UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION LOCAL 1-184, Applicant v. PREMIER HORTICULTURE LTD., Respondent

LRB File No. 194-16; January 18, 2019
Chairperson, Susan C. Amrud, Q.C.; Members: Maurice Werezak and Laura Sommervill

For the Applicant: Heather M. Jensen

For the Respondent: Brent Matkowski

Application by Employer to exclude all evidence of without prejudice communications – Board allowed evidence of dates of communications based on recognized exception to settlement privilege.

Application by Employer to dismiss Union's application since it was filed after the 90-day deadline in subsection 6-111(3) of the Act had expired – Board found that extenuating circumstances excused the delay, there was no litigation or labour relations prejudice, rights asserted were very important and Employer admitted committing the unfair labour practices.

Unfair labour practice – Employer chose not to apply Collective Agreement to employees hired at new location, even though it contemplated new locations would be developed and employees there would be represented by Union – Union dues not deducted or remitted, contrary to Act and Collective Agreement.

REASONS FOR DECISION

Background:

[1] On August 24, 2016, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local 1-184 ["Union"] filed an Unfair Labour Practice Application against Premier Horticulture Ltd. ["Employer"]. An Amended Application was filed on September 15, 2016. The Employer filed a Reply on September 15, 2016.

[2] The hearing of this application took place on February 22 and 23 and March 10, 2017, before then Vice-chairperson Graeme Mitchell and panelists Maurice Werezak and Laura Sommervill. Vice-chairperson Mitchell was appointed as a Judge of the Court of Queen's Bench on September 21, 2018. The parties agreed that this matter could be concluded by Chairperson Amrud listening to the recording of the hearing and then issuing this decision in conjunction with the other members of the panel.

[3] The Union is the bargaining agent for the Employer's employees. A certification order was issued by the Board on June 2, 1971, with respect to these employees, and the Union and the Employer are recognized as successors to the union and employer named in that Order.

[4] The Employer operates a peat moss harvesting and processing business in north east Saskatchewan. This includes a peat moss processing and packaging plant near Carrot River and bogs from which peat moss is harvested and then shipped to that plant. Peat moss is harvested from a bog for several years until the bog is depleted. New bog sites must be found and developed on a continuous basis to ensure an ongoing supply of peat moss for the plant. Employees at the plant and the bogs have historically been included as Union members without question until 2016, when the Employer opened the Smokey Ridge Bog, which is 178 kilometres from Carrot River. The Employer takes the position that this bog is too far away from Carrot River for the employees working there to be included in the bargaining unit.

Without Prejudice Communications

[5] The Employer raised a preliminary issue with respect to the admissibility of some of the Union's evidence, on the basis that it constituted without prejudice communications and was therefore inadmissible by virtue of settlement privilege. It objects to the admission of evidence respecting any communications between the parties from December 12, 2015 to July 19, 2016. Its position is that neither any aspect of those communications, nor the fact that without prejudice communications took place, is admissible. The Union does not propose admission of the content of the communications, but only of the fact that they were taking place, to explain the delay in launching its application. At the commencement of the hearing the Board ruled that it would hear all of the evidence, take note of the Employer's objections throughout the hearing, and decide as part of these Reasons for Decision which evidence it would admit.

[6] The Law of Evidence in Canada states that a settlement privilege can be recognized if the following conditions exist:

> *(1) A litigious dispute must be in existence or within contemplation.*
> *(2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed.*
> *(3) The purpose of the communication must be to attempt to effect a settlement[1].*

[7] All of these conditions exist with respect to the communications in issue here. The question, then, is whether there is an exception to the privilege that would allow the Board to admit evidence respecting the fact that communications occurred and the dates of those communications.

[8] In *Sable Offshore Energy Inc. v Ameron International Corp.*, [2013] SCC 37, the plaintiff settled its dispute with some, but not all, of the defendants. The remaining defendants applied for disclosure of the settlement amounts. At paragraph 2 the Supreme Court stated:

> *The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.*

[9] The Court elaborated further on the purpose of settlement privilege:

> *[11] Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225 (H.C.J.):*
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> > *. . . the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system. [p. 230]*
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> *This observation was cited with approval in Kelvin Energy Ltd. v. Lee, [1992] 3 S.C.R. 235, at p. 259, where L'Heureux-Dubé J. acknowledged that promoting settlement was "sound judicial policy" that "contributes to the effective administration of justice".*
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> *[12] Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a prima facie presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (Rush & Tompkins Ltd. v. Greater London Council, [1988] 3 All E.R. 737 (H.L.), at p. 740).*

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[1] Sopinka, Lederman and Bryant: The Law of Evidence in Canada, 5th ed. (LexisNexis Canada Inc., 2018), paragraph 14.348.

> *[13] Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 U.B.C. L. Rev. 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in Cutts v. Head, [1984] 1 All E.R. 597, at p. 605:*
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> > *. . . parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations . . . may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in Scott Paper Co v. Drayton Paper Works Ltd (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.*
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> *What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.*

[10] At paragraph 19, in the course of considering whether it should create a new exception to the privilege for the amounts of settlements, the Court provided examples of existing exceptions, none of which are applicable here. However, it noted the general principle that, to come within an exception to the privilege:

> *… a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (Dos Santos Estate v. Sun Life Assurance Co. of Canada, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20).*

[11] The Court did not consider or comment on the issue before the Board, namely whether an exception is recognized for the purpose only of disclosing the fact that settlement communications were undertaken and the dates when those communications occurred, to explain delay.

