

ESSENTIAL SERVICES TRIBUNAL

Amalgamated Transit Union, Local 615 – Applicant **v.** **The City of Saskatoon - Respondent**

LRB File No. 150-16; September 30, 2016

Chairperson, Kenneth G. Love, Q.C.; Tribunal Members: Pamela Haidenger-Bains, Q.C. and Carolyn Jones

For the Applicant: Mr. Gary Bainbridge
For the Respondent: Mr. Jon Danyliw

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** The Amalgamated Transit Union, Local 615 (the “Union”) and the City of Saskatoon (the “City”) have been engaged in prolonged negotiations towards the settlement of a new collective bargaining agreement. The Union initially requested the establishment of an Essential Services Tribunal pursuant to section 7-6 of *The Saskatchewan Employment Act* (the “Act”) by correspondence dated June 28, 2016. That request was subsequently withdrawn by the Union by letter dated September 16, 2016. The City disputed the ability of the Union to withdraw its request for establishment of an essential services tribunal. The Tribunal met on September 23, 2016 to consider its jurisdiction to make a determination as initially requested by the Union.

Facts:

[2] The Union served written notice pursuant to section 7-6 of the *Act* on June 28, 2016. That notice appointed Ms. Carolyn Jones as the Union's nominee to the Essential Services Tribunal.

[3] By correspondence dated June 28, 2016, the City disputed the need to establish an Essential Services Tribunal, taking the position that there was an Essential Service Agreement in force between the parties dated October 29, 2010. In its correspondence, the City requested that the Union's request to have an Essential Services Tribunal appointed be refused.

[4] By correspondence dated September 15, 2016, the City appointed Ms. Pamela Haidenger-Bains, Q.C. to be its nominee to the Essential Services Tribunal.

[5] By letter dated September 16, 2016, the Union withdrew its request for the appointment of an Essential Services Tribunal.

[6] By letter dated September 16, 2016, the City advised that it would not consent to the withdrawal of the Union's request for the appointment of an Essential Services Tribunal.

[7] By letter dated September 16, 2016, pursuant to section 7-7 of the *Act*, I appointed myself as Chairperson of the Essential Services Tribunal.

Relevant statutory provision:

[8] Relevant statutory provisions are as follows:

Notice of impasse

7-6(1) If, in the opinion of a public employer or a union, collective bargaining to conclude an essential services agreement has reached a point where agreement cannot be achieved, the public employer or union shall serve a written notice that an impasse has been reached on:

- (a) the chairperson of the board;*
- (b) the minister; and*
- (c) the other party.*

(2) No written notice mentioned in subsection (1) must be served until the period mentioned in subclause 6-33(7)(d)(ii) has expired. SASKATCHEWAN EMPLOYMENT 203 203 c. S-15.1

(3) The written notice mentioned in subsection (1) must contain the name of the person whom the party giving the notice appoints to the tribunal.

(4) Within three days after receiving the written notice mentioned in subsection (1), the other party shall serve on the first party, the chairperson of the board and the minister a written notice naming the person whom it appoints to the tribunal.

...

Essential services tribunal

7-7(1) On receipt of the parties' appointments to the tribunal, the chairperson of the board shall appoint the chairperson or a vice-chairperson of the board as the chairperson of the tribunal.

(2) No person is eligible to be appointed as a member of a tribunal or to act as a member of a tribunal if the person:

- (a) has a pecuniary interest in a matter before the tribunal; or
- (b) is acting or has, within a period of one year before the date on which the dispute is submitted to the tribunal, acted as lawyer or agent of any of the parties

(3) The tribunal shall:

- (a) hear:
 - (i) evidence presented relating to the dispute; and
 - (ii) argument by the parties or their lawyers or agents; and
- (b) make a decision respecting the matters mentioned in subsection 7-8(3) that are the subject of the dispute.

(4) The decision of the majority of the members of a tribunal or, if there is no majority decision, the decision of the chairperson of the tribunal is the decision of the tribunal.

(5) In exercising its powers and fulfilling its responsibilities pursuant to this Part, a tribunal may exercise all or any of the powers mentioned in subsection 6-49(3), and that subsection applies, with any necessary modification, to the tribunal.

(6) The decision of the tribunal pursuant to this Division: (a) is final and conclusive; and (b) is binding on the parties.

(7) The public employer and the union shall bear their own costs of the tribunal and the remuneration and expenses of the member of the tribunal that it has appointed.

