KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 27**

Date: **2024 02 22**
File No.: KBG-SA-00079-2024
Judicial Centre: Saskatoon

BETWEEN:

SERVICE EMPLOYEES INTERNATIONAL UNION-WEST

APPLICANT

- and -

SASKATCHEWAN LABOUR RELATIONS BOARD
SASKATCHEWAN HEALTH AUTHORITY
EXTENDICARE (CANADA) INC.

RESPONDENTS

Counsel:

Shannon G. Whyley and Fraser W. Duncan	for the applicant
Paul L. Clemens	for the respondent, Saskatchewan Health Authority
Andrew W.M. Restall	for the intervenor, Canadian Union of Public Employees, Local 5430

FIAT — ROTHERY J.
February 22, 2024

INTRODUCTION

[1] Service Employees International Union-West [SEIU] brought an originating application for judicial review of the decision (2023 CanLII 113192 (Sask LRB)) [*Decision*] of the Saskatchewan Labour Relations Board [Board] dated November 30, 2023, seeking an order quashing the *Decision*. In accordance with General Application Practice Directive #9, and with the agreement of SEIU, Saskatchewan Health Authority [SHA], and the intervenor, Canadian Union of Public

Employees, Local 5430 [CUPE], the hearing of the judicial review will be set by the Local Registrar to occur no sooner than November 1, 2024.

[2] SEIU also seeks an order pursuant to s. 6-13 of *The King's Bench Act*, SS 2023, c 28, and Rule 3-60(2) of *The King's Bench Rules* staying the *Decision* of the Board until after the hearing of the judicial review. CUPE was granted intervenor status in the application for the stay of proceedings as well as the judicial review. Both SHA and CUPE are opposed to the implementation of the stay of proceedings requested by SEIU.

BACKGROUND

[3] Prior to October 9, 2022, the date when SHA finalized an agreement with Extendicare (Canada) Inc. [Extendicare] to purchase five long-term care facilities in Saskatchewan, SEIU was the certified bargaining agent for the Extendicare homes. Three were located in Regina, one in Moose Jaw, and one in Saskatoon. Because Extendicare operated as a private for-profit entity, its union was not part of the joint bargaining process that had been in place between SHA and CUPE, SEIU and Saskatchewan Government and General Employees' Union (SGEU) in the time frame of 2003-2006, and onward.

[4] When SHA purchased the five long-term care facilities from Extendicare, three previous Board orders dated March 14, 1997, recognizing SEIU as the certified bargaining unit for the facilities in each of Regina (with three long-term care homes), Moose Jaw and Saskatoon, were affected. On November 7, 2022, SEIU applied to the Board pursuant to s. 6-18 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [*SEA*], seeking a declaration from the Board that the collective bargaining rights, privileges and/or duties in respect of the five former Extendicare facilities had transferred to SHA as the successor employer.

[5] The applicable section of Part VI of *SEA* germane to the Board's *Decision* is the following:

> **6-18**(1) In this Division, **"disposal"** means a sale, lease, transfer or other disposition.
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> (2) Unless the board orders otherwise, if a business or part of a business is disposed of:
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> (a) the person acquiring the business or part of the business is bound by all board orders and all proceedings had and taken before the board before the acquisition; and
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> (b) the board orders and proceedings mentioned in clause (a) continue as if the business or part of the business had not been disposed of.
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> (3) Without limiting the generality of subsection (2) and unless the board orders otherwise:
>
> (a) if before the disposal a union was determined by a board order to be the bargaining agent of any of the employees affected by the disposal, the board order is deemed to apply to the person acquiring the business or part of the business to the same extent as if the order had originally applied to that person; and
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> (b) if any collective agreement affecting any employees affected by the disposal was in force at the time of the disposal, the terms of that collective agreement are deemed to apply to the person acquiring the business or part of the business to the same extent as if the collective agreement had been signed by that person.
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> (4) On the application of any union, employer or employee directly affected by a disposal, the board may make orders doing any of the following:
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> (a) determining whether the disposal or proposed disposal relates to a business or part of a business;
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> (b) determining whether, on the completion of the disposal of a business or part of the business, the employees constitute one or more units appropriate for collective bargaining;
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> (c) determining what union, if any, represents the employees in the bargaining unit;
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> (d) directing that a vote be taken of all employees eligible to vote;

> (e) issuing a certification order;
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> (f) amending, to the extent that the board considers necessary or advisable:
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> (i) a certification order or a collective bargaining order; or
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> (ii) the description of a bargaining unit contained in a collective agreement;
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> (g) giving any directions that the board considers necessary or advisable as to the application of a collective agreement affecting the employees in the bargaining unit referred to in the certification order.
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> (5) Section 6-13 applies, with any necessary modification, to a certification order issued pursuant to clause (4)(e).

