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Dear Ms. Jensen, Ms. Johnson, Mr. Longo and Ms. Schatz:

Re: LRB Files No. 092-10, 099-10 and 105-10; Unfair Labour Practice Applications SEIU-West, Saskatchewan Government and General Employees' Union and Canadian Union of Public Employees v Saskatchewan Association of Health Organizations and Saskatchewan Health Authority

Background:

[1] This matter commenced in 2010, when SEIU-West, Saskatchewan Government and General Employees' Union ["SGEU"] and Canadian Union of Public Employees ["CUPE"] filed unfair labour practice applications against Saskatchewan Association of Health Organizations (SAHO) and a number of regional health authorities[1] ["Respondents"]. After a hearing lasting more than 40 days, the Board issued a decision respecting those applications on April 10, 2014[2]. That decision was considered by the Court of Queen's Bench on judicial review[3]. An appeal was taken from that decision

[1] Pursuant to sections 3-2 and 3-4 of *The Provincial Health Authority Act*, this matter now continues against the Saskatchewan Health Authority in place of the regional health authorities. The application filed by SGEU also named the Government of Saskatchewan as a respondent but they are not a party to this application.
[2] *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*, 2014 CanLII 17405 (SK LRB).
[3] *SEIU-West v Saskatchewan Association of Health Organizations*, 2015 SKQB 222 (CanLII).

to the Saskatchewan Court of Appeal, which issued its decision on December 12, 2016[4]. In that decision, the Court of Appeal remitted two issues to the Board for reconsideration:

- whether the Respondents had engaged in direct bargaining with employees, contrary to s. 11(1)(c) of *The Trade Union Act*; and
- remedies for the breach of s. 11(1)(a) of *The Trade Union Act* relating to misrepresentations about retroactive pay.[5]

[2] The parties have now come to the Board on a preliminary issue with respect to how the reconsideration ordered by the Court of Appeal is to proceed. In particular, the parties ask the Board to determine whether new evidence will be admissible during that hearing. This preliminary application was heard on July 15, 2019 by Chairperson Susan Amrud and Board members Ken Ahl and Bert Ottenson.

[3] The Unions propose the following process:

a. The parties identify the portions of the transcript and exhibits from the original Board hearing and provide this information to the other parties and the Board by a set date.
b. All parties have an opportunity to identify any further excerpts of the transcripts or documents required, within three weeks of receiving the other information from all parties.
c. The panel of the Board hearing the matters remitted to the Board review these exhibits and transcript prior to the reconsideration hearing.
d. At the reconsideration hearing, all parties will have the opportunity to call *viva voce* evidence and file new documents on the understanding that any such information or evidence would not duplicate evidence contained in the transcript and exhibits of the previous proceedings, as far as reasonably possible. It is anticipated such new evidence, if any, would be limited.
e. The Board would hear oral and written argument in the normal course.

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[4] *Cypress (Regional Health Authority) v Service Employees' International Union-West*, 2016 SKCA 161 (CanLII). Leave to appeal to the Supreme Court of Canada was denied on December 12, 2016: *SEIU-West, et al. v. Cypress Regional Health Authority, et al.*, 2017 CanLII 32938 (SCC).
[5] At para 132.

[4] The Respondents take the position that no new evidence is required.

Argument on behalf of SEIU-West:

[5] SEIU-West is of the view that it would be a breach of procedural fairness and established principles of administrative law to limit the parties to a process of reviewing the transcript, where, as here, all parties do not consent to proceeding in that manner.

[6] SEIU-West argues that the following passage in *Chandler v Alberta Association of Architects*[6] applies to this matter:

> *26 In this proceeding the Board conducted a valid hearing until it came to dispose of the matter. It then rendered a decision which is a nullity. It failed to consider disposition on a proper basis and should be entitled to do so. The Court of Appeal so held.*
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> *27 On the continuation of the Board's original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulation. This will enable the appellants to address, frontally, the issue as to what recommendations, if any, the Board ought to make.*

[7] It argues that the ability to present evidence at the reconsideration hearing is essential, given that it will be heard by a different panel of the Board than that which conducted the original hearing.[7]

[8] SEIU-West argues that the situation in this matter is different than what occurred in *Retail, Wholesale and Department Store Union, Local 568 v Saskatchewan Association of Health Organizations Inc.*[8] where the Board declined to hear further evidence following judicial review. In that matter, the Court did not set aside the Board's decision as unreasonable. Instead, the Court told the Board to finish its decision-making process. Therefore, no further evidence was required or allowed. In this matter, the Board's decision was not sent back for supplemental reasons; the decision

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[6] [1989] 2 SCR 848, 1989 CanLII 41 (SCC).
[7] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Saskatoon Co-operative Association Limited*, 2017 CanLII 20059 (SK LRB); *Floris v Nova Scotia (Director of Livestock Services)*, [1987] NSJ No 106 (QL), 77 NSR (2d) 419 (NSTD).
[8] 2016 CanLII 30539 (SK LRB).

on these two issues was set aside and the Board was ordered to decide the issues afresh in light of the law as the Court of Appeal explained it.

