Government of Saskatchewan

Saskatchewan Labour Relations Board
1600, 1920 Broad Street
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Dear Mr. Lapchuk, Ms. Robertson and Mr. Talbot:

Re: LRB Files No. 353-13 & 263-16: David B. Lapchuk v Saskatchewan Government and General Employees' Union and Government of Saskatchewan
Request for In-person Hearing

Background:

[1] Briefly put, LRB Files No. 353-13 and 263-16 are applications made by David Lapchuk alleging that his union, Saskatchewan Government and General Employees' Union ["SGEU"] breached the duty of fair representation it owed to him in his disputes with his employer, Government of Saskatchewan ["Government"]. To date ten hearing days have been held in this matter and 126 exhibits have been entered, 42 by Lapchuk and 84 by SGEU. Lapchuk has made a request for an in-person hearing when this matter resumes.

[2] In light of the COVID-19 pandemic, the Board ceased in-person hearings in mid-March 2020. The Board commenced holding hearings again in June 2020. The COVID-19 Notice posted on the Board's website states:

> *Video hearings will be the default procedure for matters with contested evidence unless and until otherwise notified....*
>
> *If one or more parties to a matter believe(s) that a video hearing is not procedurally fair, the party or parties shall submit a plan for the conduct of the hearing in-person....*

Arguments:

[3] All parties are asking the Board to determine that this matter proceed as an in-person hearing when it resumes. Many factors were cited for this request.

[4] Lapchuk's arguments are:

- His home internet does not have sufficient bandwidth for him to participate in a video hearing. He is concerned that this will interfere with his ability to hear what is being said in the proceedings.
- Being self-represented and having medical issues, he requires the Board's accommodations to be able to properly question witnesses and to hear and understand their testimony, both their voices and visual cues as to body language.
- The case is long and complicated.
- The number of Covid cases in Regina remains low.
- The hearing room is large.
- He would like to bring a support person with him.

[5] SGEU cited the following factors:

- Lapchuk had the full benefit of an in-person hearing while presenting his evidence, so it should have the same ability to present its evidence without the risk of technical difficulties with a video hearing.
- The large volume of exhibits in this case can be more easily handled at an in-person hearing.
- Disruptions caused by participants talking over one another (as has occurred during this hearing) would negatively affect the functionality of the hearing.

[6] SGEU relied on *Labourers' International Union of North America, Local 1059, and Labourers' International Union of North America, Ontario Provincial District Council v Bruce Power LP*[1] ["*Bruce Power*"] in support of its arguments, in particular, paragraph 11:

> *Furthermore, the Board agrees with the submissions of Aluma and the Carpenters on the issue of procedural fairness. The Board should accord all parties equitable treatment. In this case, the Labourers have completed their initial presentation addressing the Board in the ordinary in-person oral presentation format with no time limits. Aluma and the Carpenters argue, with merit, that not to allow them the same opportunity might prejudice their right to fully and fairly present their case and to answer any questions the Board might have. The Board agrees. This is especially so given the complex and disputed facts and arguments in play in this case. To use an analogy often employed in the development of the Canadian west in the late 19th and early 20th centuries, "you don't change horses in midstream". Therefore, the Board finds that a videoconference hearing is not appropriate at all on the particular facts of this case.*

[7] The Government's arguments are consistent with those of the other two parties:

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[1] 2020 CanLII 28024 (ON LRB).

- This is a continuation of a hearing that, to date, has been conducted in person.
- The hearing has been lengthy, the issues are complex and the document record is voluminous.
- The importance of the decision on the merits to the applicant is significant.
- In view of the challenges in the conduct of the hearing to date, it is difficult to imagine how it could continue via video without being procedurally unfair to any of the parties at any given time.

Analysis and Decision:

[8] The issue for the Board to determine is whether it would be procedurally unfair to proceed with a video hearing in this particular case.

[9] The Board is persuaded that this is an appropriate case in which to order that the hearing proceed as an in-person hearing, for one reason, Lapchuk's submission that his home internet does not have sufficient bandwidth for him to participate in a video hearing. None of the other factors cited would lead to a conclusion that this matter could not proceed through a video hearing.

[10] SGEU relied on *Bruce Power*, a decision of the Ontario Labour Relations Board issued in April 2020. This Board does not agree with the approach taken in that case. We are not in the late 19th or early 20th century; the COVID-19 pandemic has caused many people and institutions to "change horses in midstream". In particular, courts and tribunals have been appropriately prodded to more fully adopt and embrace technology.