[12] In *Yorkton Credit Union Ltd. (Re)*, [1996] SLRBD No. 65 the employer proposed to question a witness concerning whether union representatives had received certain information from a conciliator. The Board ruled that "no evidence will be allowed of any exchanges which took place with or through the conciliator". Unlike the current case the union did not object to disclosure of the fact that discussions took place with a conciliator.

[13] In *Hunter v McCorriston*, 2016 SKCA 144 ["*Hunter*"], Hunter filed a notice of objection to McCorriston's affidavit evidence in respect of its disclosure of confidential and privileged information prepared for or arising from a pre-trial conference. The Court held that it had no jurisdiction to cure a substantive defect in McCorriston's application pursuant to a Rule of Court

that allowed it to cure procedural defects[2]. The Court then went on to say the following with respect to admissibility of privileged communications:

> *[76] As noted, in this case, the pre-trial conference did not result in a consent judgment or agreement. In these circumstances, where the exceptions enunciated in Rule 4-18 do not apply, Sable requires a party seeking to adduce privileged materials to rebut the presumption of inadmissibility by showing, on balance, that "a competing public interest outweighs the public interest in encouraging settlement". But, here, the Chambers judge's conclusion that the privileged communications were relevant and admissible to respond to an allegation of undue delay would seem to be of an entirely different order than the examples of a competing public interest enumerated in Sable—i.e., an allegation of misrepresentation, fraud or undue influence, or a potential for overcompensating a party. In Meyers v Dunphy, 2007 NLCA 1 [Meyers], Wells C.J.N.L. made this point when he wrote:*
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> > *[52] Thus, despite the assertion of Burnyeat J., in Berry v. Cypost Corp., [2003 BCSC 1827, 21 BCLR (4th) 186] I cannot agree that there is any authority supporting the proposition that use of otherwise privileged correspondence, for the purpose of establishing confirmation of a cause of action pursuant to subsections 16(1) and (2) of the Limitations Act, is an established exception to the settlement privilege. I can envisage a circumstance where use of "Without Prejudice" correspondence to establish confirmation for purposes of the Limitations Act may well be an exception* ***where the circumstances also establish some blameworthy or meritorious conduct, as a result of which, a "compelling or overriding interest of justice" warrants admitting the correspondence, notwithstanding the settlement privilege. I cannot, however, agree that absent some such special reason, there is anything about confirmation, for purposes of the Limitations Act, that would outweigh the public policy interest, in promoting resolution of disputes by negotiated settlement, and justify admitting in evidence communications protected by settlement privilege.*** *Relevance to confirming a cause of action, for purposes of subsections 16(1) and (2) of the Limitations Act is not, alone, sufficient. [Underlined emphasis in original, bold emphasis added in Hunter]*
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> *[77] I agree with Wells C.J.N.L.'s analysis. I respectfully conclude an exception to the presumption of inadmissibility of settlement pre-trial conference materials and communications to meet an allegation of undue delay in bringing a claim would be available, for example, where one party had improperly used those settlement negotiations to intentionally dupe the other party into complacency until a limitation period had expired. But, the existence of discussions around a potential cause of action during pre-trial settlement negotiations or the recognition of a potential cause of action in a privileged settlement offer do not, of themselves, constitute a competing public interest sufficient to compel the setting aside of the presumption of inadmissibility of that material on public policy grounds. Something more, something blameworthy or untoward on the part of the other party, must be shown such that it would not be in the "compelling and overriding interest of justice" to let matters stand as they are. And, there is no evidence here upon which to conclude Ms. Hunter waived the filing of a counter-petition or acquiesced to a late filing. To be clear, it is not improper to wait to see whether an adverse party files a claim with the courts within the applicable limitation period and, if not, to then rely on a missed limitation period. For this reason, I am unable*

[2]After a divorce judgment had issued, McCorriston brought a claim that could only be made by a "spouse".

> *to uphold the admission of the privileged materials into evidence on the basis of the first reason given by the Chambers judge for doing so.*

[14] *McAllister v McAllister*, 2016 SKQB 408 (CanLII) considered *Hunter*, and then added the following comment:

> *The purpose of this discussion is, of course, to maintain to the maximum effect the settlement privilege and the sanctity of the pre-trial process. In the straightforward words of the Supreme Court in Sable Offshore Energy Inc. v Ameron International Corp., 2013 SCC 37 (CanLII), [2013] 2 SCR 623: "settlement privilege promotes settlements". For the pre-trial process to be effective, the parties must know with certainty that what is said, the compromises made, the admissions accepted, and the positions ultimately taken, will not be the subject of broadcast other than in the strictly defined circumstances developed in The Queen's Bench Act,1998, The Queen's Bench Rules or the cases. These strictly defined circumstances bring into focus the court's overarching obligation to ensure justice is done as between the parties. (para. 33)*

[15] All of these cases dealt with a situation where the purpose for which the privileged communications were sought to be admitted was to prove the truth of their content. *Meyers v Dunphy*, 2007 NLCA 1 ["*Meyers*"] makes clear that a differentiation must be made with respect to the purpose for which a party proposes to tender evidence of privileged communications. The Court cites with approval the following passage from the decision of Lord Robert Walker in the Court of Appeal decision in *Unilever plc v. The Procter & Gamble Co.*, [2001] 1 All E.R. 783:

