UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7656, APPLICANTS v MOSAIC POTASH COLONSAY ULC and NUTRIEN LTD., RESPONDENTS

LRB File Nos: 193-18 & 194-18; April 16, 2019
Vice-Chairperson, Barbara Mysko; Board Members: Phil Polsom and Laura Sommervill

Counsel for the Applicants United Steel:	Heather M. Jensen
Counsel for the Respondent Mosaic:	Eileen V. Libby, Q.C.
Counsel for the Respondent Nutrien:	Kevin C. Wilson, Q.C.

Practice and Procedure – Production of documents – Employer seeks pre-hearing production of documents – Board considers application pursuant to section 6-111(1) of *The Saskatchewan Employment Act* for an Order directing production of documents or things – Board determines that, by ordering production of documents, it would pre-determine the merits of the Unfair Labour Practice Application – Board declines to make requested Order.

Practice and Procedure – Intervenor status – Employer applies for intervenor standing in an Unfair Labour Practice Application commenced by the Union against another Employer – Board reviews previous decisions respecting applications for intervenor standing – Direct interest, exceptional, and public law intervenor standing denied.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On September 10, 2018, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (Local 7656) (the "Union") brought separate Unfair Labour Practice Applications against Mosaic Potash Colonsay ULC ("Mosaic" and "Employer") and Nutrien Ltd. (Rocanville Division) ("Nutrien" and "Employer"). Each Application alleges an unfair labour practice (or a contravention of the Act) within the meaning of clauses 6-62(1)(b) and section 6-62(1)(d) of *The Saskatchewan Employment Act*.

[2] Both Mosaic and Nutrien filed Replies to the Unfair Labour Practice Applications, dated October 4, 2018 and October 9, 2018, respectively, in which they deny that they committed unfair labour practices. The Union wrote to the Board requesting that its Applications be scheduled for a hearing. In reply, the Employers sought a preliminary hearing on their requests for particulars and the question of standing in the main hearing of the Application against Mosaic. The preliminary hearing was held on March 6, 2019. The parties made argument and filed Briefs of Law, which the Board has reviewed and found helpful.

Preliminary Matter:

[3] At the outset of the hearing, counsel for the Union noted that it had made a clerical error in its description of the Applicant Union when drafting the Unfair Labour Practice Application against Nutrien. According to counsel, the proper name of the Applicant is the international Union, not the Local. Nutrien takes issue with this, suggesting that the wrong Local is listed, but that the correct Local should be included, and not the international Union.

[4] Although the Board has the authority to amend any defect or error in any proceedings, it recognizes that the Employer has formulated its reply in relation to the original style of cause. Therefore, the Board has decided to defer the matter to the main hearing to give the parties the opportunity to come to an agreement, formally apply to amend their pleadings and/or make submissions.

Facts:

[5] The Requests for Particulars must be considered in the context of the Unfair Labour Practice Applications brought against the Employers. Both of these Applications are dated September 10, 2018.

[6] In its Applications, the Union states that it has joined a council of union locals representing employees in the potash industry in Saskatchewan. It says that it served notice on Mosaic and Nutrien to bargain revisions to the collective agreements, on January 19, 2018 and April 12, 2018, respectively. According to the Union, it selected a committee of individuals to represent its members for purposes of collective bargaining, including presidents or designates from other potash mines in Saskatchewan. The Union says that each and all of the individuals are members of its bargaining committee.

[7] The Union says that the Employers have insisted on bargaining only with their own employees or staff representatives employed by the Union, and have refused to bargain with other union bargaining committee members chosen by the Union, including individuals not employed by the respective Employer and, where relevant, individuals who belong to a different union.

[8] The Union alleges that the Employers have imposed an improper precondition on bargaining, and in so doing, have demonstrated a failure to make every reasonable effort to conclude a collective agreement. Furthermore, the Employers have interfered in the internal administration of the Union by attempting to designate or choose the union's bargaining representatives.