[11] The approach taken in *Bruce Power* has not been consistently followed by the Ontario Board. In June 2020 the Ontario Board considered the use of video hearings in detail in *Labourers' International Union of North America, Local 183 v Innovative Civil Constructors Inc.*[2]:

> *19. In my view, when considered critically in the context of the technological resources available to the parties and the Board in today's modern world, this concern* [assessing credibility] *ought not to preclude the Board from hearing evidence from witnesses by way of video hearing. Counsel for Local 183 argued strenuously that video hearings are appropriate, even when credibility is at issue. He argued that* ***there is no basis in fact for the proposition that assessments of credibility made by a trier of fact at an in-person hearing are more reliable than assessments of credibility made by a trier of fact at a video hearing.***
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> *20.* ***I agree.*** *Over the years the Board has identified many different considerations that factor into the ultimate determination of the credibility of any given witness. Those*

[2] 2020 CanLII 42431 (ON LRB).

considerations include the clarity and consistency of the testimony offered, having regard to contemporaneous notes or other documents; the demeanour of the witness; the ability of the witness to avoid the tug of self-interest; the firmness of the recollection of the witness; whether the witness was well-situated and could see and hear what actually happened; the overall plausibility of the testimony when considered to that of others; and the likelihood of "bias" towards any given party or viewpoint. All of these factors are utilized by the Board to determine whether testimony offered by a witness is, as O'Halloran J.A. put it in Faryna v. Chorny, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.), "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". ***None of the factors typically considered by the Board when assessing credibility is absent when evidence is adduced by way of a video hearing.***

. . .

23. The Board acknowledged at paragraph 23 of its decision that the evidence expected to be offered by Mr. Jaramillo would be "long and complex and involve a great many issues of credibility which are central to the ultimate result". The Board noted that the ability of a decision maker to reach conclusions regarding the credibility of a witness testifying by way of video conference had previously been considered by Rutherford J. in Pack All Manufacturing Inc. and Triad Plastics Inc., 2001 CanLII 7655 ("Pack All Manufacturing"). In Pack All Manufacturing, Rutherford J. stated the following, at paragraph 6 of his reasons:

> *In my experience, a trial judge can see, hear and evaluate a witness' testimony very well, assuming the video-conference arrangements are good. Seeing the witness, full face on in colour and live in a conference facility is arguably as good or better than seeing the same witness obliquely from one side as is the case in our traditional courtrooms here in the Ottawa Court House. The demeanor of the witness can be observed, although perhaps not the full body, but then, sitting in a witness box is not significantly better in this regard. Indeed, I often wonder whether too much isn't made of the possible ability to assess the credibility of a witness from the way a witness appears while giving evidence. Doubtless there are "body language" clues which, if properly interpreted, may add to the totality of one's human judgment as to the credibility of an account given by a witness. The danger lies in misinterpreting such "body language," taking nervousness for uncertainty or insincerity, for example, or shyness and hesitation for doubt. An apparent boldness or assertiveness may be mistaken for candour and knowledge while it may merely be a developed technique designed for persuasion. Much more important is how the substance of a witness' evidence coincides logically, or naturally, with what appears beyond dispute, either from proven facts or deduced likelihood. I am not at all certain that much weight can or should be placed on the advantage a trier of fact will derive from having a witness live and in person in the witness box as opposed to on a good quality, decent sized colour monitor in a video-conference. While perhaps a presumption of some benefit goes to the live, in person appearance, it is arguable that some witnesses may perform more capably and feel under less pressure*

> *in a local video-conference with fewer strangers present and no journeying to be done.*

The Board observed that this same issue had been extensively analysed by a panel of the Human Rights Tribunal of Ontario in Johnson v. Ekonomidis, 2004 CanLII 18 ("Johnson"). In Johnson, the Tribunal made the following observation, at paragraph 31 of its decision:

> *... **It is difficult to see how, in the ordinary case, evidence taken by video conferencing (assuming that it is properly functioning) is likely to prejudice any of the parties.** The technology permits all parties, including the trier of fact, to fully observe the witness while testifying. This not only facilitates the assessment of credibility, but the conduct of the examinations of the witness.*

At paragraph 34 of its decision in Johnson, the Tribunal also commented upon the limited utility of observing the demeanour of a witness for the purpose of assessing credibility:

> *The most significant indicia of credibility and reliability – namely the internal consistency of the evidence and its relationship to other evidence can be fully addressed and evaluated without seeing the witness. Indeed, it is now well recognized in the jurisprudence that the "demeanour" of a witness is often an inadequate basis upon which the trier of fact should assess credibility or reliability.*

24. The Board in Islington Nurseries concluded that, for the reasons identified by Rutherford J. in Pack All Manufacturing and the Human Rights Tribunal in Johnson, it cannot be automatically concluded that any prejudice which may result from a witness giving evidence by way of video conference is likely to be significant, even in cases which are long, complex, or involve issues of credibility. Ultimately the Board considered all of the circumstances, and determined that it would permit Mr. Jaramillo to testify by way of video hearing.