> *[19] . . .He also recognized that despite its wide scope, occasionally the privilege has to yield, and he considered how those occasions are determined. In his analysis of the more modern cases he identified a pattern of departure from the "mechanistic" application of express rule and specific exceptions, in favour of analysis of the purpose of the rule. At pages 790-791 he wrote:*
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> > *In the course of counsel's clear and well-researched written and oral submissions a general issue arose as to whether the 'without prejudice' rule should be seen as a rule of very wide scope which does, however, on occasion have to yield to some more powerful principle with which it comes in conflict (such as the need to prevent a litigant deceiving the court with perjured evidence); or whether that wide view represents a failure of proper analysis of the true foundation and purpose of the rule. The most forthright passages in support of the wide view are to be found in Walker v Wilsher (1889) 23 QBD 335, in passages from the judgments of Lord Esher MR, Lindley and Bowen LJJ conveniently set out in the judgment of Oliver LJ in Cutts v Head [1984] 1 All ER 597 at 603-604, [1984] Ch 290 at 302-304. The clearest statement of the need for analysis is in the judgment of Hoffmann LJ in Muller v Linsley & Mortimer (a firm) [1996] PNLR 74 at 77 where he said:*
> >
> > *'Some of the decisions on the without prejudice rule show a fairly mechanistic approach, but the recent cases, most*

> *notably the decisions of this court in Cutts v. Head ([1984] 1 All ER 597, [1984] Ch 290) and the House of Lords in Rush & Tompkins Ltd v. Greater London Council ([1988] 3 All ER 737, [1989] AC 1280), are firmly based upon an analysis of the rule's underlying rationale. Cutts v. Head shows that the rule has two justifications. Firstly, the public policy of encouraging parties to negotiate and settle their disputes out of court and, secondly, an implied agreement arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice. In some cases both of these justifications are present; in others, only one or the other. So, in Cutts v. Head the rule that one could not rely upon a without prejudice offer on the question of costs after judgment was held not to be based upon any public policy. It did not promote the policy of encouraging settlements because as Oliver L.J. said: "As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement …" It followed that the only basis for excluding reference to a without prejudice offer on costs was an implied agreement based on general usage and understanding that the party making the offer would not do so. Such an implication could be excluded by a contrary statement as in a Calderbank offer [see Calderbank v Calderbank [1975] 3 All ER 333, [1976] Fam 93].'*

He [Hoffman L.J. in Muller v. Linsley] then considered the Rush & Tompkins case at some length and continued (at 79-80):

> *'If one analyses the relationship between the without prejudice rule and the other rules of evidence, it seems to me that the privilege operates as an exception to the general rule on admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of a party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, i.e. independently of the truth of the facts alleged to have been admitted. Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made. Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute. Likewise, a without prejudice letter containing a threat is admissible to prove that the threat was made. A without prejudice letter containing a statement which amounted to an act of bankruptcy is admissible to prove that the statement was made; see (Re Daintrey, ex p Holt [1893] 2 QB 116, [1891-4] All ER Rep 209).* ***Without prejudice correspondence is always admissible to explain delay in commencing or prosecuting***

> ***litigation. Here again, the relevance lies in the fact that the communications took place and not the truth of their contents.*** *Indeed, I think that the only case in which the rule has been held to preclude the use of without prejudice communications, otherwise than as admissions, is in the rule that an offer may not be used on the question of costs; a rule which, as I have said, has been held to rest purely upon convention and not upon public policy. This is not the case in which to attempt a definitive statement of the scope of the purely convention-based rule, not least because, as Fox L.J. pointed out in Cutts v. Head ([1984] 1 All ER 597 at 613, [1984] Ch 290 at 316), it depends upon customary usage which is not immutable. But the public policy rationale is, in my judgment, directed solely to admissions. In a case such as this, in which the defendants were not parties to the negotiations, there can be no other basis for the privilege.'*
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> *[20] Lord Robert Walker recognized that there are established exceptions. At page 791, he wrote:*
>
> > *Nevertheless, there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. …*
>
> *He then listed circumstances that he described as "among the most important instances". [underlined emphasis in Meyers; bold emphasis added]*

[16] Number five on the list of circumstances where the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote reads as follows:

> *In order to explain delay or apparent acquiescence in responding to an application to strike out a proceeding for want of prosecution but use of the letters is to be limited to the fact that such letters have been written and the dates at which they were written.*

[17] The Law of Evidence in Canada says the following, at paragraph 14.374:

> *Settlement negotiations conducted without prejudice may be taken into account by the court where a question of laches is raised as a defence. The fact that compromise negotiations took place and the dates upon which they occurred may be admitted to explain away an allegation of delay in bringing an action. It is not usually necessary to disclose the content of the communications.*

[18] *Meyers* dealt with a situation where the court was asked to admit evidence that a defendant had, through acknowledgement of the cause of action, confirmed their liability, and accordingly extended the date from which the limitation period in that case commenced to run. The application before the Board does not involve an immutable limitation period. The issue before the Board is whether, in the circumstances of this case, it should exercise its discretion

and refuse to consider the application because it was filed after the 90-day deadline for filing it had expired. In making this determination the Board will take into consideration the reason why the Union waited to file its application. Withholding this information from the Board would leave the Board with the misleading impression that no communications occurred between the parties during the seven months in question.

[19] The Board finds that, when the purpose for which the privileged information is sought to be admitted is carefully assessed, the Union's request falls within a recognized exception to settlement privilege. The fact that communications were occurring between the Union and the Employer and the dates on which they occurred are admissible as an exception to settlement privilege.