[9] On September 20, 2018, Mosaic wrote to the Union as follows:

> *We kindly ask that you provide on behalf of the applicant [United Steelworkers] the following particulars:*
>
> 1. *Is the application being brought by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union or by United Steelworkers Local 7656?*
>
> 2. *Are all the individuals listed in paragraph 3(h) of the unfair labour practice application properly constituted members of the bargaining committee in accordance with the United Steelworkers Local 7656's bylaws? If so, please provide a copy of the bylaws outlining bargaining committee memberships and selection requirements and all documents including, but not limited to, minutes of Union meetings confirming that the members are properly constituted pursuant to the bylaws.*

[10] Nutrien made a similar request by letter dated September 25, 2018, as follows:

> *In order to be in a position to reply to the application, please advise whether all the individuals listed in paragraph 3(i) of the unfair labour practice application are properly constituted members of the bargaining committee in accordance with the union's bylaws or similar documents. If so, please provide a copy of the bylaws or similar documents outlining bargaining committee memberships and selection requirements and all documents including, but not limited to, minutes of Union meetings confirming that the members are properly constituted pursuant to the bylaws or similar documents.*

[11] The Union replied to both Employers on September 28, 2018. Its reply to Mosaic reads as follows:

> *The application is brought by International Union.*
>
> *[…]*

> *The Union views the employer's request for the particulars to be a further improper interference with the administration of a trade union, and is a continuation of the conduct the union is complaining of as an unfair labour practice in this application. The union further takes the position that enforcement of the union's constitution and bylaws are internal to the union and furthermore a matter over which the Labour Relations Board does not have jurisdiction, except to the extent of ensuring that the application of the principles of natural justice in a dispute between the employee and the union relating to matters in the constitution of the union. There is no basis in the Act for the employer to have any interest in enforcing the constitution or bylaws of the union and indeed, it is the union's position it is an unfair labour practice for the employer to interfere in union administration in this manner.*

[12] The Union's reply to Nutrien is almost identical. Shortly following the Union's correspondence, the Employers filed their Replies to the Union's Unfair Labour Practice Applications.

[13] In their Replies, the Employers assert that the Union gave notice to bargain with "observers" in attendance during bargaining, a matter of some concern. According to the Employers, not only are the "observors" not members of the Union's Local, but they may in some cases be employed by the competing company. This raises questions about sensitive and confidential information being made accessible to the competing Employer. The Employers do not acknowledge or agree that the competitors' employees, or employees from other mines in general, are properly constituted members of the bargaining committee.

[14] Under the circumstances, the Employers have requested that the Unfair Labour Practice Application against Mosaic proceed first, and that Nutrien be granted standing to intervene in the hearing for the purpose of cross examining witness and making argument. Nutrien requests that its case be held in abeyance pending the outcome of the Mosaic case.

Relevant Statutory Provisions:

[15] The following statutory provisions are applicable to the preliminary matters:

> ***Unfair labour practices – employers***
> *6‑62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
> *. . .*
> *(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;*

. . .

(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;

Powers re hearings and proceedings:

6‑111(1) With respect to any matter before it, the board has the power:
(a) to require any party to provide particulars before or during a hearing or proceeding;
(b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing or proceeding;

. . .

General powers and duties of board
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:
(a) conduct any investigation, inquiry or hearing that the board considers appropriate;
(b) make orders requiring compliance with:
(i) this Part;
(ii) any regulations made pursuant to this Part; or
(iii) any board decision respecting any matter before the board;
(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act;

Proceedings not invalidated by irregularities
6‑112(1) A technical irregularity does not invalidate a proceeding before or by the board.
(2) At any stage of its proceedings, the board may allow a party to amend the party's application, reply, intervention or other process in any manner and on any terms that the board considers just, and all necessary amendments must be made for the purpose of determining the real questions in dispute in the proceedings.
(3) At any time and on any terms that the board considers just, the board may amend any defect or error in any proceedings, and all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings.
(4) Without limiting the generality of subsections (2) and (3), in any proceedings before it, the board may, on any terms that it considers just, order that the proceedings be amended:
(a) by adding as a party to the proceedings any person that is not, but in the opinion of the board ought to be, a party to the proceedings;
(b) by striking out the name of a person improperly made a party to the proceedings;
(c) by substituting the name of a person that in the opinion of the board ought to be a party to the proceedings for the name of a person improperly made a party to the proceedings; or

> *(d) by correcting the name of a person that is incorrectly set out in the proceedings.*

Argument of the Parties:

[16] There are two preliminary matters: 1) the requests for particulars; and 2) the application for standing. On both matters, the Employers' written arguments are almost identical to each other.

[17] The first matter relates to the requests for particulars. According to the Employers, a primary issue is whether the disputed individuals are "representatives of a union" for the purposes of bargaining. If it is proven that the individuals are not members of the Union's bargaining committee then the Unfair Labour Practice complaint must fail. In effect, the Unfair Labour Practice Application "will be impacted" by the requested particulars based on "the specific authority and standing of the contested individuals at the bargaining table".

