December 6, 2023

United Food and Commercial Workers Union,
Local 1400
1526 Fletcher Road
Saskatoon, SK S7M 5M1

Attention: Heath Smith (via email)

ATCO Structures & Logistics Ltd.
c/o McLennan Ross LLP
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Attention: Dan Bokhenfor (via email)

ATCO Frontec Ltd.
c/o Seiferling Law
200 – 306 Ontario Avenue
Saskatoon, SK S7K 2H5

Attention: Steve Seiferling (via email)

Dear Sirs:

Re: LRB File No. 105-23: Common Employer Application
UFCW, Local 1400 v ATCO Structures & Logistics Ltd. and ATCO Frontec Ltd.

LRB File No. 133-23: Abandonment Application
ATCO Structures & Logistics Ltd. v UFCW, Local 1400

LRB File No. 138-23: Summary Dismissal Application (re: LRB File No. 105-23)
ATCO Frontec Ltd. v UFCW, Local 1400

LRB File No. 157-23: Summary Dismissal Application (re: LRB File No. 133-23)
UFCW, Local 1400 v ATCO Structures & Logistics Ltd.

Background:

[1] The following applications are before the Board:

a) LRB File No. 105-23 [Common Employer Application]: An application pursuant to s. 6-20 of *The Saskatchewan Employment Act* [Act] brought by the United Food and Commercial Workers Union, Local 1400 [Union] seeking a declaration that ATCO Structures & Logistics Ltd. [ASL] and ATCO Frontec Ltd. [Frontec] are common employers, amongst other relief.

b) LRB File No. 133-23 [Abandonment Application]: An application pursuant to s. 6-16 by ASL requesting cancellation of the certification order [Certification Order] the Union relies upon in LRB File No. 105-23, alleging that the Union abandoned its bargaining rights with respect to the Certification Order.

c) LRB File No. 138-23 [Frontec's SD Application]: A summary dismissal application brought by Frontec seeking dismissal of the Common Employer Application on the basis that it is not performing work at the site [Site] covered by the Certification Order as Frontec; rather, it is being performed by a legal entity known as Wicehtowak Frontec Services [WFS], which was formed by Frontec and George Gordon Developments Ltd.

d) LRB File No. 157-23 [Union's SD Application]: A summary dismissal application brought by the Union seeking dismissal of the Abandonment Application on the basis that it discloses no arguable case.

[2] Further to the Board's request, the parties provided written submissions with respect to:

a) The sequence in which the abovementioned applications should be heard; and

b) The manner in which the summary dismissal applications should be heard (i.e., via written submissions alone, or via an oral hearing).

[3] The Union's position is that the Union's SD Application and Frontec's SD Application should be heard first, on the basis of written submissions alone. Following determination of these applications, the Board can hear the Abandonment Application and Common Employer Application, in turn, if either, or both, survive the summary dismissal process.

[4] The Union acknowledges the Board's authority to control its own process and to summarily dismiss and forgo an oral hearing of any matter. It cites *KBR Wabi Ltd.* for the principle that summary dismissal applications are assessed based on the pleadings in the underlying application.[1] As the

[1] *International Brotherhood of Electrical Workers, Local 529 v KBR Wabi Ltd.*, 2013 CanLII 73114 (SK LRB) [*KBR Wabi Ltd.*], at para 79.

Union puts it, "only evidence that has already been pled is available for the Board's consideration."[2] Deciding the summary dismissal applications first is efficient since they could be determinative with respect to the underlying applications. Further, determining the summary dismissal applications by written submissions alone is more expeditious than requiring oral hearings with respect to them. The Union emphasizes that the Common Employer Application was filed on July 14, 2023, and its desire to proceed to a prompt hearing on that matter, provided it remains relevant after the summary dismissal applications.