Timeliness of Application

[20] The Employer raised another preliminary objection, namely, that the Board should refuse to consider the Union's application because it was filed beyond the 90-day deadline set out in subsection 6-111(3) of *The Saskatchewan Employment Act* ["Act"]:

> *6-111(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.*

[21] The Employer further argued that the Union was required to seek the Employer's consent to file beyond the 90-day deadline. Since it did not, the application is out of time. The Board does not accept that interpretation of these provisions. If the late-filing party has the consent of the other party, the Board has no discretion, it must hear the application. If no consent was provided, the Board has discretion whether to refuse to hear the application.

[22] In *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, 2016 CanLII 58881 (SK LRB) ["*Saskatchewan Polytechnic*"] the Board set out the principles to be applied in determining when it should exercise its discretion to dismiss an unfair labour practice application filed beyond the 90-day deadline:

- *Applications alleging an unfair labour practice must be filed within 90 days after the applicant knew or ought to have known about the misconduct giving rise to the allegation (ss.6-111(3)).*

- *The 90 day limitation period reflects the fact that time is of the essence in addressing labour relations disputes and timely resolution of such disputes is essential to ensuring amicable labour relations in Saskatchewan (Dishaw, at para. 36; Peterson, at para. 29; SGEU, at paras. 13-14).*

- *It is important to identify with precision when the 90 day limitation commences. Typically, the alleged misconduct will be founded upon a particular fact situation and the clock starts running from that date (SGEU, at para. 29).*

- *A complaint may be based on a "continuing policy or practice rather than a discrete set of events". This fact makes it more difficult to ascertain the commencement of the 90 day limitation period and may make it easier to justify a delay (Toppin, at para. 29; SGEU, at para. 30).*

- *The Board will adjudicate applications filed outside the 90 day limitation period provided the other party consents or otherwise waives the application of the limitation period (ss. 6-111(4)).*

- *Where no such consent or waiver is given, the Board possesses discretion to adjudicate the application (ss. 6-111(3); SGEU, at para. 24).*

- *When exercising this discretion, the Board should apply the non-exhaustive list of counter-vailing factors identified in Toppin (SGEU, at paras.26-27; Toppin, at para. 30)*

- *Prejudice is presumed in all late filings; however, if actual prejudice could result from hearing the application it will be dismissed.*[3]

[23] The *Toppin* guidelines mentioned above, were established by the Alberta Labour Relations Board[4]:

> *1. The 90-day time limit is a legislative recognition of the need for expedition in labour relations matters.*
>
> *2. "Labour relations prejudice" is presumed to exist for all complaints filed later than the 90-day limit.*
>
> *3. Late complaints should be dismissed unless countervailing considerations exist.*
>
> *4. The longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed. There is no separate category of "extreme" delay.*
>
> *5. Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:*
>
> > *(a) Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?*
> > *(b) Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?*

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[3] Paragraph 18.

[4] *Neville Toppin v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 488,* [2006] Alta. L.R.B.R. 31, 123 C.L.R.B.R. 253.

> *(c) Has the delay caused actual litigation prejudice or labour relations prejudice to another party?*
> *(d) And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complaint?*

[24] In subsection 6-111(3) of the Act, the Legislature has given the Board discretion to refuse to hear an application filed later than 90 days after the unfair labour practice occurred. This means the Board starts from the premise that the application should be heard, and then reviews the principles and considerations described above to determine whether the application should be dismissed.

[25] The first issue is, when did the 90-day time period begin to run? In this case this requires an assessment of when the Union knew that the Employer had hired employees without making it a condition of their employment that they become Union members and pay Union dues. In making this assessment, section 5:02 of the Collective Agreement must be considered:

> *Employees whose regular jobs are not in the bargaining unit shall not work on a regular basis on any jobs which are included in the bargaining unit except for the purpose of instructing, testing or to maintain operations until a qualified employee is available or some specific work not related directly or usually done on peat production. For example, tree slashing at new bogs, hauling peat moss on long distances from new bogs, gravel transportation, building erection, peat exploration may be contracted out.*

[26] Since section 5:02 contemplates initial work at new bogs being contracted out, the fact that the Union was aware that activity was being undertaken at a new bog was not sufficient to start the clock; they needed to know that the work was being undertaken by employees of the Employer.

[27] The following evidence was before the Board. On September 3, 2015 Paul Hallen[5] sent an email to Claude Gobeil[6] indicating that it had been brought to his attention that there had been some activity regarding new bogs in the Hudson Bay area and that the Employer may have already hired some employees. Mr. Hallen asked for a formal meeting to discuss the issue. A conference call for that purpose occurred on September 25, 2015. During this call, the Employer confirmed that it was developing a new bog and had hired employees to work there. It advised the Union that its preference would be for a separate collective agreement for the employees at

[5] President and business agent of Union Local.
[6] Employer's Director of Saskatchewan Operations.

this new bog, known as the Smokey Ridge Bog. Another conference call was held on October 16, 2015. On November 17, 2015, the Union sent a letter to the Employer which contained what it described as its "formal position":

> *After careful consideration the Union wishes to give our formal position regarding the new Smokey Ridge Bog that is currently being developed by the company. The Union takes the position that the Smokey Ridge Bog ought to be included under the existing collective agreement, as all other new and original bogs under certification order dated June 2, 1971 have been in the past. The Union sees no reason for a departure from the normal practice of including new bogs under the current collective agreement.*