Arguments of the Parties:

[9] The parties took divergent views of the issue which the Essential Services Tribunal should determine. The City asked that the Tribunal determine whether or not the Essential Services Agreement between the parties was a valid and subsisting agreement which was required to be honoured by the Union. The Union took the position that since the negotiations between the parties were no longer at a point where agreement cannot be achieved, and their request for the appointment of an Essential Services Tribunal had been withdrawn, that there was no longer any live dispute for the Tribunal to address.

[10] The Union provided a written argument which we have considered and found helpful. The City provided oral argument directed to its position that the Tribunal should consider the validity of the existing Essential Services Agreement. The City did not present argument with respect to the position advanced by the Union regarding the Tribunal's jurisdiction to continue in the face of a withdrawal of the Union's request.

[11] In its argument, the Union cited numerous authorities for its position. These included: *Direct Traffic Management Inc.*¹, a decision of the Ontario Labour Relations Board, *Labourers' International Union of North America, Local 837 v. James Donn Piling Limited*², another decision of the Ontario Board, *St. Basil's Parish Centre Bingo v. Saskatchewan (Liquor and Gaming Authority)*³, a decision by Justice Scheibel of the Saskatchewan Court of Queen's Bench, *Marshall v. West Parry Sound Health Centre*⁴, also a decision of the Ontario Labour Relations Board, *Daycon Mechanical Systems (Re:)*⁵, a decision of the Saskatchewan Labour Relations Board, *British Columbia (Police Complaint Commissioner) v. Vancouver (City) Police Department*⁶, a decision of the British Columbia Supreme Court, *Winnipeg (City) v. Board of Revision (Winnipeg) and Lakeview-National Hotels Inc.*⁷, a decision of the Manitoba Court of Appeal, *O.K. Economy Stores, a Division of Westfair Foods Ltd. (Re:)*⁸, *United Steelworkers of*

¹ [2014] O.L.R.D. No. 1931, 247 C.L.R.B.R. (2d) 319

² [2015] O.L.R.D. No. 734, CanLII 16141 (ON LRB)

³ [1994] S.J. No. 445, 122 Sask. R. 73 (QB)

⁴ [2006] CanLII 10978 (ON LRB)

⁵ [1998] S.L.R.B.D. No. 19

⁶ [2003] BCSC 279, 12 B.C.L.R. (4th) 89

⁷ [1993] 110 D.L.R. (4th) 177, 88 Man R (2d) 130 (CA)

⁸ [1994] S.L.R.B.D. No. 74, 23 C.L.R.B.R. (2d) 1

*Americal, Local 5917 v. Jamel Metals Inc.*⁹, *Teichreb (Re:)*¹⁰ and *Lisoway v. Canadian Union of Public Employees, Local 3078*,¹¹ all decisions of the Saskatchewan Labour Relations Board.

Decision:

[12] The Tribunal issued its decision at the conclusion of the hearing on September 23, 2016. The Tribunal's decision was that in the face of the withdrawal of the request for the appointment of the Essential Services Tribunal, the Tribunal had no jurisdiction to proceed to hear and determine the matter. These are the reasons for that decision.

Analysis:

[13] The Tribunal agrees with the submissions made by the Union that it no longer had jurisdiction to act under Part VII of the *SEA* following the withdrawal of the notice given by the Union under section 7-6. It is clear that the Union does not require the consent of the City to give notice under section 7-6. There is nothing in that section, nor in Part VII that would require the other party to consent to the withdrawal of the notice.

[14] *St. Basil's Parish Centre Bingo*¹² dealt with a situation where a bingo hall had had its licence suspended by the Saskatchewan Liquor and Gaming Authority. The bingo hall applied to the Authority for a review of the suspension. The review hearing was scheduled. On the morning on which the review was to be held, the bingo hall sought to withdraw its application for review. The Commission refused to accept the withdrawal and proceeded with the hearing as scheduled. That decision was taken for judicial review before Mr. Justice Scheibel.

[15] In his decision, Mr. Justice Scheibel held that the Commission had no jurisdiction to proceed with the hearing. At paragraph 7 of that decision he says: "The application for review has been withdrawn by the Applicant and the Commission has no jurisdiction to deal with a review which has been withdrawn".

⁹ [2005] CanLII 63019 (SKLRB)

¹⁰ [2013] S.L.R.B.D. No. 28, 236 C.L.R.B.R. (2d) 1

¹¹ [2005] CanLII 63084 (SKLRB)

¹² *Supra* note 3

[16] Mr. Justice Scheibel reviewed case authority from England which dealt with the issue. In support of his decision, he quoted from *Boal Quay Wharfingers Ltd. v. King's Lynn Conservancy Board*¹³ as follows:

...But I think those words only apply to an application which is still a subsisting application when the time comes for a decision. An applicant has the right to withdraw it at any time before the decision is given. If an application is withdrawn, the licensing authority are under no duty, and have no power, to hear or determine the application. They cannot refuse it because there is no subsisting application for them to refuse. There is nothing left of the application.