*25. **In my view, it is time to put an end to the assumption that a video hearing negatively affects the ability of a decision-maker to make credibility assessments.** For the reasons identified above by Rutherford J. in Pack All Manufacturing, the Tribunal in Johnson, and the Board in Islington Nurseries, I am of the view that holding a video hearing to secure the evidence of Mr. Cordeiro would not have any effect upon my ability to assess the credibility of the testimony he offers. Ultimately, the demeanour of Mr. Cordeiro will be of little significance. What will matter is whether his evidence is consistent with the other credible evidence called by the parties, including the myriad documents filed as exhibits. **If Mr. Cordeiro testifies by video hearing, the fact that he has done so will not have an effect on his credibility.***

26. There are other concerns identified by the BUC and Innovative. In support of their position that they will be significantly prejudiced by a video hearing to secure the evidence of Mr. Cordeiro, the BUC and Innovative both observe that this is a proceeding that involves a large number of documents that have been awkward to handle during in-person

hearings. In the context of a video hearing, both parties raise the concern that dealing with those documents will be so unwieldy and awkward that their cases will be prejudiced.

27. ***I agree that there are many documents. However, in my view it will be possible to deal with document issues in an effective manner.*** *Pre-hearing documentary production that satisfied all of the parties was completed years ago. Most of the documents that have been referred to the witnesses to date are found in separate tabs in three inch, three-ring binders, so they are easy to locate. The awkwardness experienced to date in dealing with documents was typically the result of counsel, the witnesses, and the Board being required to move from a tab located in one binder to a tab located in a second binder, and sometimes back, in the middle of a series of questions. Assuming that counsel, the witness, and the Board each has the same amount of desk space during the course of a video hearing, that awkwardness will not be any worse during the course of a video hearing than it has been to date. Most of the key documents have already been identified by one or more witnesses, so I do not anticipate that there are many new documents left to be made exhibits.*

28. To the extent that there are documents that have not yet been entered into evidence but will be put to Mr. Cordeiro, the Board can ensure that all of those documents are identified by each party to the others, and in their possession, in advance of the next hearing dates. The Board's Rules of Procedure require any such documents be identified at least ten days before the hearing commences. That date passed years ago. If a document is produced by a party at the last minute, and the document is permitted by the Board to be put to the witness, the document can be emailed to the witness and the other parties at that time. There may be a delay in those circumstances while counsel and their clients review the document, but there would have been a similar delay if Mr. Cordeiro was providing his testimony in-person. A short delay in these circumstances is something that litigation by video hearing can easily accommodate.

. . .

31. Finally, during argument counsel for Innovative expressed a concern regarding what I will refer to as an unevenness in the opportunity provided to the parties to test each other's case. In particular, counsel for Innovative is troubled by the fact that Local 183 has had a full opportunity to test his client's entire case in person, but that he will not be provided with that same opportunity. Counsel for the BUC also raised this same issue. Both the BUC and Innovative relied upon the following passage from Bruce Power LP, 2020 CanLII 28024, in support of their position:

> *11. Furthermore, the Board agrees with the submissions of Aluma and the Carpenters on the issue of procedural fairness. The Board should accord all parties equitable treatment. In this case, the Labourers have completed their initial presentation addressing the Board in the ordinary in-person oral presentation format with no time limits. Aluma and the Carpenters argue, with merit, that not to allow them the same opportunity might prejudice their right to fully and fairly present their case and to answer any questions the Board might have. The Board agrees. This is especially so given the complex and disputed facts and arguments in play in this case. To use an analogy often employed in the*

> *development of the Canadian west in the late 19th and early 20th centuries, "you don't change horses in midstream". Therefore, the Board finds that a videoconference hearing is not appropriate at all on the particular facts of this case.*
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> *During the course of oral argument, counsel for the BUC argued that it would cause significant prejudice to the BUC if the evidence to be given by its only witness is provided in a different way than the evidence that has been provided to date by Innovative and Hired Resources. Counsel for the BUC reiterated the observation made by the Board in Bruce Power LLP that "you don't change horses in midstream".*
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> *32. While I appreciate the mischief that underlies the analogy used by the Board in Bruce Power LP,* ***I disagree with the passage to the extent that it may suggest that it is inequitable and procedurally unfair for the Board to require one party to call evidence by way of an in-person hearing, and to allow another to call evidence by way of a video hearing. For the reasons set out above, I do not agree that a video hearing inherently prejudices the right of a party to fully and fairly present its case and to answer any questions that the Board (or, for that matter, any other party) may have. Although evidence called through a video connection is not given in person, it is offered live. The party offering the evidence, and any party which tests that evidence, all have the same opportunity to offer and test the evidence, respectively, as they do should that very same evidence be offered in person. Even if there are complex and disputed facts and arguments in play, there is nothing inherent in the use of video technology which builds unfairness or inequity into a hearing which utilizes that technology.*** *(emphasis added)*