[28] On December 11, 2015 Claude Rinfret[7] emailed Mr. Hallen stating:

> *The Company holds its position on Smokey Ridge Bog. As discussed, we are in agreement to recognized [sic] the Steelworkers as representing the employees of this new bog throughout another collective agreement. We are of the opinion that the scope of the bargaining unit in Carrot River is not covering this bog.*
>
> *We are then, respecfully [sic] declining your proposal <u>but remain open to further discussion</u>. [emphasis added]*

[29] The parties continued to be in regular contact by email and telephone and in-person discussions through December 2015 and January and February 2016. A flurry of communications in mid to late March 2016 led to an in-person meeting in Montreal, Quebec on April 6, 2016, followed by another in-person meeting in Carrot River on May 4, 2016. On July 19, 2016, the Union provided a letter to the Employer with its formal position: the Smokey Ridge Bog and other bogs developed or future bogs are captured by the Union's province wide certification and should be governed by the Collective Agreement. On August 2, 2016, the Employer replied with its formal position: it was not recognizing the application of the Collective Agreement over its operation out of Smokey Ridge. On August 24, 2016, the Union filed the unfair labour practice application.

[30] The Employer argues that it was consistent in its position from September 2015, which means that is when the Union knew of the activity that it alleges is an unfair labour practice, and that therefore the time for filing this application expired, at the latest, in December 2015.

[31] The Union argues that the clock did not begin to run until the Employer provided its final position, in writing, on August 2, 2016.

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[7] Employer's Labour Relations, Pay & Benefits Director.

[32] The Employer submitted as evidence Mr. Hallen's typewritten notes of the September 25, 2015 conference call. In those notes he indicated that the Employer advised they had hired two employees at the Smokey Ridge Bog. The Union objected to this document being admitted as evidence on the basis that it was hearsay. The Board is prepared to admit and rely on this document.

[33] Clause 6-111(1)(e) of the Act states:

> ***Powers re hearings and proceedings***
> *6-111(1) With respect to any matter before it, the board has the power:*
>
> > *(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the board considers appropriate, whether admissible in a court of law or not;*

[34] Mr. Hallen admitted that this document contained his notes from the September 25, 2015 conference call and agreed that they were a reasonable reflection of the conversation on that call. These notes, and the Employer's evidence respecting the conversation, establish that September 25, 2015 is the date on which the Union became aware of the unfair labour practices alleged in this application.

[35] This means that the application was filed out of time. The Employer did not waive the late filing. The Board would note, however, that as of the date of the hearing, the unfair labour practices were continuing. This is similar to the situation in *Saskatchewan Government and General Employees' Union v Saskatchewan (Government)*, 2009 CanLII 30466 (SK LRB) where, after finding that the unfair labour practice was founded on a particular fact situation, and therefore the application was filed after the 90-day deadline had expired, stated the following, at paragraph 30:

> *That having been said, however, as noted in the Toppin case, supra, at para. 29 "Delay may be excused where the complaint concerns a continuing policy or practice rather than a discrete set of events: UNA, Loc. 23 et al v. Chinook RHA [2002] Alta. L.R.B.R. LD-056." This case clearly concerns a continuing policy implemented by the Employer which may have a considerable impact on its current and future employees. It was in force throughout the period in question and remains in force at present.*

[36] Keeping this additional circumstance in mind, the Board now turns to the countervailing considerations described in the *Toppin* guidelines to determine how to exercise its discretion.

[37] The first question is who is seeking relief against the time limit, a sophisticated or unsophisticated applicant? The Union argues that, in considering this guideline, the Board should look at the resources within the office of the Local and find that it is an unsophisticated applicant. The Employer argues that the Union is a large, sophisticated international union with unlimited resources. The evidence indicates that Mr. Hallen was aware throughout this timeframe that he had access to the resources of the Union head office whenever he needed them. If he chose to wait several months before accessing them, that would not change the fact that this is a sophisticated applicant. It should also be noted that Mr. Hallen testified that he has been employed fulltime as a business agent for the Union since 1994 or 1995. The Board agrees that the Union is a sophisticated applicant.

[38] The second question is why did the delay occur? Are there extenuating circumstances or aggravating circumstances? The evidence shows that the reason for the delay was the parties' continuing interest in reaching an agreement between themselves about how to resolve the underlying issue. The Board considers these extenuating circumstances compelling, as amicable labour relations are more likely to result from an agreement reached between the parties. The admissible evidence *(i.e.*, dates of communications) shows an ongoing effort by the parties to resolve the issues themselves. The expectation that they could do so was not "wishful thinking" by the Union, as the Employer attempted to characterize it. The Employer expended as much time and resources as did the Union on the settlement efforts, and expressed disappointment that, in the end, they were unsuccessful.

[39] The Employer attempted to counter this evidence by suggesting that the Board take into account its evidence that its position did not change throughout the time period commencing with the conference call on September 25, 2015 until the date of the hearing. However, given that the Board has ruled that the content of the without prejudice communications between the parties from December 12, 2015 to July 19, 2016 is not admissible, there is no evidence before the Board respecting how or whether the parties' positions changed or remained the same during that time period.