Argument on behalf of SGEU:

[9] SGEU argues that the Court of Appeal quashed the portions of the Board's original decision that relate to the issues of direct bargaining and remedies for the breach of clause 11(1)(a) of *The Trade Union Act* relating to misrepresentations about retroactive pay. The quashing of the decision on those points means that the Board's findings of fact and/or credibility in that decision are not binding on the panel that will conduct the reconsideration hearing:

> *The effect of a judgment quashing an administrative tribunal's decision is "to extinguish the decision being set aside for all purposes": Burton v Canada (Minister of Citizenship and Immigration), 2014 FC 910 (CanLII) at para. 30. From this it follows that the doctrines of stare decisis, res judicata and issue estoppel do not operate at any new hearing. Nor are the first tribunal's findings of fact or respecting credibility binding on any subsequent panel constituted to rehear the matter. See especially: Rodriguez, supra, at para. 4, and Lee v Canada (Minster of Citizenship and Immigration), 2003 FCT 743 (CanLII), at para. 11.*[9]

[10] SGEU also argues that the well-settled principle of law[10] that requires those who decide a case to have heard the case, applies here, and requires the Board to hold that further evidence is admissible. Especially since two of the three original panel members are no longer available to conduct the reconsideration hearing, a hearing *de novo* is required.

[11] Unless the Court of Appeal directs otherwise, the Board can decide how it will conduct a reconsideration hearing. The Board has full discretion to set its procedure in this matter since the Court did not provide any direction on that issue.

Argument on behalf of CUPE:

[12] CUPE filed a letter with the Board indicating that it supports the written submissions of SEIU-West and SGEU. At the hearing it asked the Board to consider, in particular, the following sentence

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[9] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Saskatoon Co-operative Association Limited*, *supra*, at para 59.
[10] For example, *Bender v Schmeiser*, 2010 SKQB 316.

in paragraph 123 of the Court of Appeal's decision: "This omission on the part of the Board leads me to conclude that the appropriate way to proceed is by setting aside its decision insofar as it concerns direct bargaining and by remitting that issue for reconsideration in light of the relevant evidence and the governing legal principles as explained in this decision". CUPE's view is that the reference in that sentence to "the relevant evidence" does not limit the Board to a consideration of the evidence admitted at the original hearing; "as explained in this decision" refers back only to "the governing legal principles".

Argument on behalf of the Respondents:

[13] The Respondents argue that the Court of Appeal made it clear that new evidence is not required with respect to either issue remitted to the Board for reconsideration. With respect to the direct bargaining issue, the Court did not find that the evidence tendered at the original hearing was deficient or needed to be supplemented.

[14] With respect to the remedies for breach of s. 11(1)(a) issue, it says, the Court expressly chose to defer to the Board's approach regarding the use of evidence:

> *It is also appropriate to defer to the Board's decision at least as it concerns the application of s. 11(1)(a) to the facts of this case. The record was extensive and involved. The Board had the advantage of hearing the testimony of witnesses first-hand and it brought its expertise to bear on the evidence as a whole. A differently-constituted Board or a judge might, hypothetically, have come to a different result. But, as noted above, that is not the issue on a review for reasonableness. The question is whether the Board's decision fell within a range of possible, acceptable outcomes which were defensible in respect of the facts and law. That, in my opinion, is the case here insofar as s. 11(1)(a) of the Act is concerned.* [11]

[15] The Respondents argue that, since the Court of Appeal did not direct the Board to consider new evidence, it cannot consider new evidence[12]. Clear wording is required before the Board has authority to hear a matter *de novo*[13]. The Unions have long ago closed their cases; procedural

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[11] *Cypress (Regional Health Authority) v Service Employees' International Union-West*, *supra*, at para 105.
[12] *Bernard v Canada (Attorney General),* 2012 FCA 92 (CanLII), appeal dismissed [2014] 1 SCR 227, 2014 SCC 13 (CanLII); *Retail, Wholesale and Department Store Union, Local 568 v. Saskatchewan Association of Health Organizations Inc.*, *supra*.
[13] *Retail, Wholesale and Department Store Union, Local 568 v. Saskatchewan Association of Health Organizations Inc*, *supra,* at para 18.

practicality and fairness provides that they should not be allowed to have two opportunities to tender evidence to support their positions. They have not explained what issues would be better resolved with the introduction of new evidence. It is an abuse of process for the Unions to apply at this late stage for leave to introduce new evidence.