[12] If the Board was to agree with the parties that credibility cannot be properly assessed during a video hearing, no hearings requiring the submission of evidence could proceed by way of video hearing. The Board rejects the suggestion that this would be an appropriate procedure for it to adopt. As indicated in its COVID-19 Notice, the Board is operating on a presumption that all hearings will proceed as video hearings unless it would be procedurally unfair to do so in a particular case. Nothing in this case leads to a conclusion that assessment of credibility of witnesses would be more difficult here than in any other case. This Board agrees with the Ontario Board that a video hearing provides as much of an opportunity to see and assess a witness's evidence as an in-person hearing provides.

[13] The Board also rejects the suggestion that an oral hearing in person is somehow superior to an oral hearing by video, and that therefore, since Lapchuk's witnesses testified through an in-person hearing, fairness dictates that SGEU's witnesses testify in the same manner. The Board is of the view that this is merely a restatement of the previous argument, which has already been rejected.

[14] The Board is not swayed by the potential for disruptions at the hearing. As noted by the parties, this has been an ongoing challenge that use of an in-person hearing will not resolve.

[15] The existence of a large number of documents does not lead to a conclusion that an in-person hearing is required in this case. SGEU asserts that the documents could be more easily managed at an in-person hearing, but provides no rationale for this assertion. Of the 126 exhibits entered to date in this matter, the vast majority were found in binders provided to the Board in advance of the hearing. The Board's *Guidelines for Video Hearings* posted on the Board's website provides a procedure for sharing and entering exhibits:

> *Exhibits and submissions:*
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> - *All submissions and exhibits will be exchanged and provided electronically, either in advance, during, or after the hearing, depending on the circumstances;*
> - *Three business days prior to the hearing, parties will provide all possible exhibits to the Registrar by email or cloud storage, except for those that are unanticipated or are otherwise required to be provided during the hearing;*
> - *Parties are responsible for the contents of their possible exhibits and for saving and naming exhibits in a manner that facilitates retrieval;*
> - *The Registrar will provide the panel with the possible exhibits to be reviewed as they are spoken to, and as they are entered;*
> - *Exhibits will be shared via WebEx during the hearing, unless an alternative process is proposed and approved by either the Executive Officer in advance of the hearing, or the panel during the hearing.*
> - *Exhibits that are provided during the hearing will be submitted and exchanged by email, and will be shared via WebEx with all participants to be viewable on the screen during testimony, unless an alternative process is proposed and approved by the panel.*

[16] All of the arguments raised by the parties, that suggest that video hearings are inferior to in-person hearings, are addressed through the following comment in *Arconti v. Smith*[3], in which it was determined that the examination of a witness could proceed by videoconference:

> *In my view, the simplest answer to this issue is, "It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.*

[17] The number of COVID-19 cases in Regina, the province being in a later phase of re-opening and the size of the hearing room are not factors that apply only to this particular case. Therefore, they are not relevant to the issue before the Board, that is, whether a video hearing would be procedurally unfair in this particular case.

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[3] 2020 ONSC 2782 (CanLII) at para 19.

[18] In light of Lapchuk's technological issues, the Board grants his request that this matter proceed as an in-person hearing. It is to be noted that this factor is only accepted by the Board because Lapchuk is self-represented in this matter. If he was represented by counsel, the Board's *Guidelines for Video Hearings* provide:

> *Counsel will be responsible to ensure that clients and witnesses have appropriate technology to allow for viewing of all participants and exhibits, that is compatible with WebEx, that internet bandwidth is adequate, and that they are capable and adept at using the technology in advance of the test run and the hearing.*

Counsel are expected and required to be proficient at using technology and to ensure that arrangements are made for their clients and witnesses to use it effectively. However, the Board is willing to make accommodations in this case, for Lapchuk.

[19] The hearing will proceed in accordance with the Board's *Guidelines for the Conduct of In-person Hearings* that are posted on the Board's website as of the date of the hearing. SGEU has provided submissions respecting modifications to those *Guidelines*. SGEU's submissions are accepted, as they apply to its participation at the hearing. As the *Guidelines* provide, the Board may make further orders before or during the hearing, to ensure that the hearing can proceed in an expedient and safe manner, at the request of a party or on the Board's own motion.

Yours truly,

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