[5] ASL's position is that the Union's SD Application should be heard first, by way of written submissions. If the summary dismissal application fails, the Abandonment Application should be scheduled for an oral hearing. If the Abandonment Application is dismissed via the Union's SD Application, or after an oral hearing, Frontec's SD Application should proceed by way of oral hearing. If Frontec's SD Application is unsuccessful, the Common Employer Application should proceed by way of oral hearing.

[6] ASL agrees that the Union's SD Application can proceed by way of written submissions, on the basis of the facts alleged by ASL. It suggests that an oral hearing with respect to the Abandonment Application, if necessary after resolution of the Union's SD Application, could be accomplished in a single day. In its view, an agreed statement of facts may dispense with the need for much evidence.

[7] ASL submits that deferring the hearing of Frontec's SD Application and the Common Employer Application promotes procedural economy, since the outcome of the Abandonment Application could render them moot. ASL also submits that the Common Employer Application is not time sensitive.

[8] Frontec's position on sequencing is the same as ASL's. It emphasizes that if the Abandonment Application is successful, neither the Frontec SD Application nor the Common Employer Application will be required. Further, if the Frontec SD Application is successful, the Common Employer Application will not be required.

[2] Union's submissions on sequencing, p 2.

[9] Frontec submits that an oral hearing is required for the Frontec SD Application because the Board will need to resolve a disputed question of fact. Notably, the Frontec SD Application requests that the parties be permitted to call evidence.[3] Frontec also submits that s. 28(1) of *The Saskatchewan Employment (Labour Relations Board) Regulations* [Regulations] suggests that it is entitled to an oral hearing for the Frontec SD Application:

> *28(1) On an application being filed pursuant to the Act and these regulations, the registrar shall give the parties to the application, including any employer, union, labour organization or other person that filed a reply pursuant to section 24 or an application to intervene pursuant to subsection 25(2), notice of the date, place and time for hearing the application.*

[10] While agreeing with the Union on the test for summary dismissal from *KBR Wabi Ltd*., Frontec emphasizes that s. 6-111(1)(p) empowers the Board to dismiss an application on the basis of either "no arguable case" or "lack of evidence", with the latter basis at least partially underpinning the Frontec SD Application.

[11] Frontec cites the Court of Appeal's decision in *Campbell* as authority for an oral hearing being required to resolve disputed questions of fact.[4] The Board notes that, in *Campbell*, one of the issues was whether the Workers' Compensation Board [WCB] should have determined that a plaintiff's civil action was statute-barred[5] without resolving material contested facts through oral evidence. In *obiter*, the Court commented that the WCB erred in doing so.[6]

[12] Frontec submits:

> *The [Frontec SD Application] would be determinative of the [Common Employer Application]. This application, however, is centered around a contested issue of fact. Frontec submits that it does not complete work on the Site, whereas [the Union] contends that it does. As with the decision in Campbell, an oral hearing is necessary to allow Frontec*

[3] Frontec SD Application, para 5: "The applicant is requesting that this matter be considered with an oral hearing, with the parties being able to call evidence with respect to the summary dismissal application."
[4] *Campbell v Workers' Compensation Board,* 2012 SKCA 56 [*Campbell*].
[5] Pursuant to s. 168 of the WCB's then-enabling legislation.
[6] *Campbell*, at para 86: "… it was unfair to make these determinations in the manner that it did, assuming that these findings were, as its Ruling would indicate, critical to its decision."

> *to present its case and provide oral argument as to why its assertion of fact is, indeed, the correct one.*[7]

Analysis and Decision:

[13] The first question the Board will address is whether the Frontec SD Application requires an oral hearing. The second question the Board will address is the appropriate sequencing of the applications.

1. *Does the Frontec SD Application require an oral hearing?*

[14] Pursuant to clause 6-111(1)(q) of the Act, the Board may decide any matter before it without holding an oral hearing. Accordingly, s. 28 of the Regulations should not be interpreted as requiring the Board to grant an applicant an oral hearing if requested by the applicant. Rather, whether an oral hearing is required is a matter of procedural fairness. If an application can be resolved in a procedurally fair manner on the basis of written submissions alone, the Board may choose to do so.