[18] In support of this argument, the Employers rely on section 6-62(1)(d) which reads:

> *6‑62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> *. . .*
>
> *(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;*

[19] The Employers state that their requests meet the so-called *Air Canada* factors. They argue that the information is arguably relevant to the issue to be decided, the request is sufficiently particularized, the production is not in the nature of a fishing expedition, and there is a probative nexus between the issues in dispute and the material being requested. Furthermore, there is no prejudice, or if there is, it is outweighed by the probative value of the evidence.

[20] Nutrien also relies on Articles 2.05(a) and 6.07(c) of the Collective Agreement, which read:

> *2.05 (a) The Union agrees to certify promptly, in writing, to the Corporation a list of the names and official positions of its duly authorized local officers and representatives and the members of the committees as may be elected to deal with the Corporation and to give the Corporation prompt, written notice of any change or addition which may thereafter be made in such list.*

[…]

6.07(c) The Corporation recognizes the Union's negotiating committee for the purpose of negotiating a new collective agreement, to consist of five (5) employees, or alternates, selected in a manner to be determined by the Union. […]

[21] Mosaic likewise relies on Article 13.03 of its Collective Agreement:

> *(a) If the Company is given at least one (1) weeks' notice in writing, a leave of-absence, without pay, will be granted to employees who have been elected or appointed by the Union, not to exceed seven (7) in number to attend Union Labour seminars, courses, conferences or to attend to other Union business such as negotiation preparations, negotiations, arbitration preparations and attendance. Additional employees may also be granted such leave-of-absence provided they can be spared.*
>
> > *(i) The company will pay members of the Union Negotiating Committee at **their** base rate for **each shift that negotiations are conducted on their regular schedule**, to a maximum amount equivalent to fourteen hundred (1400) hours at JC 16, once per Collective Agreement. **If the hours fall on any regular schedule shift(s) they will be considered approved Union Leave as per article 16.06(d). If the hours fall on an employee's scheduled day(s) off they** will not be considered time worked for the calculation of overtime payment. In the event a Collective Agreement is reached before the full amount is paid, the balance will be paid to the Union for the purpose of training and education of Mosaic employees.*
> >
> > *[Bold in Original]*

[22] The Employers take issue with the Union's seemingly inconsistent portrayals of the contested individuals, first as "observers" and then as "members" of the bargaining committee. To the Employers, this apparent conflict highlights the issues with the proposed bargaining team, and underscores the need to clarify its status, and that of its individual "members". More generally, the Employers say that the "status" of the disputed individuals is central to the questions raised in the Unfair Labour Practice Applications.

[23] The Union argues in response that the Employers' request constitutes a further attempt to interfere in the internal affairs of the Union and to control or influence the Union's selection of its bargaining representatives. It says that the "particulars" are not relevant to any issue within the Board's jurisdiction and are an attempt to "co-opt" the Board into a further violation of its rights.

[24] Furthermore, according to the Union, the Employers' requests are more in the nature of documentary production than disclosure of particulars. It says that the documents requested are not relevant to issues within the Board's jurisdiction or in dispute. The documents "involve"

confidential and privileged information, and the prejudicial effect of producing them clearly outweighs any probative value.

[25] The Union argues that the Board does not have the statutory authority to interpret and "police" compliance with its Constitution and Bylaws. In some circumstances the Board will supervise whether an individual is treated fairly and in compliance with natural justice, but suggests that this is not one of those cases. The requests were not made by Union members who have or may experience consequences arising from the operation of the Bylaws or Constitution. Therefore, the Board does not have jurisdiction to make the Order requested.

[26] The second matter is the question of standing. Nutrien observes that the same legal issue is before the Board on both Applications, and therefore it is appropriate to proceed by way of a "test case", in which one of the Applications is held in abeyance pending the determination on the first Application. The Employers have agreed that the Mosaic case should proceed first, with Nutrien participating as an intervenor. The Employers cite the Board's decision in *Saskatoon Public Library and SGEU, Re*, 2016 CarswellSask 689; 284 CLRBR (2d) 238 ("*Saskatoon Public Library*") in support of this assertion. Nutrien does not agree to renounce its right to be heard in relation to its own Application, nor to be bound by the determination in the Mosiac case.

[27] While Nutrien suggests that it satisfies all three categories of standing, the focus of its argument is on direct interest standing. It says that it meets the direct interest test because both Applications arise out of the same fact pattern and directly impact the legal rights of the other. On the question of whether the cases can be run concurrently, both Employers strongly object, predicting extraordinary levels of procedural and evidentiary confusion if that occurs.

[28] Mosaic agrees with Nutrien in that the same legal issue is before the Board in both cases, and consents to Nutrien's application for intervenor standing. On the substance of Nutrien's application, Mosaic echoes Nutrien's arguments.