[17] This case is somewhat different from the situation found in *St. Basil's Parish Centre Bingo*. That case involved a situation where the applicant had the right to file an application for review and then unilaterally withdrew that application. There was no other party involved who had an interest in the application. That was also the case in the *Direct Traffic Management Inc.*¹⁴ where an application for certification was withdrawn prior to its determination.

[18] The Tribunal has taken into consideration potential prejudice to the City (but which they did not raise in their arguments) resultant from the withdrawal of the application. For example (and one which we had no evidence to support that it had occurred), had the City taken steps, to its prejudice, as a result of the Union having given notice under section 7-6 of the *Act*, the Tribunal may have reached a different conclusion. However, there was no such claims advanced by the City, they steadfastly took the position that they were entitled to know if the Essential Services Agreement was in force and effect and whether or not the Union intended to honour their obligations under it.

[19] Viewed from a higher vantage point, the effect of the withdrawal of the Notice under section 7-6 returns the parties to the position they were in prior to June 28, 2016 when the Notice was served. The provisions of Part VII remain available to them, if resort is possible under the terms of Part VII. The City's initial position was that the Tribunal should not be formed as there was already an Essential Services Agreement in place between the parties which had already governed their behavior during the contract negotiations. They took the position that no Essential Services Tribunal was necessary, or available to the Union in the face of this Agreement. It appears that by its withdrawal of the Notice, they are in no worse situation

¹³ [1971] 1 W.L.R. 1558 at p. 1566

¹⁴ *Supra* Note 1

than if they had been successful in making those arguments to deny the Tribunal jurisdiction to deal with the matters raised by the Union's Notice.

[20] The Union also argued that the Tribunal lacked jurisdiction because the Tribunal had no evidence that collective bargaining had reached a point where agreement cannot be achieved (which was referred to by the Union as an "Impasse"). We cannot agree with this argument as advanced by the Union. In order for an Essential Services Tribunal to be requested, section 7-6 requires only that either the public employer or the union be of the opinion that, to use the word the Union used, an impasse has occurred in bargaining for an essential services agreement. No proof of any such impasse is required to be provided by either party to the dispute in order for a Tribunal to be formulated. It is not a condition precedent to the formation of a Tribunal.

[21] The Union also argued that any decision by the Tribunal would be moot because there was no longer a dispute between the parties. In its Brief, the Union stated: "There are no matters at issue which are the subject of any dispute. The Union accepts the essential services agreement as being binding on the parties. Therefore, this proceeding [sic] unnecessary and the issues are moot".

[22] Given that acknowledgment by the Union of the binding nature of the essential services agreement between the parties, the Union argued that there is nothing for the Tribunal to adjudicate. That is not strictly the case. The essential services agreement between the parties was concluded under legislation which was subsequently struck down as being unconstitutional¹⁵ by the Supreme Court of Canada. Part VII was the legislation passed by the legislature to conform to the Supreme Court ruling in that case. Under section 7-8(3), a tribunal is required, in its decision, to rule with respect to points (a) to (e) set out in that section. The current agreement may not include provisions which cover all of the points set out.

[23] Even if that were the case, the parties are not precluded from entering into collective bargaining to "fill" any holes that might exist in the current agreement, and, if, in the event they are unable to conclude an agreement with respect to those holes, then the process under section 7-6 for the appointment of a tribunal is available to them.

¹⁵ [2015] 1 SCR 245, 2015 SCC 1 (CanLII)

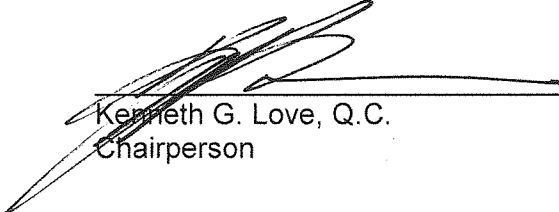
[24] Strictly speaking, the issue is not totally moot. However, given the withdrawal of the Notice by the Union, the issue of whether or not there is an essential service agreement is no longer in dispute. There may be ongoing issues, as noted above, between the parties which the *SEA* makes provision for.

[25] We therefore find that the withdrawal of the Notice by the Union renders the Tribunal without jurisdiction to proceed with the hearing notwithstanding the lack of consent by the City.

[26] This is a unanimous decision of the Tribunal.

DATED at Regina, Saskatchewan, this **30th** day of **September, 2016**.

LABOUR RELATIONS BOARD



Kenneth G. Love, Q.C.
Chairperson