[15] Summary dismissal applications are generally determined by the Board on the basis of written submissions alone. This promotes efficiency and timeliness in resolving such applications. An applicant or respondent may request the ability to make oral submissions, or the Board may ask the parties for same, but such circumstances tend to be exceptional.

[16] As identified by the parties, the Board employs the test stated in *KBR Wabi Ltd.* when determining whether to summarily dismiss an application on the basis that it discloses no arguable case:

> *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
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> *2. In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*[8]

[7] Frontec written submissions on sequencing, para 50.
[8] *KBR Wabi Ltd.*, at para 79.

[17] The Frontec SD Application cites the above test,[9] but also notes that the Board is empowered to summarily dismiss an application where there is "a lack of evidence".[10]

[18] While s. 6-111(p) grants the Board the authority to summarily dismiss an application where there is a lack of evidence, the Board has exercised this power sparingly. As will be explained, the Board has not developed a practice of convening oral hearings in summary dismissal applications to hear evidence (as opposed to argument) regarding contested matters in the underlying application. Indeed, such a practice was not contemplated by the Board in *KBR Wabi Ltd.* (emphasis added):

> *[81] … when an application for summary dismissal is received by the Board and it is referred to an in camera panel or the Executive Officer of the Board, the first question to be determined is whether or not this matter is one that should be dealt with by the Board through written submissions rather than through an oral hearing process utilizing the Board's authority in s. 18(q). The second question, which is whether an arguable case exists or there is a lack of evidence, would then be dealt with either by way of written submissions or through oral argument at a hearing.*[11]

[19] In *Soles*, the Board noted its reluctance to consider lack of evidence as a ground for summary dismissal at the pleadings stage of proceedings (emphasis added):

> *[23] It is therefore incumbent upon us to consider whether in this case, the application should be summarily dismissed without a hearing because there is a lack of evidence or no arguable case. In our view, it is not appropriate to consider the specific ground of a "lack of evidence" because, by its very words, it infers a requirement to produce evidence at this stage of the proceedings. While we will examine below the requirements for the filing of an application, we note that, at the pleadings stage, a party is not specifically required to outline all the evidence it intends to adduce or all the documents it intends to introduce in evidence at a hearing. While it is possible that the Board may in the future utilize a process where the parties must file their evidence in written form rather than have an oral hearing (i.e. a "paper hearing"), a practice currently generally limited to the determination of interim applications, it would seem that the ground of a "lack of evidence" would more appropriately be used for dismissing an application following the introduction of evidence, whether or not an oral hearing is held.*[12]

[9] Frontec SD Application, para 4a).
[10] Frontec SD Application, para 4c).
[11] *KBR Wabi Ltd.*, at para 81.
[12] *Soles v Canadian Union of Public Employees, Local 4777*, 2006 CanLII 62947 (SK LRB) [*Soles*], at para 23.

[20] This passage from *Soles* has been cited in more recent decisions of the Board, including *Upper*[13] and *Ha*[14].

[21] That said, there may be limited circumstances where the Board is willing to summarily dismiss an application for lack of evidence at the pleadings stage. For example, in *Fraser*, the applicant's unfair labour practice application could not succeed without relying upon settlement privileged communications.[15] These communications were referenced and relied upon in the unfair labour practice application.[16] The Board summarily dismissed the application, without an oral hearing, stating:

> *[112] In conclusion, the Board finds no compelling public interest to admit the evidence of the proposed settlement agreement, and related communications, that outweighs the public interest in encouraging settlement. Fraser's entire application rests on the admission of said evidence. In the absence of this evidence, there is no evidence to sustain a claim.*[17]

[22] Ultimately, the Board will only summarily dismiss an application for lack of evidence where it is plain and obvious that it must fail due to lack of evidence, as was the case in *Fraser*. In *Roy*, the Board explained this as follows (emphasis added):