[29] The Union did not file a written argument on the application for standing. In the hearing, it asserted that Nutrien did not meet the test for any of the three categories of standing. With respect to direct interest, it stated that the Employers are inviting the Board to misapply the test of direct interest standing. In relation to public interest standing, it says that the Employers simply do not have a distinct perspective. The Union's concern is that Nutrien will be given two chances to argue

its case. It says that, instead of allowing Nutrien to participate in Mosaic's case, it would consent to concurrent hearings.

Analysis:

Requests for Particulars

[30] The Board agrees with the Union's observation that the Employers' requests are more akin to document production than disclosure of particulars. The Employers ask whether specific individuals listed in the Application are properly constituted members of the bargaining committee in accordance with the bylaws or "similar documents". The Employer then asks for a copy of the bylaws and "all documents including, but not limited to, minutes of Union meetings confirming that the members are properly constituted pursuant to the bylaws". Clearly, the Employer will not be satisfied with an affirmative answer to the first question. Critical to the Employers' request is the production of supporting documentary evidence.

[31] The Board considered a request for documents in *Voyager Retirement v Genpar Inc and SEIU-West, Re*, 2016 CarswellSask 706; 4 CLRBR (3d) 272 ("*Voyager*"), and reviewed the relevant jurisprudence:

> *[12] Subsection 6-111(1)(b) of The Saskatchewan Employment Act, S.S. 2013, c.S-15.1 (the "SEA") authorizes the Board to order the pre-hearing disclosure of documents. When making a determination under section 6-111(b), this Board has, at least since I.B.E.W., Local 529 v. Sun Electric (1975) Ltd., [2002] Sask. L.R.B.R. 362 (Sask. L.R.B.), LRB File No. 216-01, adopted and applied criteria first identified by the Canada Industrial Relations Board in A.L.P.A. v. Air Canada, [1999] C.I.R.B.D. No. 3 (C.I.R.B.) ["Air Canada"]. See also: Edgewood Forest Products Inc. v. IWA-Canada, Local 1-184 [2012 CarswellSask 611 (Sask. L.R.B.)], 2012 CanLII 51715 at para. 12 per Chairperson Love.*
>
> *[13] The Air Canada criteria are six-fold and provide as follows:*
>
> > *1. Requests for production are not automatic and must be assessed 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.*
>
> *[14] Subsequently, the Board's adoption of these criteria received the imprimatur of the Saskatchewan Court of Queen's Bench in Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers et al. v Saskatchewan Labour Relations Board et al., 2011 SKQB 380 (CanLII); 210 CLRBR (2d) 35, at para. 144 per Popescul J. (as he then was).*
>
> *[15] These are the principles, then, which govern this aspect of the Union's applications for pre-hearing document disclosure.*

[32] The Board does not "replicate the kind of extensive pre-hearing procedures commonly utilized in a judicial setting".[1] Requests for production are not automatic and must be assessed in each case.

[33] The Board acknowledges that the requests in issue are relatively well particularized for the purposes of the current application, given the limited information available to the Employers. However, the remaining factors - relevance, potential fishing expedition, probative nexus, and weight of prejudice versus probative value – must be assessed in light of the issues raised by the underlying Applications.

[34] In this case, the underlying Applications are the Union's Unfair Labour Practice Applications, brought pursuant to clauses 6-62(1)(b) and 6-62(1)(d) of *The Saskatchewan Employment Act.* These clauses are reproduced as follows:

> *6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> > *(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;*
> >
> > *. . .*
> >
> > *(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;*

[1] *Prairie Arctic Regional Council of Carpenters, Drywallers, Millwrights v EllisDon Corporation*, 2014 CanLII 100507 (SK LRB) ["EllisDon"] at para 75 cited in *United Brotherhood of Carpenters and Joiners of America, Local 1985 v Brand Energy Solutions (Canada) Ltd*., 2018 CanLII 127660 (SK LRB) at para 4.

[35] Clause 6-62(1)(d) states that it is an unfair labour practice for an employer to "fail or refuse to engage in collective bargaining with representatives of a union representing employees in a bargaining unit whether or not those representatives are the employees of the employer."

[36] The Union has the burden to prove that the Employers have committed the unfair labour practice pursuant to clause 6-62(1)(d), that is, that the Employers have failed or refused to engage in collective bargaining with representatives of a union representing employees in a bargaining unit. If the Union fails to prove the alleged unfair labour practice then its Applications will fail. It is the Union's case to make.