[6] Following a five-day hearing on the applications brought by SEIU to the Board in July-September 2023, the Board rendered its *Decision* November 30, 2023. While concluding that SHA is a successor employer to Extendicare as defined by s. 6-18 of *SEA*, the Board did not conclude that SHA is bound by the three March 14, 1997 orders that had been in place prior to the purchase by SHA of the five long-term facilities from Extendicare. In this case, the Board "ordered otherwise", and revoked the existing certification orders for the five former Extendicare facilities.

[7] For the Moose Jaw facility, the former Extendicare employees were to become part of the existing health care provider bargaining unit for the former File Hills Health Region. The Saskatchewan Association of Health Organizations Inc. [SAHO] collective agreement with SEIU now applied to the Moose Jaw employees rather than the Extendicare collective agreement with SEIU.

[8] For the Saskatoon facility, former Extendicare employees were to become part of the existing SHA health services provider bargaining unit for the former Saskatoon Health Region. The SAHO collective agreement with SEIU now applies to the Saskatoon employees rather than the Extendicare collective agreement with SEIU.

[9] The employees of the three former Extendicare facilities located in Regina were absorbed into the existing SHA health services provider bargaining unit for the former Regina Qu'Appelle health region. These employees now are represented by CUPE. The SAHO collective agreement with CUPE now applies, rather than the previous Extendicare collective agreement with SEIU.

[10] The grounds for judicial review, as outlined in the originating application filed by SEIU on January 18, 2024, include the following. SEIU alleges that the *Decision* is unreasonable, based upon the facts before the Board, its prior decisions, and the law. SEIU alleges that the Board erred by denying employees in the former Extendicare bargaining units a representative vote regarding their bargaining agent and failed to give enough weight to s. 2(d) of the *Charter of Rights and Freedoms*, pertaining to the employees' fundamental freedom of association. Furthermore, the Board erred by unreasonably giving inappropriate weight to the "Dorsey Report", which refers to the results of a commission established by the Government of Saskatchewan in the 1990s, led by Commissioner James E. Dorsey, to examine the organization of the labour relations between health sector employers and employees. As explained at paras. 18-20 of the *Decision*, the Dorsey Commission issued its report in 1997, along with *The Health Labour Relations Reorganization (Commissioner) Regulations*, RRS 1997, c H-0.03 Reg 1 [*Dorsey Regulations*]. The *Dorsey Regulations* remain in force under *SEA*, as do the certification orders.

THE ISSUE

[11] SEIU applies for a stay of the *Decision* pending the outcome of the judicial review, as provided by Rule 3-60(2) of *The King's Bench Rules*.

THE LEGAL FRAMEWORK

[12] Counsel for SEIU, SHA and CUPE all agree that the controlling authority

for determining whether a stay of proceedings ought to be granted is *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*]. The three criteria that an applicant must prove are:

1. there is a serious question to be tried;

2. irreparable harm will result if the stay is denied; and

3. the balance of convenience, taking into account the public interest, favours granting the relief.

[13] The Supreme Court of Canada stated at p. 334 of *RJR*:

> Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores* [[1987] 1 SCR 110], at p. 127, Beetz J. expressed the position in these words:
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> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.
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> …
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> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. …

[14] The first criterion that must be proven by an applicant for a stay of proceedings is whether there is a serious question to be tried. As stated at pp. 337-338 of *RJR*:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores, supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.
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> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[15] The second criterion that must be proven is whether the applicant would suffer irreparable harm if the stay of proceedings were not granted. This criterion is explained in *RJR* at pp. 340-341:

> Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.
>
> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
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> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. …
>
> [Emphasis added]

[16] The third criterion involves determining whether the balance of convenience favours the applicant. This is also the stage where the Court must consider

any potential harm that might be suffered by a respondent.

[17] *RJR* at pp. 342-343 states:

> The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.
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> The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid* [[1975] AC 396], Lord Diplock cautioned, at p. 408, that:
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> > [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.
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> He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

THE ANALYSIS

A. A serious question to be tried:

[18] There is little debate among counsel that the judicial review of the *Decision* meets this test. It is clear from the grounds outlined in the originating application that the issues are serious. The application by SEIU is neither vexatious nor frivolous.

B. Whether SEIU and the former Extendicare facility employees will suffer irreparable harm if the *Decision* is not stayed pending the judicial review:

[19] Counsel for SEIU outlined the various forms of irreparable harm that its

members will suffer, which "cannot be quantified in monetary terms or which cannot be cured".

[20] Counsel for SHA submits that these perceived harms are merely speculative, or are able to be quantified in monetary terms or can be cured should SEIU be successful on its judicial review.