[40] The Board must then consider whether the delay caused actual litigation prejudice or labour relations prejudice to the Employer that would override the extenuating circumstances. The answer is no. This is not a case where a union sat on its hands and then surprised the employer with an application. The parties were in regular contact throughout this period, and the Employer was well aware that the Union had not abandoned its claims in this matter. There is therefore no

litigation prejudice. While labour relations prejudice is to be presumed, the evidence in this case leads the Board to the conclusion that no actual labour relations prejudice resulted from the delay. The parties worked closely together for several months, both with the expectation that they could resolve their issues. The fact that, in the end, they could not, does not automatically lead to a conclusion that they suffered labour relations prejudice. The Employer speculated on possible potential labour relations prejudice to the employees working at the Smokey Ridge Bog. Given this argument was based on speculation rather than evidence, it was disregarded.

[41] While consideration of the *Toppin* guidelines has not led to an evenly balanced case, the Board will nevertheless comment on the final consideration, the importance of the rights asserted. The rights asserted by the Union are very important; they are core to the purpose of certification. The Employer cannot choose to ignore the Union and the rights of its employees. The Employer cannot choose to ignore its obligations under the Act, the certification order and the Collective Agreement. The Board does not countenance the Employer's attitude or actions in this matter.

[42] The final question is what is the apparent strength of the complaint? The Employer admits that, having decided it did not want to apply the Collective Agreement to the Smokey Ridge Bog employees, it chose not to comply with the Letter of Intention appended to the Collective Agreement[8]. The Employer also admitted that, on the Union's discovery of its contraventions, it continued to refuse to comply with its legislative and contractual obligations.

[43] The Employer contends that the present case is similar to *United Steelworkers, Local 7656 v Mosaic Potash Colonsay ULC*, 2016 CanLII 70631 (SK LRB) ["*Mosaic*"]. In that case the Board dismissed the union's unfair labour practice application that had been filed approximately ten months late. At paragraph 47, it reviewed the rationale provided by the Alberta Labour Relations Board when it developed the *Toppin* guidelines, including the following comment:

> *We conclude that it is far too limited an approach for the Board to look only for the litigation prejudice – the damage to a party's ability to litigate the dispute – produced by the delay. The prejudice with which the Board should be concerned is broader. The Board must recognize the prejudice delay creates to the entire set of labour relations relationships in the workplace. It must keep in mind the corrosive effect of delay upon a labour relations system that is both statutorily and in practice extraordinarily sensitive to time. It must place some value on the maintenance of "industrial peace".*

[8] More on this later. See paragraphs [54] to [56].

[44] In *Mosaic*, the Board gave significant weight to the fact that the union provided no satisfactory explanation for the delay. This is the factor that differentiates *Mosaic* from the case before us. Rather than the delay here reducing industrial peace, it was meant to maintain industrial peace. This is reinforced by the last email from the Employer to the Union on this issue, which commenced with a comment that the Employer was "truly disappointed by the union's position after all the efforts we've put together into the 'without prejudice' meetings we had to find a solution to this situation"[9].

[45] The Employer also relied on *Unifor, Local 609 v Health Sciences Association of Saskatchewan*, 2016 CarswellSask 731 (SK LRB). At paragraph 32, the Board stated that the purpose of the 90-day deadline in subsection 6-111(3) is "to ensure issues are dealt with expeditiously". A decision by the Board to hear the Union's unfair labour practice application would not be contrary to that purpose. It would recognize that the parties were dealing with their issues expeditiously, albeit through an alternative and ultimately unsuccessful route.

[46] In *Mosaic*, the Board characterized the union's view that the employer might change its mind as "wishful thinking, at best"[10]. As noted earlier, the Board does not share the Employer's view that the same comment can be made about the Union in this case. The Employer here was as fully engaged as the Union in the without prejudice communications. The email from the Employer[11] that started the communications laid out the Employer's position, followed by the statement that it "remain[ed] open to further discussion".

[47] Consideration of the principles identified in *Saskatchewan Polytechnic* does not lead the Board to a decision to dismiss this application. While timely resolution of disputes is essential to ensuring amicable labour relations, the Union and the Employer were taking steps throughout the period from September 2015 to July 2016 to attempt to arrive at a solution that would confirm and continue the amicable labour relations they enjoyed.

[48] The Employer's application, to dismiss the Union's unfair labour practice application for delay, is dismissed.

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[9] U-13, Email from Rinfret to Hallen, August 2, 2016.
[10] Paragraph 22.
[11] U-10, Email from Rinfret to Hallen, December 11, 2015.

Unfair Labour Practice

[49] The final issue is the Union's unfair labour practice application. The Union alleges that the Employer has been or is engaging in an unfair labour practice, or a contravention of the Act, within the meaning of the following provisions of the Act:

> ***Parties bound by collective agreement***
> *6-41(1) A collective agreement is binding on:*
>
> *(a) a union that:*
>
> *(i) has entered into it; or*
>
> *(ii) becomes subject to it in accordance with this Part;*
>
> *(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and*
>
> *(c) an employer who has entered into it.*
>
> *(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:*
>
> *(a) do everything the person is required to do; and*
>
> *(b) refrain from doing anything the person is required to refrain from doing.*
>
> *(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.*
>
> *(4) If an agreement is reached as the result of collective bargaining, both parties shall execute it.*
>
> *(5) Nothing in this section requires or authorizes a person to do anything that conflicts with a requirement of this Part.*
>
> *(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails.*
>
> ***Employer to deduct dues***
> *6-43(1) On the request in writing of an employee and on the request of a union or union local representing the employees in the bargaining unit, the employer shall deduct and pay in periodic payments out of the wages due to the employee the union dues, assessments and initiation fees of the employee.*
>
> *(2) The employer shall pay the dues, assessments and initiation fees mentioned in subsection (1) to the union or union local representing the employee.*
>
> *(3) The employer shall provide to the union or union local the names of the employees who have given their authority to have the dues, assessments and initiation fees mentioned in subsection (1) paid to the union or union local.*
>
> *(4) Failure to make payments or provide information required by this section is an unfair labour practice.*
>
> ***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:*
>
> *. . .*

> *(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;*
>
> *. . .*
>
> *(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.*

[50] The Employer attempted to address these claims by arguing that it has two operations in Saskatchewan: the Carrot River Operation, that consists of the peat processing facility and three bogs (Ravendale Bog, Twin Bogs, Peesane Bog), and the Hudson Bay Operation, that consists of two bogs (Smokey Ridge Bog and Pasquia Bog).