[37] If the Union can establish the elements of the unfair labour practice in the absence of the requested documentation, as it suggests it can, then it follows that the documentation is not arguably relevant, or at least not material, to the Union's case. Whether this information is material to the Union's case is primarily the Union's concern, not the Employer's. Ultimately, it will be up to the Board to determine whether, in the absence of the requested information, the Union has made out its case.

[38] Furthermore, the general outline of events is significant. As the Union argues, it has alleged that the Employers committed unfair labour practices in July and/or August 2018. While this timeframe is not set out in the Application, the point is that the alleged conduct took place in the past, in the absence of the requested information. The Employers did not have the disputed information in their possession when they were alleged to have committed an unfair labour practice. If, as they argue, the Employers' conduct was legitimate and justified, at that time and in the absence of the disputed information, are they suggesting that newly acquired knowledge of the content of that information could render their conduct less legitimate and less justified? Not likely.

[39] Put another way, if the Employers learn, through the provision of the disputed information that the bargaining committee is, to adopt the Employers' phrase "properly constituted", will they then conclude that they were wrong for asking in the first place? The Board thinks not.

[40] The underlying Applications are about what the Employers did or did not do in the past. As the Union pithily says, an employer "cannot change or defend how it acted last summer with documents not in [its] possession at the time". It cannot be the case that the Employers: (1) need

the information to defend their conduct and; (2) are able to defend their conduct on the basis that they do not have the information. Both of these things cannot be true.

[41] The Employers argue that there is no prejudice to the Union in ordering the production of the documentation requested. But, according to both the Employers and the Union, it was the Union's refusal to provide the information or documentation that triggered the alleged impediments to collective bargaining and ultimately, the filing of the Unfair Labour Practice Applications. If the Board orders the production of this same information, it risks pre-determining the merits of the Unfair Labour Practice Applications before they have even begun.

[42] Clause 6-62(1)(b) states that it is an unfair labour practice for an employer "to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it". The Union alleges that the Employers, by requesting information about bargaining committee memberships and selection requirements, are interfering in the Union's internal affairs.

[43] On this point, the Union argues that *Marshall-Wells*, 1956 CanLII 74 (SCC) ("*Marshall-Wells*") is instructive. In response, the Employer rightly points out that the Union's reliance on *Marshall-Wells* amounts to substantive argument more properly raised in the Unfair Labour Practice Applications. Likewise, for the Board to rely on *Marshall-Wells*, or any authority, in prohibiting the release of the information or documentation, again, risks pre-determining the merits of the underlying Applications. Many of the Union's associated arguments are similarly substantive, and not ripe for consideration at this stage.

[44] The Employers, by requesting a production order, invite the Board to pre-determine the merits of the Union's Unfair Labour Practice Applications pursuant to clauses 6-62(1)(b) and 6-62(1)(d). The Board must first provide the parties with an opportunity to argue the substantive issues raised on those Applications. There is potentially no greater prejudice to the Union than ordering production of the very information at the heart of the dispute in the main Applications. It cannot be the case that the probative effect of the information and documentation outweighs the potential prejudice of granting the requested production.

[45] For the foregoing reasons, the Board finds that the Employers' requests for information and documentation cannot be granted. Whether the Employers' requests were warranted or

justified is a principle matter in dispute on the Unfair Labour Practice Applications. Given this conclusion, the Board cannot declare, as the Union has urged, that this decision renders the issue of production *res judicata*. That being said, the Board has decided that the Employers do not need said information or documentation to defend the Unfair Labour Practice Applications. After those Applications have been decided, the Employers may have more guidance as to whether they can and should proceed with their requests for documentation.

Application for Standing:

[46] Nutrien seeks standing on the basis of all three forms of intervention: direct interest, exceptional, and public interest (or public law). The Union responds by suggesting that the Employers should run their cases either separately or concurrently. Nutrien strongly objects to the prospect of a concurrent case, suggesting that it would complicate the proceedings unnecessarily. This is an argument with which, upon reflection, the Board has to agree.