[21] Counsel for SEIU counters that argument with the position that the employees of the former Extendicare facilities should not be submitted to two potential transitions in their relationship with SHA. If no stay of proceedings is granted, the employees will suffer upheaval in their work and bargaining rights caused by the transition to the other SEIU bargaining units in Moose Jaw and Saskatoon, and more drastically, their transition in Regina to CUPE, being a different union altogether. Then, if SEIU is successful on judicial review, the employees would be subjected to a transition back to the bargaining relationship prior to the *Decision* of the Board.

[22] I must conclude that, while there is some appeal to the simplicity of this argument, I must discard it. The test is irreparable harm and the balance of convenience; the test is not upheaval caused by a transition in bargaining agents.

[23] Counsel for SEIU submits that there has been considerable labour relations turmoil since December 1, 2023 as a result of the Board's *Decision*. The employees of the former Regina Extendicare facilities are upset and confused by having their longstanding relationship with SEIU severed. There is lack of clarity as to whether SEIU or CUPE pursue grievances, disability claims and matters requiring a duty to accommodate. The practical cost and union resources to deal with the transition for the former Extendicare employees now being members of CUPE is too difficult to measure. Counsel for SEIU submits SEIU cannot be compensated in monetary terms if it were successful in the judicial review.

[24] The affidavit evidence filed by the national representative of CUPE, Lori Sutherland, states that the concerns of the former Extendicare employees are unfounded. CUPE has been working diligently to advocate on behalf of its new members. There is no confusion on its part as to its role in assisting its new members.

[25] The Court recognizes that CUPE is a large, sophisticated and formidable union in the health sector in Saskatchewan. It already represents 6,300 union members in the Regina health region, and the additional 600 members that are brought in pursuant to the Board's *Decision* will benefit from this experienced representation.

[26] It is understandable that the former Extendicare employees feel confused and upset. Their relationship with SEIU has been longstanding. Change always brings a degree of uncertainty and apprehension. But, these are not factors that constitute "irreparable harm" and must be discounted in the analysis for granting a stay of proceedings.

[27] However, there are potential causes of irreparable harm advanced by counsel for SEIU. They are as follows.

[28] The first concern pertains to the calculation of seniority and how that would affect the former Extendicare employees. Under the SEIU collective agreement with Extendicare, seniority is calculated using an "hours based" seniority system. Oppositely, CUPE and the SEIU collective agreements in Moose Jaw and Saskatoon calculate seniority using a "date based" seniority system. If a stay of proceedings were not granted, and these employees now would be required to compete in the "date based" seniority system, they might be adversely affected in the calculation. If SEIU is successful on judicial review, seniority will need to be recalculated on the "hours based" seniority system.

[29] SHA and CUPE argue that there would be no irreparable harm because

the employees' hours worked will continue to be calculated, in case a reversal should take place. SHA and CUPE also assert that the advantages of being a member of a union that is ten times as large opens the door to advancement within a larger administration for the former Extendicare employees.

[30] The Board itself ensured that the former Extendicare employees' seniority would be preserved. The orders issued on November 30, 2023 pursuant to the *Decision* include the following:

> THE LABOUR RELATIONS BOARD … HEREBY ORDERS:
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> …
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> (e) that the existing collective bargaining agreement between Canadian Union of Public Employees, Local 5430 and Saskatchewan Association of Health Organizations Inc. with necessary modifications, including to ensure no interruption of benefits and to ensure the dovetailing of seniority, applies to the health services providers in the former Extendicare/Parkside, former Extendicare/Sunset and former Extendicare/Elmview in paragraph (a) until such time as a new collective bargaining agreement has been negotiated between the union set out in paragraph (c) and the employers set out in paragraph (d);
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> (f) that, to the extent reasonably possible, every health services provider in the former Extendicare/Parkside, former Extendicare/Sunset and former Extendicare/Elmview described in paragraph (a) is entitled to retain the seniority they earned in their former appropriate bargaining unit and to have such seniority recognized under the terms of a new collective bargaining agreement negotiated between the union set out in paragraph (c) and the employers set out in paragraph (d);
>
> …

[31] All that said, there may be the odd situation where an employee might be disadvantaged from the miscalculation of seniority. That might not only affect an employee's right to bid, but potentially holidays an employee might otherwise be entitled to. That could be a form of "irreparable harm" as contemplated by *RJR*.

[32] SEIU filed affidavit evidence of two licenced practical nurses who have worked for many years on a casual basis at one of the Regina former Extendicare facilities. They also work full time at the William Booth Special Care Home, which is subject to the CUPE-SAHO collective agreement. Now that the former Extendicare facility is a SHA facility and subject to the CUPE-SAHO collective agreement, the two licenced practical nurses are concerned that they will no longer be entitled to work on a casual basis at the former Extendicare facility because SHA will be required to pay them overtime.