[51] The evidence revealed that, in actual fact, all of these sites constitute one operation, as the peat moss from all of these bogs is processed at the one processing facility located outside Carrot River. Evidence was provided by the Union about the Employer's practice of using employees to perform work where they are needed, at various bogs and/or the plant. The Employer did not provide any evidence of how the Smokey Ridge and Pasquia Bogs constituted one operation, however there was significant evidence of a connection between all bogs and the plant. The evidence also indicated that the employees who would be employed at the Smokey Ridge and Pasquia Bogs would be doing the same job as the employees at the other bogs.

[52] In its Reply the Employer states:

> *To the extent that the Employer recognizes the Union as the bargaining agent for operations within 50 km of Carrot River, it does so voluntarily and on a case by case basis, without intention to expand the scope of the Union's certification as agreed in the collective bargaining agreement. The Union's certification does not automatically cover operations outside of Carrot River and section 2.01 of the collective bargaining agreement.*

[53] The Employer's suggestion that the Union's certification does not automatically cover operations outside of Carrot River does not withstand scrutiny. All of the Employer's operations are outside of Carrot River. The plant is outside of Carrot River; all of the bogs are outside Carrot River.

[54] The Collective Agreement contains a Letter of Intention ["LOI"] that addresses the operation of new bogs. It reads as follows:

Letter of Intention

Operation of new bogs

> *To provide for the continued exploitation of peat in Saskatchewan, Premier Horticulture plans for the gradual depletion of the bogs it currently exploits by identifying new sites of exploitations for future usage. During the next years, a new bog will likely be developed by the Company in Hudson Bay, Saskatchewan. As per the Department of Labour of Saskatchewan order dated June 2, 1971, the hourly paid employees covered in this order and employed by Premier Horticulture in the Province of Saskatchewan are represented by the Industrial Wood and Allied Workers of Canada, Local 1-184 (I.W.A. Canada, Local 1-184). This is to advise that as new bogs will be developed in this province, the Company will be pleased to meet with the Union to discuss matters of interest related to manning the new operation as was done when the Ravendale bog came into operation some years ago. The Company will undertake to make available at new bog sites chemical portable toilets as it begins work on such sites.*

[55] The Employer suggests that this LOI should be interpreted to mean only that the Employer will discuss new bogs with the Union, but that it has made no commitment with respect to the employees at those new bogs being Union members. The Board does not accept that interpretation. In the LOI, the Employer acknowledges that its employees, including those to be hired at any new bogs in Saskatchewan, including the new bog to be developed at Hudson Bay, are represented by the Union. The Employer has provided no rationale respecting why some of its employees who work at bogs would be included in the scope of the Collective Agreement and some should not.

[56] When the Ravendale Bog came into operation, the employees who worked there were automatically covered by the Collective Agreement. The Employer undertook in the LOI to do the same when other new bogs opened, including bogs in Hudson Bay. To now suggest that they can ignore their obligations because the Smokey Ridge Bog is 178 kilometers from Carrot River is not an argument that the Board can accept.

[57] The description of scope in the 1971 certification order applied to the Employer's employees employed "in the Province of Saskatchewan". This wording was changed in section 2 of the collective agreements commencing in 1988 to refer to employees employed "in the Company's operations at Carrot River, Saskatchewan".

[58] The Employer argues that the change in the wording of the scope from "in the Province of Saskatchewan" to "in the Company's operations at Carrot River, Saskatchewan" means the Collective Agreement only applies to its operations at Carrot River. According to the bargaining notes from negotiations that occurred in May 1988, tendered by the Union as Exhibits U-2, U-3 and U-4, this change was agreed to as a housekeeping change[12]. The Union argued that it was considered housekeeping because it did not change the meaning of the scope as, whichever phrase is used, it covers all of the Employer's operations in Saskatchewan. The Employer urged the Board to disregard Exhibits U-2, U-3 and U-4, and to interpret this change as a reduction in scope from province-wide to just its Carrot River operations. The Employer did not provide any contradictory evidence to that provided by the Union, namely, that the change was considered a housekeeping change when it was made. The Employer's interpretation of the change in wording would require the Board to find that the Union agreed by the change to give the Employer full discretion to decide when employees at a new bog would be represented by the Union and when they would not (by choosing whether or not to designate it as part of its Carrot River operations, as it is attempting to do here).