> *[9] Generally speaking, summary dismissal is a vehicle for the disposition of applications that are patently defective. The defect(s) must be apparent without the need for weighing of evidence, assessment of credibility, or the evaluation of novel statutory interpretations. Simply put, in considering whether or not an impugned application ought to be summarily dismissed, the Board assumes that the facts alleged in the main application are true or, at least, provable. Having made this assumption, if the Board is not satisfied that the main application at least discloses an arguable case, and/or if there is a lack of evidence upon which an adverse finding could be made, then the main application is summarily dismissed in the interests of efficiency and the avoidance of wasted resource.*[18]

[23] As the above passages from *Soles*, *Fraser* and *Roy* make clear, an application for summary dismissal based on a lack of evidence is a limited tool. It is not akin to an application for summary

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[13] *Saskatchewan Government and General Employees' Union, Local 1105 v Darryl Upper*, 2023 CanLII 10506 (SK LRB) [*Upper*], at para 39.
[14] *Saskatchewan Polytechnic Faculty Association v Ha*, 2023 CanLII 30423 (SK LRB) [*Ha*], at para 10.
[15] *Saskatchewan Public Safety Agency v Fraser*, 2023 CanLII 75460 (SK LRB) [*Fraser*].
[16] Application in LRB File No. 013-23.
[17] *Fraser*, at para 112.
[18] *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB) [*Roy*], at para 9.

judgment under Rule 7-2 of *The King's Bench Rules*, in which an applicant can apply to have a dispositive question of fact in a civil action determined on the basis of supporting affidavit evidence, and in which the Court may order cross-examination, weigh evidence and evaluate credibility.

[24] *Moose Jaw Board of Police Commissioners*[19] is illustrative. The employer was seeking to summarily dismiss an unfair labour practice application on the basis of undue delay, and the Board pointed out the limited scope of the inquiry it could undertake (emphasis added):

> *[46] It is clear that the Board has the authority to make a preliminary determination as to whether it will refuse to hear allegations of an unfair labour practice made more than 90 days after the discovery date. However, in a straightforward hearing on a preliminary question, the Board will hear and weigh all the evidence relevant to the preliminary question.*
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> *[47] By contrast, in the current application the Employer asks the Board to apply the summary dismissal test due to the alleged late filing. If invoking the summary dismissal process, the Board is restricted to considering only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish the claim. In making its determination, the Board must avoid weighing evidence, assessing credibility, or evaluating novel statutory interpretations.*[20]

[25] Here, Frontec has requested an oral hearing for the Frontec SD Application so that the parties can call evidence with respect to Frontec's assertion that it is not performing work, as Frontec, at the Site covered by the Certification Order. Frontec acknowledges that this assertion is contrary to the Union's allegations in the Common Employer Application. Further, the Board notes that the Union has pled, amongst other things, that Frontec:

> *…has been posting available position (sic) at the Material Sites, not limited to, but including, those for "General Kitchen Helper," "Front Desk Clerk," Camp Attendant," "Head Camp Attendant," "Salad/Sandwich Maker," "3rd Cook," "Baker's Helper," "HSE Advisor," and "Recreation Coordinator."*[21]

[26] In effect, Frontec is asking for an oral hearing for the Frontec SD Application to have a question of fact conclusively determined as a preliminary matter, based on to-be-called evidence.

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[19] *Moose Jaw Board of Police Commissioners v Canadian Union of Public Employees*, 2022 CanLII 90620 (SK LRB) [*Moose Jaw Board of Police Commissioners*].
[20] *Moose Jaw Board of Police Commissioners*, at paras 46-47.
[21] Union's application in Common Employer Application, para 14.

As illustrated in *Moose Jaw Board of Police Commissioners*, above, filing a summary dismissal application does not permit a party to conduct this type of litigation by installments.

