediate ruling on Mr. Plaxton's request, the Board directed both counsel to prepare written submissions outlining their positions on the Union's document production application and file them with Board prior to an oral hearing on this application scheduled for February 6, 2018. The Board stipulated that this request for a production Order was limited only to documents relevant to FCL's timeliness objections. A hearing into FCL's preliminary application is now scheduled to continue on April 9 and 10, 2018.

[6] On February 6, 2018, both Mr. Plaxton and Ms. Torrens participated by telephone. At the conclusion of this hearing, the Board reserved its decision.

[7] For the reasons that follow, the Board has concluded the Union's application for production of documents should be allowed in part. As will be apparent, the parameters of the Board's Order are limited as we determined the Union's general request for production to be extremely over-broad.

RELEVANT STATUTORY PROVISIONS

[8] For the purposes of the Union's application for a production Order, the following provisions of the *SEA* are most relevant:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *. . . . . .*
>
> *(b) to require any party to produce documents or things that may be relevant to a matter before it and do so before or during a hearing or proceeding;*
>
> *(c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:*
>
> *. . . . . .*
>
> *(iii) to compel witnesses to produce documents or things[.]*
>
> *. . . . . .*
>
> *(j) to conduct any hearing or proceeding using a means of communication that permits the parties and the board to communicated with each other simultaneously [.]*
>
> *. . . . . .*
>
> *(3) Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.*
>
> *(4) The board shall hear any allegation of an unfair labour practice that is made after the deadline mentioned in subsection (3) if the respondent has consented in writing to waive or extend the deadline.*

RELEVANT LEGAL PRINCIPLES

[9] For purposes of the analysis that follows, the Board wishes to highlight two (2) important authorities which we find to be particularly relevant. First, the Union's application for a production order arose very shortly after the hearing into FCL's preliminary application had commenced. Indeed, Mr. Plaxton raised it at the conclusion of the examination-in-chief of Mr. Boyko, FCL's principal and, presumably, only witness. This reality calls into play this Board's general approach to production applications formally commenced at just such a time. In *SEIU-West v Saskatchewan Association of Health Organizations*, 2012 CanLII 18139, 210 CLRBR (2d) 229 (SK LRB) [*SAHO*], the Board admirably summarized the governing principles as follows:

> ***[41]*** *. . .In our opinion, the right of the applicant…to go fishing for documents began to fade with the calling of their respective witnesses and the conclusion of the evidentiary portions of their respective cases. The practicality of this conclusion is apparent when one considers that there is no procedural obligation on a respondent to call any witnesses following the conclusion of the evidentiary portion of an applicant's case. Secondly, the right of the applicant…to cross-examine and to seek production of documents arising out of such examination is unfettered. Essentially, what fades and then expires when a party closes the evidentiary portion of their case, is the fishing season, the period of time when the parties have the right to seek broad-spectrum production of documents (i.e. the kind of production that may have been available through the board's pre-hearing procedures or event at the outset of the hearing)…*
>
> ***[42]*** *For purposes of clarity, we do not wish to imply that a party cannot seek production of documents once a hearing has commenced or after they have closed their respective cases. To the contrary, all parties clearly have the right to seek (and even tender) documentary evidence through someone else's witness either in support of an allegation under the Act or for the purpose of attacking the defense of an opposing party or the credibility of a witness. <u>However, for the most part, once a hearing has commenced and certainly once a party has closed the evidentiary portion of their case fishing season is over. The onus is on the party seeking a broad-spectrum production of documents after a hearing has commenced to explain their delay in seeking such documents</u>. Certainly once a party has closed the evidentiary portion of their case, extraordinary justification is required to do so. [Emphasis added; citation omitted.]*

[10] Second, when deciding applications for the production of documents, this Board has consistently applied the six-fold criteria identified by the Canadian Industrial Relations Board in *Air Canada Pilots Association v Air Canada et al.*, [1999] CIRBD No. 3 [*Air Canada*]. These criteria provide as follows:

> 1. *Requests for production are not automatic and must be assess in each case;*
> 2. *The information requested must be arguably relevant to the issue to be decided;*
> 3. *The request must be sufficiently particularized so that the person on whom it is served can readily determine the nature of the request, the documents sought, the relevant time frame and the content;*
> 4. *The production must not be in the nature of a fishing expedition; that is, the production must assist a complainant in uncovering something to support its existing case;*
> 5. *The applicant must demonstrate a probative nexus between its positions in the dispute and the material being requested;*

> 6. *The prejudicial aspect of introducing the evidence must not outweigh the probative value of the evidence itself, regardless of any possible "confidential" aspect of the document.*

[11] This analytical framework for deciding documentary production applications has been endorsed by the Queen's Bench as having "logical appeal" and illustrating "some of the concepts and principles that ought to be considered" when this Board is called upon to consider a document production application. See: *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers (United Brotherhood of Carpenters and Joiners of America, Local 1985*, 2011 SKQB 380, 210 CLRBR (2d) 35, 378 SR 82, at paragraph 144.

[12] In this application, principles flowing from these two (2) authorities persuade us that while the Union may bring an application for document production at this early stage of the proceeding, its' application must be closely scrutinized. First, the appropriate scope of the Union's request for the production of document must be ascertained with careful precision. In other words, it important that the Board be attentive to the particular issues at play, the pertinent time-frame of the dispute in question, and what documents would appear relevant to those circumstances. See especially: *AECOM Production Services Ltd. (Re)*, [2017] SLRBD No. 36, 2017 CanLII 72972 (SK LRB) [*AECOM*], at paragraphs 26-28.

[13] Second**,** while ascertaining the appropriate temporal parameters of an applicant's request for document production, it is important for this Board to ensure that our Order cannot be characterized as over-broad. Our concern may be assuaged somewhat by adhering to Factors #4 and #5 set out in *Air Canada*, namely "the production must not be in the nature of a fishing expedition", and there must be "a probative nexus" between the Union's position respecting FCL's preliminary objection and the documents the production of which it is seeking.

[14] These two (2) general propositions guided us as we assessed the Union's request for production in this case.

ANALYSIS AND DECISION

1. Assessing the Scope of the Union's Application

[15] The Union's application for a production Order in this matter is on its face extremely wide-ranging, to put it mildly. Without reproducing it completely here, suffice it to say that it is wide-ranging not only in relation to the time-frame to which it pertains, but also the documentation in respect of which it asks this Board to order production.

[16] In order to assess the merits of the Union's request, it is first necessary to identify the central issues on this application. From the Board's perspective, the issues are narrow. First, should we exercise our discretion under subsection 6-111(4) of the *SEA* to permit the Union's first unfair labour practice application to proceed in spite of the fact that it was filed outside the 90 day time limit prescribed in subsection 6-111(3)? It will be remembered that that this particular application was filed with the Board on August 24, 2017 which in the context of this application means that any job postings pre-

dating May 24, 2017 may not form the basis of an unfair labour practice claim, unless this Board exercises its' statutorily authorized discretion.

[17] However, Mr. Plaxton asserts, and the Board acknowledges, that apart from the unfair labour practice applications, it may also be possible to challenge FCL's actions on bases other than unfair labour practices. These challenges, he submits, may proceed regardless of our decision respecting the application of subsection 6-111(3) of the *SEA*, unless this Board determines they should not, based upon our jurisprudence respecting delay in commencing applications, generally. The Board observes that similar considerations are applicable in both instances, the principal difference being the 90 day time limitation found in subsection 6-111(3). See, in particular: *Hartmier*, *supra*, at paragraph 120.

2. Should a Production Order be issued, and If so, on what terms?

[18] With the relevant issues clarified, it is now necessary to assess whether this Board should direct FCL to produce documents to assist Mr. Plaxton in presenting the Union's case on this preliminary application. Not surprisingly, the parties had diametrically opposed views on the propriety of such an order.

[19] At the risk of over-simplification, their respective positions are outlined below.