[59] The Employer points to *Service Employees International Union West v Saskatoon Regional Health Authority (Article 6 Grievance)*, [2010] SLAA No 9, *Communication, Energy and Paperworkers Union, Local 777 v Imperial Oil Strathcona Refinery (Policy Grievance)*, [2004] AGAA No. 44 and Brown & Beatty Canadian Labour Arbitration[13], 4:2120 as providing guidance to the Board in interpreting the interaction between section 2 and the LOI. Brown & Beatty summarizes the appropriate approach as follows:

> ***4:2120 – Presumption that all words have meaning***
>
> *Another related general guide to interpretation is that in construing a collective agreement, it should be presumed that all of the words used were intended to have some meaning. As well, it is to be presumed that they were not intended to be in conflict. However, if the only permissible construction leads to that result, resolution of the resulting conflict may be made by applying the following presumptions: special or specific provisions will prevail over general provisions; where a definition conflicts with an operative provision, the operative provision prevails; where the same word is used twice it is presumed to have the same meaning; where two different words are used, they are intended to have different meanings; where an incorporated document conflicts with an incorporating document, the conflicting provisions of the incorporated document will not be incorporated by reference; and a clear expression of intention is required to confer a financial benefit, or other important provision. [Footnotes omitted]*

[12] Both parties agreed that a housekeeping change to a collective agreement is one that does not affect substantive rights.
[13] Canadian Labour Arbitration, Fourth Edition (Thomson Reuters, 2017).

[60] The Employer argues that, since there is a conflict between section 2 of the Collective Agreement and the LOI, section 2 overrides the LOI. However, interpreting section 2 in accordance with its ordinary meaning leads to no conflict. The only processing plant operated by the Employer is the one situated outside Carrot River. As a practical matter, the company's operations in Saskatchewan comprise the processing plant outside Carrot River and the bogs that feed its operations. There is no basis in the Collective Agreement on which the Employer is entitled to unilaterally decide that employees working at bogs more than 50 kilometres from Carrot River are not covered by the Collective Agreement[14]. The Employer is not entitled to ignore the Collective Agreement and decide for itself whether or not new employees it hires are represented by the Union. The Collective Agreement says that it applies to new bogs. The parties agreed to a process that would apply when a new bog was developed; the Employer chose to ignore its obligations. The Employer admitted to committing the unfair labour practices alleged by the Union.

[61] The Employer indicated that it had a preference for a separate collective agreement for the employees at the Smokey Ridge and Pasquia Bogs because it was sometimes difficult to get employees to sign up for overtime. The Employer also indicated that bog and plant employees have different issues, but both kinds of employees are covered by the Collective Agreement, and would continue to be even if that argument was accepted. The Employer also argued that these two bogs are too far away from the others to be covered by the Collective Agreement. There is nothing in the Collective Agreement that would make this a relevant consideration. In fact, the opposite is true. The LOI contemplates bogs being developed in the Hudson Bay area. All of these arguments ignore the fact that this is not the Employer's choice. Rather than attempt to bargain a resolution to what it called the bog issues, the Employer decided to ignore the Collective Agreement and the Act. That is not an option available to the Employer. Given that the Employer agreed to and signed the Collective Agreement, they are bound its provisions, whether they like it or not.

[62] The Board finds that the Employer has committed the unfair labour practices alleged by the Union in its Application. The evidence admitted at the hearing satisfies the Board that, contrary to section 6-41 of the Act, the Employer failed to comply with the Collective Agreement: it failed to recognize the Union as the exclusive representative of its employees as required by section

[14] While this is the Employer's stated position, it does not argue that the employees at the Peesane Bog are excluded, and the Peesane Bog is 62 kilometers from Carrot River.

4:01; it failed to require the employees it hired at Smokey Ridge Bog to execute the Union Check-off Form and Application for Membership, as required by section 4:05; it failed to remit dues to the Union as required by section 4:06; it failed to enter into discussions with the Union about the Smokey Ridge Bog as required by the LOI. The Employer also contravened section 6-43 and clause 6-62(1)(r) of the Act by failing to remit Union dues for the employees working at the Smokey Ridge Bog.

[63] The Board accordingly makes the following Orders:

(a) A declaration that the Employer committed unfair labour practices contrary to sections 6-41, 6-43 and 6-62 of the Act;

(b) An order requiring the Employer to apply the Collective Agreement, and pay to employees and former employees at the Smokey Ridge Bog all unpaid back wages and benefits owing under the Collective Agreement;

(c) An order requiring the Employer to provide to the Union information pertaining to all employees and former employees at the Smokey Ridge Bog, including names, contact information, dates employed, hours worked, amounts paid, and hourly rates of pay from the date employees were first employed at the Smokey Ridge Bog to the present;

(d) An order requiring the Employer to pay to the Union, at no cost to the employees, the equivalent of the Union dues, initiation fees and assessments that would have been deducted and remitted in relation to the employees and former employees employed at the Smokey Ridge Bog if the Employer had applied the Collective Agreement from the commencement of their employment at the bog up to the date the Collective Agreement is applied to the employees at the Smokey Ridge Bog;

(e) An order requiring the Employer to refrain from committing the same unfair labour practices and contraventions of the Act, and to rectify any and all contraventions of the Act.

[64] Given the passage of time since the hearing, the Board will remain seized with this matter to make further orders should the parties be unable to agree on the implementation of the Orders described above.

[65] Both counsel provided comprehensive written arguments respecting the issues in this matter, which the Board reviewed and found helpful. Although not all of the numerous arguments raised have been addressed in these Reasons, all were considered in reaching a decision.

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

Dated at Regina, Saskatchewan, this 18th day of January, 2019.

LABOUR RELATIONS BOARD

_____
Susan C. Amrud, Q.C.
Chairperson