Analysis and Decision:

[16] The jurisdiction of the Board to reconsider this matter derives from the Judgment of the Court of Appeal, which includes the following direction with respect to the matters returned to the Board:

> *The determinations made in the judgment appealed from concerning Section 11(1)(c) of The Trade Union Act and the issue of direct bargaining and the question of remedies for the breach of Section 11(1)(a) of The Trade Union Act relating to misrepresentations about retroactive pay be both remitted to the Saskatchewan Labour Relations Board for reconsideration in light of the law as explained in the decision of the Court.*

[17] In its decision, the Court provided the following elaboration with respect to the direct bargaining issue:

> *[115] As explained earlier, the reasonableness standard of review is deferential. Nonetheless, it is apparent that the Board's decision in relation to the direct bargaining issue must be set aside.*
>
> *. . .*
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> *[122] It is apparent that the Board's conceptualization of the relative roles of employers and unions in the collective bargaining process and its assessment of the impact of the 2008 amendment on the issue of direct bargaining led it to conclude that the only fact bearing materially on the direct bargaining issue was whether SAHO had put its proposals on the bargaining table before communicating with employees. This, in turn, led the Board to disregard evidence that had been tendered in relation to matters such as the stated objectives of SAHO's communication strategy, the timing of SAHO's communications relative to what was happening at the bargaining table, the specific content of SAHO's communications, the nature or format of the communications (posters, letters, tent-cards and so forth), and the intensity of the communication campaign. All of this needed to be considered against the background fact that both sides were keenly aware of the importance of winning the support of the taxpaying public for their positions and made competing efforts to do just that. In short, the Board did not fully complete the assessment of the problem before it.*
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> *[123] This omission on the part of the Board leads me to conclude that the appropriate way to proceed is by setting aside its decision insofar as it concerns direct bargaining and by remitting that issue for reconsideration in light of the relevant evidence and the governing legal principles as explained in this decision. In so doing, I do not presume to suggest how the*

> *Board might resolve the s. 11(1)(c) issue. This, of course, is the same bottom-line result that the Chambers judge arrived at for his own reasons.*

[18] With respect to the question of remedies for the breach of clause 11(1)(a) of *The Trade Union Act*, the decision stated:

> *[130] All things considered, the Chambers judge correctly decided that it was appropriate to set aside the Board's remedial order and refer the question of an appropriate remedy for the breach of s. 11(1)(a) back to the Board for reconsideration.*

[19] In summary, the Court stated:

> *[132] By way of a practical end result, the direct bargaining issue and the question of remedies for the breach of s. 11(1)(a) relating to misrepresentations about retroactive pay are both remitted to the Board for reconsideration in light of the law as explained in this decision.*

[20] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Saskatoon Co-operative Association Limited*, the direction from the Court of Appeal to the Board was clear: "The Board's decision is quashed. There will have to be a new hearing"[14]. The Board interpreted the effect of this direction on the conduct of a rehearing as follows:

> *[59] The effect of a judgment quashing an administrative tribunal's decision is "to extinguish the decision being set aside for all purposes": Burton v Canada (Minister of Citizenship and Immigration), 2014 FC 910 (CanLII) at para. 30. From this it follows that the doctrines of stare decisis, res judicata and issue estoppel do not operate at any new hearing. Nor are the first tribunal's findings of fact or respecting credibility binding on any subsequent panel constituted to rehear the matter. See especially: Rodriguez, supra, at para. 4, and Lee v Canada (Minster of Citizenship and Immigration), 2003 FCT 743 (CanLII), at para. 11.*
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> *[60] Furthermore, in some cases, it may even amount to a breach of the rules of natural justice were a rehearing not to proceed by way of a de novo hearing which would allow the parties to lead fresh evidence before a differently constituted panel. See, e.g.: Floris, supra, at p. 9 (NSJ).*
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> *[61] As a result, guided by the Court of Appeal's clear and firm direction that the Board's original decision in this matter must be quashed and a new hearing convened, as well as the general understanding about the effect of such an order reflected in jurisprudence from other courts, this Board is satisfied that the re-hearing is this matter must proceed as a hearing de novo. This means that all the evidence will be received by way of viva voce testimony. What*

[14] *Saskatoon Co-operative Association Limited v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2016 SKCA 94 (CanLII) at para 41.