2.1 The Union's Position

[20] The Union began by asserting that despite its' repeated requests for document production, FCL had only delivered "one piece of paper" which was admitted into evidence at the hearing and marked as Exhibit E-8. However, Mr. Plaxton submits that far more documentation is needed in order for him to prepare adequately his cross-examination of Mr. Boyko. In its' formal notice, the Union is looking for particulars about and copies of postings of, some jobs dating back to 2007 (see especially: paragraph A.5 of the Request for Orders for Disclosure and Production of Documents and Things and Particulars dated January 18, 2018). He asserts that these documents are needed sooner rather than later to avoid in his words "trial by ambush or trial by avalanche". In support of his position advocating for a broad spectrum order for document production, Mr. Plaxton relied upon a number of authorities, including *AECOM*, *supra*; *EllisDon Corporation (Re)*, [2014] SLRBD No. 41; *United Food and Commercial Workers, Local 1400 v PA Bottlers Ltd.*, [1997] SLRBR 249 [*PA Bottlers*].

2.2 FCL's Position

[20] FCL's position is that no production order is necessary. It contends that because Mr. Plaxton was present and heard Mr. Boyko's examination-in-chief, he knows the case he has to meet and has enough information to prepare his cross-examination. Ms. Torrens reminded the Board that the only issue at this stage of the proceedings is the timeliness of the Union's applications. She submitted that to FCL's knowledge the Union has been collecting job postings since approximately January 2017 and, as a consequence, is well-informed about when postings of contested positions were made. In support of FCL's position on this application, Ms. Torrens relied upon a number of

authorities, including *SAHO*, *supra*; *SEIU-West v Atria Management Canada ULC*, 2016 CanLII 74281, 281 CLRBR (2d) 212 (SK LRB), and *PA Bottlers*, *supra*.

2.3 Decision of the Board

[21] The Board has determined that a limited order respecting the production of relevant documentation is appropriate in these circumstances, for the following reasons.

[22] First, as the only issue pertinent to this application is when the Union knew or ought to have known that FCL was posting job notices for out-of-scope positions, this narrows considerably the documentation which is relevant, as well as the applicable time frame.

[23] Second, the job postings relevant to the timeliness issue relate to out-of-scope positions, as it is the creation of these position about which the Union objects. The fact that the Union, itself, may have been collecting copies of those positions since January 2017, as asserted by FCL, does not mean that FCL is relieved from disclosing relevant documentation to the Union.

[24] Third, subsection 6-111(3) expressly contemplates a 90 day time frame. For purposes of the Union's first unfair labour practice applications this means that statutory time-period commence on or about May 24, 2017. However, as the Union is asserting that its' applications are also based on other provisions of the *SEA*, to which statutory time limits do not apply, the parties are thrown back to the principles outlined in *Hartmier*, *supra*.

[25] While there is no clear time limit attached to the application of the *Hartmier* principles, the Board has determined that August 24, 2016 – one year (1) preceding the date the Union's first application was commenced – is an appropriate cut-off date for disclosure purposes. The Board acknowledges that this particular date is an arbitrary one; however, the Board's case law indicates that if an application is filed more than (1) year following the events which gave rise to it, the applicant must provide strong reasons to explain this delay. For purposes of this application, the Board believes this time-frame will afford Mr. Plaxton ample disclosure in order to defend against FCL's preliminary application.

ORDER

[26] For purposes of FCL's preliminary application in relation to LRB File No. 171-17 – the Union's first unfair labour practice application – the Board makes the following Order pursuant to clause 6-111(1)(b) of the *SEA*:

1. **That** FCL shall produce a listing of all "new positions" FCL asserts are out-of-scope positions created within the geographic area of the certification order from August 24, 2016 to August 24, 2017; particulars of these positions, and the date each of these positions was posted.

2. **That** FCL shall produce copies of the job postings in relation to those positions.

3. **That** in all other aspects, the Union's two (2) applications entitled "Request for Orders for Disclosure and Production of Documents and Things and Particulars", each dated January 18, 2018 are deferred.

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

Yours very truly,

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