[27] Consistent with the "patently defective" standard described in *Roy*, the Board does not convene oral hearings in summary dismissal applications for the purpose of hearing and resolving evidence from the parties on contested facts. Further, it should be noted that if a summary dismissal application is unsuccessful, evidence in relation to the underlying application[22] is tendered in the context of that application. As such, the concern raised by the Court of Appeal in *Campbell* does not arise. The parties are provided with the opportunity to tender evidence and challenge each other's evidence in the context of the underlying application.

[28] Accordingly, the Frontec SD Application will be heard by written submissions, should Frontec still intend to proceed with it in light of these reasons.

[29] Finally, the following should be mentioned. All of the parties agree that the summary dismissal applications and the Abandonment Application should be heard before the Common Employer Application. If the Common Employer Application remains extant after the preceding applications are resolved, it remains open to any of the parties to request that the Board address a preliminary issue in the context of the Common Employer Application, which will proceed by oral hearing. The Board can consider the appropriateness of doing so at that time.

2. How should the applications be sequenced?

[30] The Board is the master of its own schedule and is empowered under subsection 6-103(1) and clause 6-111(1)(k) of the Act to adjourn or postpone any proceeding if it considers postponement appropriate.

[31] When determining the sequence in which related applications will be heard, the key considerations for the Board are fairness to all parties, efficiency and judicial economy.[23] In *Woodland Constructors*, these were described as follows:

[22] The underlying application being that which was requested to be summarily dismissed.
[23] *Construction Workers Union, CLAC Local 151 v Woodland Constructors Ltd.*, 2023 CanLII 58549 (SK LRB) [*Woodland Constructors*], at para 13.

> *[13] In spite of the different forum and type of proceeding involved, the key considerations employed by the Court are also relevant when the Board is determining the sequencing of related applications. Paraphrasing from Piett,[5] some of the questions when assessing the key considerations include:*
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> - *Has the party seeking postponement of any application(s) proceeded promptly with the application(s) it seeks to have determined first?*
> - *Will postponing the application(s) promote efficiency, in the circumstances?*
> - *Are any of the applications time sensitive, or needing to be heard promptly to ensure the proceeding is conducted fairly?*
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> *[14] In addition, the Board has generally prioritized certification applications to ensure that employees are not unduly delayed in the exercise of their rights,[6] though successorship and recission applications could be prioritized based on similar reasoning. When determining sequencing, the Board will be mindful of making economical use of the time and resources of the parties and the Board. Ultimately, the list of factors which may impact sequencing in specific circumstances is not closed.*[24]

[32] Here, the Board is cognizant that the Common Employer Application was filed nearly five months ago, and that the Union undoubtedly wishes to proceed with litigating it at the earliest opportunity. In *Woodland Constructors*, the Board alluded to successorship applications as having some urgency so that employees are not unduly delayed in the exercise of their rights. Generally, the same might be said of common employer applications. At the same time, all parties have recognized the need to make economical use of their time and resources, and that of the Board.

[33] In considering fairness, efficiency and judicial economy, the Board is persuaded that the sequencing proposed by the Union is that which is preferable. While Frontec will be required to argue the Frontec SD Application before knowing whether the Abandonment Application succeeds, the Board is concerned with the potential delay if each potentially determinative application with respect to the Common Employer Application is heard strictly in turn.

[34] Accordingly, the Board will hear the applications in the following order and manner:

a) The summary dismissal applications will be heard first, by written submissions.

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[24] *Woodland Constructors*, at paras 13-14.

b) The Abandonment Application will be heard next, by oral hearing, if it remains extant following the Union's SD Application.

c) The Common Employer Application will be heard last, by oral hearing, if it remains extant following any of the preceding applications.

[35] The Registrar will communicate with the parties to set timelines for the filing of written submissions in the summary dismissal applications.

[36] These reasons and decision are made in my capacity as the Board's executive officer, for the purposes of s. 6-97 of the Act.

Yours truly,

Michael J. Morris, K.C., Chairperson
Labour Relations Board