[33] This is certainly an example of "irreparable harm" if these employees can no longer supplement their monthly income. However, at this point, it is merely a concern of theirs. One can take judicial notice of the great need for nursing staff in Saskatchewan's health care system, but I accept that these two employees might be adversely affected if the stay of proceedings were not granted.

[34] The third example of "irreparable harm" pertains to family leave benefits that the former Extendicare employees would not be entitled to should a stay of proceedings not be granted. The evidence is that employees subject to the CUPE-SAHO collective agreement have access to fewer hours of negotiated family leave benefits, and the leave hours are taken from the employee's sick time bank. Oppositely, the SEIU-Extendicare family leave provisions are separate from sick leave time, and is a separately funded benefit, resulting in a greater benefit. If a former Extendicare employee is required to access the CUPE family leave benefit, that is a lesser benefit, causing immediate hardship if a stay of proceedings were not granted.

[35] I recognize that there is a better bereavement leave and pallbearer leave benefit under the CUPE-SAHO collective agreement. However, that does not change the fact that a former Extendicare employee might be adversely affected in the short term without a stay of proceedings.

[36] I find that SEIU has met the second criterion of proving irreparable harm.

C. The balance of convenience test to determine whether a stay of proceedings ought to be imposed pending the outcome of judicial review:

[37] Counsel for SEIU submits that the balance of convenience favours it. A stay of proceedings would prevent uncertainty for the former Extendicare employees and prevent any disruption and confusion in the transition process. Counsel submits the evidence of irreparable harm has already been outlined, and a stay of proceedings would preserve the *status quo* that was in place prior to December 1, 2023.

[38] Counsel for SHA submits that SHA will suffer the greater harm by the granting of the stay of proceedings. The affidavit evidence of the executive director of labour and employee relations of SHA outlines the effect that a stay of proceedings would have on SHA. The stay of proceedings would create labour problems and inefficiencies, increased taxpayer costs and a danger to patient care.

[39] SHA explained that the purchase of the Extendicare facilities arose as a result of the inability of Extendicare to cope with the COVID-19 outbreak in 2020. During the pandemic, agreements were reached with SEIU, CUPE and SHA for CUPE members to work at the Extendicare facilities in Regina to maintain staffing levels and to ensure patient care. The cost to SHA for this additional care over a six-week period in 2021 was approximately $218,000. Now, if another pandemic or serious infectious outbreak recurs, SHA can draw on 6,300 CUPE employees to assist the 600 employees at the former Extendicare facilities.

[40] If a stay of proceedings were in place, SHA states that it would have to employ redundant SEIU employees at the former Extendicare facilities to handle ongoing maintenance, such as snow removal, plumbing and general service repairs. SHA may even need to contract out some of these services at the former Extendicare facilities, imposing unnecessary salary costs on SHA.

[41] The stay of proceedings would limit the options available to SHA to accommodate former Extendicare employees with a disability. It would also limit the options open to SHA to deal with harassment allegations by employees without the ability to move them within the larger Regina health district.

[42] A stay of proceedings would delay the ability for SHA to implement payroll, scheduling policies and procedures within the single provincial health authority model. SHA could be forced to delay adding former Extendicare employees to the project that is consolidating 87 human resources systems, and bringing all 43,000 SHA employees under a unified payroll, scheduling and human resources management system. The project is planned to be in place by June 2024. Keeping the former Extendicare employees under a separate system increases costs. The judicial review will not even be heard until several months later.

[43] The director of contract bargaining for SEIU filed an affidavit in response to the concerns raised by SHA. SEIU takes the position that because SEIU cooperated with SHA during the pandemic and permitted non-SEIU employees to handle maintenance from time to time, this could be resolved again between SEIU and SHA.

[44] However, the issue before the Court in exercising its discretion is not whether some problem can be solved in the future through negotiation and agreement. The issue is whether, by SHA having to operate within the constraints resulting from a stay of proceedings being imposed, it amounts to an "inconvenience" that is placed on SHA. On the facts of this case, SHA will suffer the greater harm by the stay of proceedings. Thus, the balance of convenience lies in its favour. The granting of a stay of proceedings must be declined.

[45] As noted at p. 354 of *RJR*, "public interest in health is of such compelling importance". Ensuring the best possible patient care with the corresponding obligation to keep health costs in check far outweighs the perceived harm that a few employees

might experience if a stay of proceedings were not granted.

CONCLUSION

[46] The application by SEIU for a stay of proceedings pending the completion of the judicial review hearing is hereby dismissed.

_____J.
A.R. ROTHERY