[47] In *C.E.P. v J.V.D. Mill Services*, [2010] SLRBD No 27, 199 CLRBR (2d) 228 ("*JVD Mill Services*"), the Board clarified its approach to granting intervenor status. This approach was later summarized in *CLAC Local 151 v Ledcor Industrial Limited,* 2018 CanLII 53123, 2018 CarswellSask 259 ("*Ledcor*"):

> *18 In J.V.D. Mill Services, supra this Board referred to an article entitled "Interventions in British Columbia: Direct Interest, Public Law & "Exceptional" Intervenors" (2010), 23 CJALP 183 [Interventions in British Columbia]. The authors — Sheila M. Tucker and Elin R.S. Sigurdson — attempted in this article to consolidate and rationalize case-law developed in British Columbia respecting intervention applications brought before administrative tribunals and the courts in that jurisdiction. At page 186, Ms. Tucker and Ms. Sigurdson summarized their survey of the authorities as follows:*
>
> > *In our opinion, the British Columbia jurisprudence presently recognizes the following bases for intervenor standing:*
> >
> > > *1. The applicant has a direct interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be directly affected by the answer ("direct interest intervenor");*
> > >
> > > *2. The applicant has a demonstrable interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be affected by the answer, can establish the existence of "special circumstances" and my* [sic] *be of assistance to the court in considering the issues before it ("exceptional intervenor");*
> > >
> > > *3. The applicant has no legal rights or obligations that may be affected by the answer to the legal question in dispute, but can satisfy the court that its perspective*

> *is different and its participation may assist the court to* [sic] *considering a public law issue before it ("public law intervenor").*
>
> *19 The Board in J.V.D. Mills, supra, at paragraph 14 "adopted the[se] three categories of intervenor status as reflective of the categories of status that may be granted".*

[48] The Board has followed these principles on many occasions, including: *Saskatchewan Building Trades Council v Construction Workers Union, CLAC Local 15*, 2018 CanLII 38251 ("*Saskatchewan Building Trades Council*"); *Construction Workers Union, CLAC Local 151 v The International Association of Heat & Frost Insulators and Asbestos Workers, Local 119*, 2018 CanLII 127663 ("*Construction Workers Union"); CLAC Local 151 v Ledcor Industrial Limited,* 2018 CanLII 53123, 2018 CarswellSask 259 ("*Ledcor*"); and *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial v International Brotherhood of Electrical Workers, Local 2038*, 2017 CanLII 6027.

[49] In *Ledcor*, the Board explained that an intervention is, by nature, an unusual or extraordinary occurrence:

> *By definition, an intervenor is a stranger to on-going litigation before an administrative tribunal or a court. As such allowing such a party to participate in the litigation, especially private litigation, is an unusual, if not extraordinary occurrence. It is precisely for this reason that applications to intervene must be carefully scrutinized, and when deciding them this Board should exercise its discretion to grant intervenor standing sparingly, mindful of the particular factual matrix of the case under consideration.*

[50] The granting of intervenor status is a matter of discretion for this Board. An intervention application must be carefully scrutinized so as to avoid any unnecessary impact on the efficient and fair adjudication of the *lis*. The Board exercises its discretion based on the circumstances of each case, taking into account the fairness to the party seeking standing and/or the potential for the party seeking standing to assist the Board without doing injustice to the other parties: *J.V.D. Mill Services*.

[51] In determining whether to grant public interest or public law intervenor status, the Board considers the so-called *Latimer* factors, the origins of which were recounted in the *Ledcor* decision:

> *21 In Saskatchewan, the leading authority respecting various considerations to be taken into account by a court or an administrative tribunal adjudicating an intervenor application*

> *remains R. v. Latimer (1995), 128 Sask. R. 195 (Sask. C.A. [In Chambers]), 1995 CanLII 3921. There Sherstobitoff J.A. stated at paragraph 6:*
>
> > *The textbook, The Conduct of an Appeal by Sopinka and Gelowitz, (Toronto: Butterworths) at p. 187-8 [sic], summarizes the matters usually considered by a court of appeal on such applications:*
> >
> > > *In considering an application to intervene, appellate courts will consider: (1) whether the intervention will unduly delay the proceedings; (2) possible prejudice to the parties if the intervention is granted; (3) whether the intervention will widen the lis between the parties; (4) the extent to which the position of the intervener is already represented and protected by one of the parties; and (5) whether the intervention will transform the court into a political arena. As a matter of discretion, the court is not bound by any of these factors in determining an application for intervention but must balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the lis. [Footnotes omitted.]*
>
> *22 Latimer, supra, of course, was decided at time when public interest interventions were far more novel than they are today. Nevertheless, these considerations remain very pertinent, and Saskatchewan courts have transposed them to interventions in other areas of law.*
>
> *[citations removed]*

[52] The Board will consider each category of standing in turn.

Direct Interest Standing:

[53] With respect to direct interest intervenor standing, the applicant must show that it has a direct interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be directly affected by the answer.