> *utility, if any, the transcript of the previous hearing may have in the new hearing will be decided at that hearing.*[15]

[21] The direction in this matter is not as clear and firm as in that decision, however, the only reasonable interpretation is that it is to the same effect.

[22] In *Canada (Citizenship and Immigration) v. Yansane*[16], the Federal Court of Appeal emphasized that "only instructions explicitly stated in the judgment bind the subsequent decision-maker; otherwise, the comments and recommendations made by the Court in its reasons would have to be considered mere *obiters*, and the decision-maker would be advised to consider them but not required to follow them". The Court concluded as follows:

> *The administrative decision-maker to whom the case is returned must always comply with the reasons and findings of the judgment allowing the judicial review, as well as with the directions and instructions explicitly stated by the Federal Court in its judgment.*[17]

[23] In this matter, the Judgment of the Court of Appeal did not explicitly address the issue of the procedure to be followed by the Board on the rehearing. The comments in its decision must be interpreted in light of that fact.

[24] The Respondents referred the Board to the following excerpt from *Bernard v Canada (Attorney General), supra*, which, it says, stands for the principle that, because the Court of Appeal did not authorize the Board to consider new evidence on the rehearing, it cannot consider new evidence:

> *The present case, however, is somewhat different, in that the decision under review was made pursuant to a Court-ordered re-determination of the Board's July decision. Hence, the scope of the Board's decision-making authority in that proceeding was defined by the Court's order in Bernard I. That order limited the Board to determining how much home contact information the*

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[15] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Saskatoon Co-operative Association Limited*, *supra*.
[16] 2017 FCA 48 (CanLII), at para 19.
[17] *Supra*, at para 27.

> *CRA may disclose to PIPSC without infringing Ms Bernard's rights under the Privacy Act. It did not authorize the Board to reconsider its February decision in light of Ms Bernard's Charter rights.*[18]

[25] The Board does not find that decision applicable here, as the Federal Court of Appeal was commenting on the scope of the review undertaken by the Public Service Labour Relations Board, not the procedure followed on undertaking the review.

[26] The Board agrees with SEIU-West that the direction provided to the Board in this matter is significantly different from the direction provided to the Board in *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v K-Bro Linens System Inc.*[19] In that case, the Court of Queen's Bench did not remit the issue in question to the Board for reconsideration; neither did it set aside the Board's findings. Instead it provided the following directions:

> *[72] In the result, I find that the Board's conclusions in relation to the issues raised by the applicants – with one exception – were justified, transparent and intelligible, and were possible, acceptable outcomes which are defensible in respect of the facts and law.*
>
> *[73] The one exception is the Board's failure to explain how it dealt with the issue of whether K-Bro was a common and/or related employer with any of the other respondents. Given that this was a central issue on the application,* ***I am referring this matter back to the Board to enable it to make that decision****. (emphasis added)*

[27] In this matter the Court of Appeal did not refer the two issues back to enable the Board to make a decision; it remitted them for reconsideration. The Court of Appeal did not say that the parties cannot put in new evidence. It stated, in paragraph 123 that the Board is to consider all relevant evidence. CUPE's interpretation of paragraph 123 is both grammatically correct (since there is no comma following the word "principles") and consistent with the lack of reference to evidence in the Court of Appeal's Judgment. It is the Judgment that is definitive.

[28] Given the Board's findings with respect to the effect of the Court of Appeal's direction, the argument that the Unions, having closed their cases years ago, cannot now ask to reopen them, does not apply. The Court has determined that two issues must be re-heard. There is no abuse of process.

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[18] At para 31.
[19] 2015 SKQB 300 (CanLII).

[29] Given the Court of Appeal's Judgment, the parties are entitled to a *de novo* hearing. During the original hearing the Board heard from 18 witnesses and admitted a significant number of exhibits (many of which consisted of binders of information). In the interests of saving time and resources for the Board and the parties, the Board encourages the parties to rely on the transcripts and exhibits from the original hearing as much as possible. A process akin to that suggested by the Unions would provide for an efficient consideration and determination of this matter. The panel conducting the reconsideration hearing will determine what evidence is relevant to its determination of the two issues remitted by the Court of Appeal to the Board.

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

Yours truly,

Susan C. Amrud, Q.C., Chairperson
Labour Relations Board