[54] Nutrien suggests that the first Application should proceed as a "test case", as occurred in *Saskatoon Public Library*.[2] But in contrast with *Saskatoon Public Library*, Nutrien suggests that its intervention should be grounded in its direct interest in Mosaic's case. Nutrien distinguishes the finding in *Saskatoon Public Library*, suggesting that unlike the applicant unions in that case, the Employers' applications "arise out of the same fact pattern". In making this argument, Nutrien relies on an excerpt from the following passage:

> *8 When considering the granting of direct intervenor status, the Applicant must have a direct interest, i.e.: legal rights or obligations that may be directly affected by the answer to the questions posed by the litigation. That is, they must have a direct interest in the lis*

[2] *Saskatoon Public Library and SGEU, Re*, 2016 CarswellSask 689, 284 CLRBR (2d) 238 ("*Saskatoon Public Library*").

> *between the parties. Both SGEU and RWDSU argued that they did indeed have a direct interest in the questions being posed in the litigation insofar as they had an interest similar to CUPE in the outcome of the litigation.*
>
> *9 While a significant interest, having a common interest in litigation is not a direct interest whereby rights and interests will be directly affected. This is not a situation which arises out of the same fact pattern (and in the case of RWDSU a significantly different fact pattern insofar as the initial application came not from the employer, but from the union and, more significantly, that the application was subsequently withdrawn).*

[55] The Employers in this case do have a common interest in litigation but do not have a direct interest whereby rights and interests will be directly affected. Moreover, since the decision in *Saskatoon Public Library*, the Board has held that "[a] proposed 'direct interest' intervenor must demonstrate more than simply asserting the decision in one case could be utilized as a precedent in some future case in which it may be involved."[3] The proposed intervenor must have direct interest in the *lis* of the case in which it wishes to participate.

[56] The Employer's argument, while not unreasonable, invites the Board to extend the category of direct interest standing beyond its intended reach. Nutrien does not have a direct legal interest in the outcome of this case. No legal obligations are going to be imposed upon it by the operation of the Order or decision. The potential for a bad precedent is not a sufficient basis for an intervention order on this basis. While Nutrien's legal rights may be indirectly affected by the outcome of the case, it is not true to say that they will be directly affected.

[57] To the extent that the Board is required to consider whether the applications "arise out of the same fact pattern", as suggested by the Employers, Nutrien's argument as a whole contradicts this general assertion. Nutrien objects to concurrent hearings on the basis that the "factual records are simply different for each of the Mosaic and Nutrien cases, even though they both concern the same legal question". This assertion weakens the proposition that the applications "arise out of the same fact pattern".

[58] In support of its request for standing, Nutrien raises the *audi alteram partem* principle of natural justice, stating that "refusing intervenor status where the matters are so directly related and determinative of the other would violate the right to be heard when a party's legal interests are being determined". Nutrien seems to suggest that, because it satisfies the test on direct

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[3] *Ledcor* at para 26.

interest intervenor standing, the Board's denial of its standing as a direct interest intervenor will offend the *audi alteram partem* principle. Nutrien has pointed to no authority to support the application of *audi alteram partem* to the Applications before it.

[59] *Audi alteram partem* is a well-established principle. It stands for the proposition that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them. Presumably, this novel argument hinges, in part, on the suggestion that the two Unfair Labour Practice Applications involve a set of facts, some of which are common to each Employer. And while this suggestion is likely accurate, Nutrien's own argument quite properly urges two proceedings on the basis of the factual differences between them.

[60] Given the Board's foregoing determination on direct interest, the *audi alteram partem* principle does not advance Nutrien's argument in relation to the first category of standing. An intervenor is a stranger to another party's litigation. It does not participate in another's litigation by right. Nutrien still has the right to be heard – in its own case.

[61] Nutrien insists that it satisfies all of the hallmarks of direct interest intervenor status and it is unnecessary to examine the remaining two categories. However, given the Board's finding on direct interest, it will proceed to consider exceptional and public interest standing at this stage.

Exceptional Interest Standing:

[62] On the question of exceptional interest standing, the Board has repeatedly articulated the test, which may be summarized as follows:[4]

> 1. *the applicant must have a demonstrable interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be affected by the answer;*
> 2. *the applicant can establish the existence of "special circumstances"; and*
> 3. *the applicant may be of assistance to the Board in considering the issues before it.*

[63] It is important that the Board exercise its discretion on this category sparingly. The Board regularly receives applications involving "similar fact patterns", and it must assess a request for

[4] See, for example, *Ledcor* at para 18 and *Saskatoon Public Library* at para 7.

standing on a case-by-case basis. The Board therefore considers the question of exceptional intervenor standing as follows.

[64] First, there is no question whether Nutrien has a demonstrable interest in the answer to the legal question in dispute. It does.

[65] Second, the "exceptional" nature of this category requires some additional factor or factors to bring the proposed intervenor into the realm of "special circumstances". Nutrien has established the existence of "special circumstances" that differentiate it from others who may have a similar interest. The particular circumstances of this case, including the overlap in issues, do not rise to the level of creating a direct interest, but they do serve to differentiate Nutrien from others with a similar interest.

[66] Third, however, Nutrien is required to demonstrate that it may provide assistance to the Board in considering the issues before it. On this point, the Board observes that Nutrien has made no attempt to differentiate its perspective from that of Mosaic. The written submissions made it abundantly clear that there is little material distinction in the positions of the two Employers. And while the Board is aware that the *Latimer* factors are not directly relevant to the exceptional interest test, the lack of any material distinction raises questions about the additional value of Nutrien's assistance.

[67] The Board has considered whether Nutrien has otherwise addressed the issue of "assistance" to the Board's satisfaction, and concludes that it has not. The Board has reviewed the written and oral arguments in detail, and has found no support for this part of the exceptional interest test. Simply put, Nutrien has provided no basis upon which the Board could find that it would provide assistance to the Board in considering the issues before it. For this reason, the Board declines Nutrien's request to grant exceptional interest intervenor standing in this case.

Public Interest/Law Intervention:

[68] For a party to be granted public interest or public law intervenor status, there must be a public law aspect to the dispute giving it significance beyond its immediate parties, and making it a matter on which additional perspectives might well assist.[5] The Applications in issue are more

[5] See, for example, *Ledcor* at paras 18 and 30.

in the nature of private law disputes than matters raising questions of public law. Although the Board's assessment of this factor, being a threshold consideration, could mark the end of the inquiry into public interest standing, the Board will proceed to analyze Nutrien's application through the lens of the remaining factors.

[69] The first factor is whether the intervention will unduly delay the proceedings. One might suggest that the request to intervene has already had some impact on the timelines, but the Request for Particulars makes it difficult to neatly attribute the delay to the intervention application itself. And although the Employer has not made any direct representations about its willingness to accede to the scheduling needs of the main parties, the Board will assume for the present purposes that it would so accede. Given these considerations, this factor, as applied to the present circumstances, is neutral in its effect.

[70] The second factor is whether the proposed intervenor's participation will unduly prejudice one of the parties. The Board acknowledges that most interventions, by their nature, create some degree of prejudice for the opposing party by necessitating the marshalling of resources to respond to the intervenor's submissions. The Union suggests, further, that granting intervenor status would give Nutrien two opportunities to argue its case. This is a legitimate concern about fair process. And while this factor weighs against the Employer, it is not wholly determinative in this case.

[71] The third factor is whether there will be a widening of the *lis* caused by the intervention of the applicant Employer. This is a factor over which, depending on the case, the Board may have some measure of control. As with *Saskatoon Public Library*, if Nutrien is "allowed to …cross-examine witnesses, there is a danger that the *lis* between the parties will be widened." The Board can certainly fashion an order to limit Nutrien's participation to legal submissions only, so as to minimize the risk that the *lis* will be widened. If the Board found that an intervention was appropriate, it would take this additional step.

[72] As with the Board's reasoning in *Ledcor*, the "central inquiry for assessing" whether the application should succeed is whether Nutrien can bring a new perspective on the issue raised by the application.[6] In this regard, Nutrien has provided no information to show what "distinct

[6] *Ledcor* at para 33.

perspective" it would bring to the Board. As this Board has already observed, the Employers' written arguments were virtually identical. The Employers' oral argument provided no further basis upon which the Board could find that it offers a distinct perspective. Nutrien has simply not addressed this factor to the satisfaction of the Board.

[73] The last factor is whether, as a result of the intervention, the proceedings will be transformed into a political arena. Given the subject matter, there is no chance that the proceedings will be transformed in this fashion.

[74] Finally, to the extent that it is necessary to consider whether Nutrien's intervention would enable the Board to make a better decision, the Board has not been persuaded that it would.

[75] For the foregoing reasons, the Board makes the following Order:

a. That the Applications for Particulars and Production of Documents by Mosaic Potash Colonsay ULC and Nutrien Ltd. are dismissed;

b. That Nutrien's Ltd.'s Application to Intervene in LRB File No. 193-18 is denied.

c. That LRB File Nos. 193-18 and 194-18 are to be set down for separate hearings on the agenda of the May Motions' Day for scheduling.

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

DATED at Regina, Saskatchewan, this **16th** day of **April, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson