Labour Relations Board
Saskatchewan

THE NORTH WEST COMPANY and TORA REGINA (TOWER) LIMITED o/a GIANT TIGER, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. THE NORTH WEST COMPANY and TORA REGINA (TOWER) LIMITED o/a GIANT TIGER, REGINA, Respondent

LRB File Nos. 026-04 & 041-08; June 2, 2008
Chairperson, Kenneth G. Love, Q.C.; Members: Kendra Cruson and John McCormick

For the Employer: Susan Barber
For the Union: Drew Plaxton

Reconsideration – Criteria – Board discusses and applies criteria for reconsideration – Board concludes that successorship and opening of new store occurring subsequent to hearing before original panel constituted crucial evidence not adduced for good and sufficient reasons – Board reconsiders original decision and orders vote.

Interim order – Criteria – Board finds arguable case for unfair labour practice where employer chose not to respond to union's union security requests following certification – Balance of labour relations harm favours union – Board orders employer to provide employee information to union and gives union access to employees in workplace.

***The Trade Union Act*, ss. 5(i), 5.3 and 13.**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers, Local No. 1400 (the "Union") filed an application with the Board on February 11, 2004, pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") to be designated as the certified bargaining agent for a unit of employees of Tora Regina (Tower) Limited operating as Giant Tiger, Regina (the "Employer") described as follows:

> *all employees of [the Employer] operating as Giant Tiger in the City of Regina, except the Store Manager.*

[2] By a decision dated July 4, 2007, the Board issued a certification order in the following terms:

> ***THE LABOUR RELATIONS BOARD****, pursuant to Sections 5(a), (b) and (c) of The Trade Union Act,* ***HEREBY ORDERS:***
>
> *(a) that all employees employed by Tora Regina (Tower) Limited operating as Giant Tiger in Regina, Saskatchewan, except the store manager and office associate, are an appropriate unit of employees for the purpose of bargaining collectively;*
>
> *(b) that United Food and Commercial Workers Union, Local 1400, a trade union within the meaning of The Trade Union Act, represents a majority of employees in the appropriate unit of employees set out in paragraph (a);*
>
> *(c) Tora Regina (Tower) Limited, the employer, to bargain collectively with the trade union set forth in paragraph (b), with respect to the appropriate unit of employees set out in paragraph (a).*

[3] The Employer applied to the Court of Queen's Bench for judicial review of the Board's Order, which application was granted on October 25, 2007. The Court of Queen's Bench quashed the certification Order dated July 4, 2007

[4] The Union appealed the decision of the Court of Queen's Bench to the Court of Appeal for Saskatchewan. By decision dated March 14, 2008, the Court of Appeal overturned the decision of the Court of Queen's Bench and restored the Certification order issue by the Board.

[5] The Employer then applied to the Board for a reconsideration of the certification Order pursuant to ss. 5(i) and 13 of the *Act*.

Facts:

[6] The material facts in this matter are not in dispute and were relied upon by both the Court of Queen's Bench and the Court of Appeal in reaching their decisions.

[7] The Board took 41 months to render its decision in respect of the certification application. It was agreed by both the Court of Queen's Bench and the Court of Appeal that this amount of time to render a decision was "inordinate and unreasonable."

[8] During the period of time that the Board's decision was reserved, considerable change occurred with respect to the workplace. As at February 11, 2004, when the application for certification was made there were 65 employees in the proposed bargaining unit. As of July 20, 2007 (which was the date on which Karen Milani, Vice-President, Human Resources for the North West Company swore an affidavit for use in the proceedings before the Court of Queen's Bench) there were only twelve of those employees who were still employed by the Employer. In addition, between February 11, 2004 and July 20, 2007, there had been a turnover of 220 employees in the certified bargaining unit. This turnover included employees at both Store 405 and Store 421.

[9] At the time of the application for certification, the Employer operated one Giant Tiger location in Regina, which was Store 405, located at 2735 Avonhurst Drive, Regina, Saskatchewan. On or about June 23, 2007, the Employer opened another location in Regina, Store 421, at 2610 Victoria Avenue East, Regina, Saskatchewan. As of the date of the certification Order issued by the Board, Store 421 employed 50 people, including one manager, two department managers and one employee who was employed as an office associate and whom the Employer claimed acted in a confidential capacity.

[10] As at the date of the certification Order, there were a total of 112 people employed at both of the locations operated in Regina: 46 at Store 421 and 66 at Store 405, who could be within the scope of the bargaining unit description.

[11] Also in early June of 2007, prior to the opening of store 421, the North West Company, the parent company of the Employer, reorganized its Canadian operations for tax reasons. That reorganization resulted in Store 405 being transferred to a Limited Partnership known as the North West Company LP. Store 421 was

opened by the North West Company LP and was not, at any time, operated by Tora Regina (Tower) Limited.

[12] The Union has applied to have the North West Company LP named as a successor to the Employer in respect of the employees named in the certification Order, but, at the request of the Union, that application was not heard by the Board as a part of these proceedings.

Proceedings before the Court of Queen's Bench:

[13] The Court of Queen's Bench, in its decision, stated that there was little merit in referring the matter back to the Board for reconsideration. The Court felt that given the whole of the circumstances, the only appropriate remedy "is to grant the application applied for and to quash the decision of the LRB and its resultant certification Order as issued."

[14] The Court also suggested that it was incumbent upon the parties to have informed "the LRB of the material changes in circumstances which it must have known about prior to the issuance of the LRB's certification Order."

Proceedings before the Court of Appeal:

[15] The Court of Appeal did not share the Court of Queen's Bench point of view. They took the view that the Board had no obligation to take the new fact situation into account in making its decision. At paragraph 11 of its decision, the Court says:

> *The reason for our conclusion in this regard is ultimately very simple. The Board was entitled, and indeed obliged, to make its decision on the basis of the facts before it. Those facts revealed majority support for the Union. The Board acted on that evidence and made the only decision open to it. It cannot be found to have erred for proceeding in that manner.*

[16] At paragraph 14, the Court also says:

> *The Board will not normally consider evidence of changes in employee support for a union after the date a certification application is filed. As explained in decisions such as U.S.A.,*

> *Local 5917 v. Doepker Industries Ltd. [2000] Sask. L.R.B.R. 259 at paras. 47-48, there are compelling reasons for this approach. Nonetheless, we agree with the Chambers judge that there might be situations involving delay where the facts in relation to a certification application change so much between the date of the application and the date of the Board's decision that the decision, when it is ultimately made, will not be based on any meaningful evidence of employee support for the union seeking certification. In such circumstances, however, one or both of the parties, if they are concerned about the situation, should put the particulars of those developments before the Board so it can decide whether they should be taken into account. In opinion, the Board has not independent obligation to seek out such information, or to confirm its non-existence, before deciding a reserved application for certification. The Board is entitled, even in the event of a long delay between a hearing and its decision, to act on the basis of the facts put forward by the parties.*

[17] At paragraph 17 the Court held that delay in rendering a decision, in and of itself, would not be considered a denial of natural justice, and "the courts will intervene only where there is both unreasonable delay and the delay is shown to have caused prejudice to the applicant."

[18] The Court of Appeal, in reversing the Court of Queen's Bench, suggested that there were a number of possible alternatives available to the parties who felt aggrieved by the certification. Those alternatives included:

> (a) the employees may bring an application for decertification; or
>
> (b) the Board might have accepted evidence of post-application developments, had they been brought to the Board's attention by the parties; or
>
> (c) ordering a representation vote under s. 6 of the *Act*; or
>
> (d) the Employer may have brought an application for reconsideration of the certification order pursuant to ss. 5(i) and 13 of the *Act* after the Board had issued its decision.

[19] Acting on the suggestion made by the Court of Appeal, the Employer has made an application for reconsideration of the certification Order, "after the Board had released its decision". In making that application, the Employer also made an application for an interim order that the certification Order be stayed. The Union also

brought an application (LRB File No. 041-08) alleging an unfair labour practice by the Employer, an application for interim relief in respect of that unfair labour practice as well as an application for successorship under s. 37 of the *Act.*

[20] These Reasons for Decision relate to:

(a) The Employer's application for interim relief; and
(b) The Employer's application for reconsideration; and
(c) The Union's application for interim relief.

Preliminary Issues:

[21] At the commencement of the proceedings, the Union raised a number of preliminary matters. Those were:

(a) That the application for reconsideration should be heard by the panel of the Board that originally heard and determined the certification application; and
(b) That the Board ought not to hear the application for reconsideration since the Employer did not participate in the original hearing and it failed to provide the Board with the information that it now relies upon prior to the release of the decision of the Board; and
(c) That the Union objected to the Employer's use of affidavit evidence filed by it in respect of the previous court applications in these proceedings, that the affidavit evidence contained hearsay and that the Union would be precluded from cross-examining the deponent on the affidavit evidence; and
(d) A request for particulars from the Employer.

[22] The Board considered these matters, as well as its desire to have the reconsideration application heard in an expedited fashion rather than dealing with the issue of the interim application.

[23] The Board ruled as follows on the interim matters:

(a) That, while it was desirable to have the original panel hear the application for reconsideration, that has been a matter of policy only, not a requirement of the *Act.* The Board ruled that it had the jurisdiction to hear the matter, notwithstanding that the panel was made up of members of the Board other than the members of the original panel.

(b) That neither of the parties was culpable with respect to any delay in these proceedings and, if there was any culpability with respect to any delay, that culpability rested solely with the Board.

(c) That the Board would reserve any decision regarding the affidavit evidence filed or the nature of the content of the affidavit evidence until its ruling with respect to the interim application; and

(d) That the Board declined to order further particulars because the parties, after having been through proceedings both before the Court of Queen's Bench and the Court of Appeal, should require no additional particulars.

[24] On the question of consideration of the application for reconsideration at the same time as the hearing of the application for interim relief, the Board concluded that it was desirable that this be done. On the application of counsel for the Union, the matter was adjourned to dates agreeable to the parties.

Subsequent Events:

[25] Following the conclusion of the hearing of the Board on April 4, 2008, Darren Piper, a representative employed by the Union, went to both Giant Tiger locations in Regina to "communicate with the union's members concerning certification and related matters."

[26] While there is some disagreement between the parties as to the nature of Mr. Piper's visits to the stores and his conduct while there, it is common ground that

he spoke to either the assistant manager or manager at each location concerning his desire to communicate with employees concerning any questions or concerns that employees might have with respect to the certification order. At both locations, he was denied access to employees to communicate with them and was not permitted to utilize either location's employee lunch room to meet with employees.

[27] In an affidavit filed by Mr. Sedlacek, the store manager of Store 421, he describes the visit by Mr. Piper as being "very confrontational" and "not a pleasant conversation." He describes Mr. Piper as being "right in my face."

[28] This visit, along with other visits to the stores by representatives of the Union as well as communications sent by the Union to the Employer, resulted in the Union filing an unfair labour practice application against the Employer and the application for interim relief which was also considered by the Board at the resumption of the hearing. Additional facts related to that application will be provided later in these reasons when that interim application is being dealt with.

[29] Also, at the resumption of the hearing of this matter, a large number of the Employer's employees attended the hearing. Through their spokesperson Maureen Schindler they asked for, and were granted, permission to address the Board. Ms. Schindler, on behalf of those employees requested a voice in the proceedings and the right for the employees to vote on whether they wished to be represented. As a result, the Board granted Ms. Schindler intervener status on the application. She was directed to file a reply to the application no later than April 23, 2008.

[30] Ms. Schindler, in the final result, failed to file a reply to the application and subsequently advised the Board she did not wish to participate in the hearing. Accordingly, the Board advised her that her representations would not be considered by the Board.

Statutory Provisions:

[31] Relevant provisions of the *Act* include the following:

5 The board may make orders:

> *(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> . . .
>
> *13 A certified copy of any order or decision of the board shall be filed in the office of a local registrar of the Court of Queen's Bench and shall thereupon be enforceable as a judgment or order of the court, and in the same manner as any other judgment or order of the court, but the board may nevertheless rescind or vary any such order.*

Analysis and Decision:

The Employer's Applications for Reconsideration and Interim Relief:

[32] The Board exercises its jurisdiction with respect to review of its own decisions under ss. 5(i) and s. 13 sparingly. That view was expressed by the Board in *Remai Investment Corporation v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union* [1993], 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93 at 107:

> *Though the Board has the power under Section 5(i) to reopen its decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster.*

[33] The Board recognizes that there is a balance to be achieved between a request for reconsideration and the value of finality and stability in decision making. As a result, the Board has adopted a two step approach which requires that the applicant first establish grounds for reconsideration before a decision is made as to whether a reconsideration or some other disposition of the matter is appropriate.

[34] The Board has adopted the reasoning in *Overwaitea Foods v. United Food and Commercial Workers No. C86/90,* a decision of the British Columbia Industrial Relations Council. In that case, the British Columbia Industrial Relations Council

adopted six criteria in which it would give favourable consideration to an application for reconsideration. Those criteria were set out as follows:

> *In Western Cash Register v. International Brotherhood of Electrical Workers, [1972] 2 CLRBR 532, the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRD No. 61/79, [1979] 3 Can LRBR 153, added a fifth and a sixth ground:*
>
> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
>
> 2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
>
> 3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
>
> 4. *if the original decision turned on a conclusion of law of [sic] general policy under the code which law or policy was not properly interpreted by the original panel; or,*
>
> 5. *if the original decision is tainted by a breach of natural justice; or,*
>
> 6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[35] In the Employer's submissions to the Board, counsel relied upon criteria 2, 3, 5 and 6 as the grounds for reconsideration by the Board. We will deal with each of those criteria in turn.

Crucial Evidence

[36] In *Remai, supra*, the Board considered criteria 2 in some detail. At 109, the Board agreed that the second criteria outlined above was "an accurate statement of the standard which must be met if the applicant is to succeed on this application." It also expressed the view that "[T]he argument that a tribunal should enter into a

reconsideration of a decision on the basis of different evidence is one which must clearly be approached with some caution."

[37] The Board in the *Remai* decision, *supra*, also discussed various cases from other jurisdictions which had set out the requirements which a party for reconsideration needed to satisfy to justify a reconsideration of a decision on the basis of new evidence. At 110 and 111, the Board concluded:

> *The requirements expressed in these cases seem to us to represent sensible standards by which to decide whether a decision will be reconsidered on the basis of new evidence. The evidence must not only be crucial, but there must be some convincing and reasonable explanation for not putting the evidence forth at the original hearing. In this sense, the standard framed as one of showing "good and sufficient reason" in the British Columbia cases seems to us to be preferred to the "due diligence" criterion set out in the Detroit River Construction case. Though "due diligence" may be one requirement, it seems to us conceivable that there might be other reasonable explanations for a failure to put evidence before the Board.*
>
> *The possibility of reconsideration is not offered to make it possible for the parties to mend their mistakes or experiment with a different strategy at a second hearing – an opportunity which advocates everywhere would no doubt welcome. The jurisdiction to reconsider a decision is intended instead to redress an injustice which would be perpetrated by failing to take into account evidence which, for reasons beyond the control of the party making the application, was not presented at the first hearing.*

[38] The Employer argued before the Board, as it had in the Court of Queen's Bench and the Court of Appeal, that there had been significant turnover in the workforce between the time that the Board first heard the application for certification and the date of the Board's decision, a period of 41 months. However, this is not an unusual occurrence in the certification process. As recognized by the Court of Appeal, at paragraph 11 of its decision:

> *The reason for our conclusion in this regard is ultimately very simple. The Board was entitled, and indeed obligated, to make its decision on the basis of the facts before it. Those facts revealed majority support for the Union. The Board acted on that evidence*

> *and made the only decision open to it. It cannot be found to have erred for proceeding in that manner.*

[39] The Court of Appeal also adopted the reasoning of the Board with respect to workplace change between the date of application and the date of the order based on the Board's reasoning in *U.S.A. Local 5917 v. Doepker Industries Ltd.* [2000] Sask. L.R.B.R. 258, LRB File No. 016-00. At 274 and 275, the Board says:

> *[47] Pursuant to s. 10 of the Act, the long-standing policy of the Board on certification applications is that the relevant date for determining the level of support for the application is the date that the application is filed; that is,* ***other than in exceptional circumstances****, the Board does not consider evidence of additional support, or evidence of withdrawal of support, for the application, that is received by the Board after the date the application is filed. This general policy has been established by decisions of the Board that are too numerous too list here, including the Congregation of Sisters of Notre Dame de Sion, supra, cited above by counsel for the Employer. The underlying rationale for this policy was explained by the Board in Construction and General Workers Union, Local 180 v. Gunner Industries Ltd., [1997] Sask. L.R.B.R. 318, LRB File No. 333-96, at 321-22, as follows: [Emphasis Added]*
>
> > *In keeping with this provision* [s. 10 of the Act]*, the Board has consistently refused to consider evidence of support or of revocation of support which originates after the date the application is filed. In Hotel Employees & Restaurant Employees Union v. Chi Chi's Restaurant Enterprises Ltd., [1986] June Sask. Labour Rep. 31, LRB File No. 035-86, the Board summarized this well-entrenched policy in these terms, at 34:*
> >
> > *The Board has always required an applicant for certification to establish majority support as of the date on which the application is filed, and only if there is a cloud over the union's organizing campaign in the form of coercion, undue influence, or misrepresentation, will the Board order a vote by secret ballot rather than rely on support cards. That policy facilitates the employees' choice of collective bargaining, renders pointless the imposition of sanctions on the employees once the application has been filed, and protects as much as possible the future relationship between the union and employer from the acrimony that often arises during a pre-vote contest between the union and anti-union forces. In*

> *this case there are no reasons why the Board should depart from its normal practice by ordering a vote.*

In a more recent decision in Retail Wholesale Canada, a Division of the United Steelworkers of America v. United Cabs Ltd., [1996] Sask. L.R.B.R. 337, LRB File No. 115-95, the Board explained the basis of the policy as follows, at 366:

> *The evidence which was presented was of persons who had signed a Union card and later changed their minds. It is common enough in any democratic system for persons to alter their views about important issues, and they are perfectly entitled to do that. It is also true in any democratic system that there must be some criteria for determining what the majority do support in relation to particular decisions, and establishing fixed points at which opinion will be assessed. Elections are held to elect members to legislatures, for example: though voters may decide the day after an election that they no longer support the candidate they voted for, a parliamentary system could not function if such changes of opinion were allowed to alter the outcome of the election.*

In the case of applications filed with this Board related to questions of trade union representation, it is necessary to develop a coherent picture of whether there is majority support for a trade union at a particular time. The time which has been accepted consistently by the Board as critical for this purpose is the date on which an application was filed. The question of majority support will be determined as of that date, whether or not individuals might later wish to withdraw their support for the trade union or add their support.

[40] Both the Board's comments above, and the decision by the Court of Appeal in paragraph 14 recognize that the Board's usual policy was subject to possible "exceptional circumstances" where:

> *…there might be situations involving delay where the facts in relation to a certification application change so much between the date of the application and the date of the Board's decision that the decision when it is ultimately made, will not be based on any meaningful evidence of employee support for the union seeking certification.*

[41] In *Health Sciences Association of Saskatchewan v. Royal University Hospital*, [1993] 3rd Quarter Sask. Labour Rep. 128, LRB File No. 210-90, the Board recognized such exceptional circumstances: at 129, the Board says:

> *… The special circumstances that the applicant relies upon are the nearly two and one-half years between the date when the application was filed and the date the vote was conducted. During this interval there has been a significant turnover among the employee compliment to the extent that 35 of 81 employees who will be directly affected by the vote, would be ineligible if the Board applied its normal rule.*

[42] The *Royal University Hospital* case, *supra*, did not, however, deal with a certification application but rather was concerned with a situation where a vote had been ordered but, because of disagreements over the make up of the voter's list, the delay of two and one-half years developed.

[43] Similarly, in *Schan v.Little Borland Ltd. and United Brotherhood of Carpenters and Joiners of America*, [1986] Oct. Sask. Labour Rep. 48, LRB File No. 221-85, which case also dealt with a vote ordered by the Board and the composition of the voter's list, the Board ruled at 50:

> *The Board recognizes that it has seldom treated laid off tradesmen in any sector of the construction industry as employees eligible to participate in a representation vote. Nevertheless, every case obviously depends upon its own particular facts and circumstances. The Board's finding in this case that the long term relationship between the three employees in dispute and this contractor, and the intention by the employer and the employees to resume that relationship in the foreseeable future, does not constitute a general ruling with respect to the construction industry. Quite simply, the Board is satisfied that its decision to permit the three tradesmen to vote was fair and equitable on the facts and circumstances of this particular case.*

[44] The Board must also determine if there are sufficiently "exceptional" circumstances in this case to justify the Board deviating from its unusual and normal policy, as approved by the Court of Appeal.

[45] Nothing in the evidence presented by the witnesses suggests that the turnover of employees in this case was exceptional. The parties seemed to accept the level of turnover in this sector of the economy as normal. Karen Milani's evidence, as noted in her affidavit which was filed in respect of the interim application said at para 12:

> *12) As at February 11, 2004, there were 65 employees in the proposed bargaining unit for Store 405. Since that time 53 employees have either quit or been terminated from their employment such that only 12 of the employees continue to be employed at Store 405. … I am advised by the manager of store 405, Kirk Coates, that since the date of the Application for Certification there has been a turnover of 220 employees. High turnover in the retail industry is not unusual….*

[46] It would not be unusual nor exceptional for there to have been turnover between the time that the application for certification was filed and the time that a decision was issued by the Board, regardless of the time that it took to issue such a decision. Nor would such evidence of turnover necessarily be crucial evidence that could not, for good and sufficient reason, be adduced at the time. One could speculate, that if, at the time of hearing, questions concerning possible turnover of staff were posed, that the answer to such question would be that staff turnover was both expected and usual in that segment of the economy as noted by Ms. Milani in her affidavit.

[47] In her testimony, Ms. Milani recognized that there were seasonal patterns to the Employer's hiring and turnover of staff. She acknowledged that the Employer employed additional workers at holiday periods and reduced staff following those periods. She also noted that many employees were students and the ending of the school term meant many employees who were employed during the school term left their employment when the school term ended.

[48] The Board finds that there is nothing in the turnover of staff which would justify it reconsidering its decision in accordance with the second criteria from *Remai, supra*.

[49] There is, however, another element of the evidence which requires analysis. That is the other change in the workplace which occurred just prior to the

issuance of the Board's decision in this matter, which was the opening of a second location in Regina (Store 421) and the subsequent build up of the workforce resultant from that opening.

[50] At the time of the application for certification, there were 65 employees in the proposed bargaining unit and the Union filed majority support with respect to those employees. As at the date of the Board's order, an additional 47 employees were employed at Store 421. As noted by the Court of Queen's Bench in its decision, those 47 employees were "swept in" to the bargaining unit as a result of the Order of the Board.

[51] The Union argued that the "sweeping in" of those employees was a normal and usual consequence of the issuance by the Board of a certification Order encompassing the "City of Regina." When the Employer chose to open a new location that location was, by virtue of the Order, included within the bargaining unit and those employees thereby became subject to the certification Order as well. The Union argues that this is not an "unusual" effect of a certification Order.

[52] But for additional elements in this case, the Board may well have agreed with the Union in this regard. However, there was an additional element which occurred in this case as well. That was the corporate reorganization which occurred just prior to the issuance of the Board's Order which resulted in a disposition of the original location (Store 405) from the original employer, Tora Regina (Tower) Limited to the North West Company LP. Furthermore, the new location (Store 421) was not opened by the certified employer, but by the new company, the North West Company LP.

[53] It could be argued (and the Board asked the parties at the outset of the hearing on April 16, 2008 to consider these matters), that the Order issued by the Board on July 4, 2008, insofar as it was directed to a now non-existent employer, was ineffective, or that a further order of the Board was required under s. 37 of the *Act*, with respect to the new employer.

[54] The Union did make an application for successorship under s. 37, but asked that that application not be dealt with pending the Board's determination of the matter before it.

[55] The evidence of the change in employer and the opening of the new location were elements of evidence which the Board considers would have been crucial for the Board to have considered, had this evidence been known to it, at the time when it was considering and making its decision. When a disposition of a business occurs, the Board may, under s. 37(2) of the *Act*, make any of the following orders:

> (a) determining whether the disposition or proposed disposition relates to a business or part of it;
>
> (b) determining whether, on the completion of the disposition of a business or part of the business, the employees constitute one or more units appropriate for collective bargaining and whether the appropriate unit or units will be….
>
> (c) determining what trade union, if any, represents a majority of employees in the unit determined to be an appropriate unit pursuant to clause (b);
>
> (d) directing a vote to be taken among all the employees eligible to vote in a unit determined to be an appropriate unit pursuant to clause (b);
>
> (e) amending, to the extent that the board considers necessary, or advisable, an order made pursuant to clause 5(a), (b), or (c) or the description of a unit contained in a collective bargaining agreement;
>
> (f) giving any directions that the board considers necessary or advisable as to the application of a collective bargaining agreement affecting the employees in a unit determined to be an appropriate unit pursuant to clause (b).

[56] Given the changes which occurred in respect to both the transfer of the business from Tora Regina (Tower) Limited to the North West Company LP, and the opening of the new location by the North West Company LP, the Board would have had

to consider this new evidence, which could not have been presented by the parties to the Board at the time of the application.

[57] This change in ownership and the opening of the new store by the Employer occurred almost co-incidentally with the issuance of the Board's certification order. Had this information been known to the Board, it may well have considered one of the options proposed by the Court of Appeal, such as accepting evidence of post-application developments. Since this information was not made known to the Board until the application for reconsideration, it is evidence which the Board considers would have been crucial with respect to the issue.

[58] That evidence was crucial since the number of employees within the bargaining unit expanded from 65 at the time of the application for certification to 112 with the opening of Store 421. The support which was filed by the Union, and upon which the original Board certification order was made was with respect to the original 65 employees. The Board would have had to consider if the Union had demonstrated sufficient support for its application for a unit comprising 112 employees for the certification to occur without a vote of the affected employees.

[59] In *University of Saskatchewan v. C.U.P.E., Local 1975* [1978] 2. S.C.R. 834, the Supreme Court adopted the reasoning of Bayda J.A. (as he was then) with respect to the requirement that the wishes of employees were required to be determined before those employees were "swept in" to a bargaining unit which they had not chosen. While that decision was with respect to an application concerning successorship rights, it, nevertheless, established the primacy of s. 3 of *The Trade Union Act* which provides that employees have the right to "organize in and to form, join or assist trade unions…of their own choosing".

[60] In *C.U.P.E., Local 4799 v. Board of Education of Horizon School Division No. 205,* LRB file No. 053-06, the Board refused to sweep in employees who had not had the opportunity to choose a bargaining representative upon the amalgamation of several bargaining units. At paragraph [107] the Board says:

> *The overarching object and purpose of the Act is expressed in s. 3, that is, that employees have the right to join and be represented in collective bargaining by the trade union of their choice. All provisions of the Act must need be interpreted with consideration of that fundamental object and purpose in mind. We view the overall import of the opinions of Bayda, J.A. expressed in University of Saskatchewan and Prince Albert Cooperative Association, both supra, as endorsed by the Supreme Court of Canada and confirmed by the Board in Sunnyland, supra, and numerous cases since, that requiring evidence of the wishes of employees sought to be added to an existing bargaining unit strikes "an appropriate balance between the secure and stable status for a trade union and the entitlement of employees to express their wishes when there is to be an alteration in the existing method by which their terms and conditions of employment are determined.*

[61] Had the original Board been aware of the most recent developments in respect of the reorganization of the Giant Tiger stores, the opening of Store 421, and the resultant increase in the number of employees affected, they may have come to a different conclusion with respect to the application for certification based on the number of employees in the bargaining unit as of the date of the decision rather than the date of the application for certification.

[62] The Board has therefore concluded that the application for reconsideration should be granted for the reasons outlined above.

[63] The Board will allow the application for reconsideration, and, subject to the comments which follow concerning the Union's ability to state its case to employees of Giant Tiger, will order a vote amongst the affected employees in the bargaining unit. The date chosen for determination of who may vote with respect to this vote is the date that the Court of Appeal determined that the certification order of this Board remained valid, which is March 27, 2008. This date, while not in accordance with usual Board policy, as noted by the Board in *Health Sciences Association of Saskatchewan and S.E.I.U., Local 333* [1993] S.L.R.B.D. No. 53, LRB file No. 210-90, "serves to keep the representation issue in the hands of the employees who have a legitimate interest in it". To do otherwise, as noted in that case, "would serve no labour relation's purpose and

would in fact, undermine the acceptability and moral authority of whatever decision was made by the remainder of the employees".

[64] Notwithstanding that the Board has determined to allow the application for reconsideration based upon the second criteria in *Remai, supra,* we would also like to briefly consider the other criteria relied upon by the Employer in this case.

Unanticipated Operation of the Board's Order

[65] The Employer also argued that the Board's Order had an unanticipated effect, that of "sweeping in" employees of the new location to the bargaining unit. Subject to the comments above with respect to the crucial evidence issue, we cannot agree with the Employer in this regard. Absent the other crucial evidence in this case, the turnover of employees was not unusual, nor was the decision to open a second location by the Employer in the usual course of business following certification. As argued by the Union, the Employer knew or ought to have known that a certification order which was municipal in its scope would have the effect of including the employees of the Employer's new location under the umbrella of the certification order. While, the opening of a second location of a business is not an usual occurrence in the interval between an application for certification and the issuance of an order in respect of that application, in principle, the Board can see nothing in the application of its usual policies which would render such an occurrence to necessarily require its intervention by way of reconsideration of its earlier decision under this head of the criteria set out in *Remai*.

Breach of Natural Justice

[66] The Board also feels that this ground in *Remai, supra,* can be of no assistance to the Employer. The Court of Appeal was clear in its decision at paragraph 22:

> *In the end, we are not persuaded the Board's delay in rendering a decision resulted in a breach of principles of natural justice or procedural unfairness.*

[67] The Board concurs with this statement.

Significant Policy Adjudication

[68] The Board finds nothing in the facts of this case which represent a significant policy adjudication of the Board which it wishes to refine, expand upon, or otherwise change. As noted above, and by the Court of Appeal in its decision, the Board was "obligated" to make its decision on the facts before it. The Board in making its decision followed the usual and normal policies of the Board with respect to evidence of support. There is nothing in the Board's application of long standing policies of the Board which requires that those policies be refined, expanded upon or otherwise changed.

Union's Application for Interim Relief

[69] In support of its application for interim relief, the Union filed affidavits of Paul Meinema, Brandi Tracksell and Mr. Piper. The Employer filed affidavits of Kirk Coates and Mr. Sedlacek in reply.

[70] The Union alleged that the Employer was guilty of an unfair labour practice under ss. 11(1)(a), (b) and (c), s. 12 and s. 36 of the *Act*, and applied for interim relief being:

> *1) An order or orders:*
>
> > *(a). Compelling the employers comply with the Union security provisions of The Trade Union Act and the demand made by the Union concerning same and further obtain and forward membership cards for all employees hired after certification on a continuing basis;*
> >
> > *(b). In both of the employers' locations in Regina, the employers be compelled to allow union representatives free and reasonable access to members at the workplace on company time without supervision or interference;*
> >
> > *(c). The employers provide to the Union, in relation to both of the employers' locations in question, up to date employee information on an ongoing basis including names, addresses, telephone numbers, job classifications, department, rates of pay, and dates of hire, and/or termination of employment;*
> >
> > *(d). That the Board's order, reasons and such further or other information as the Board may direct be posted at such*

> *conspicuous locations in the workplaces as the Board may direct and be included in employees' pay packets and given to new hired employees for such periods of time as the Board may direct;*
>
> *(e). The employers be prohibited from commencing or maintaining any applications before the Labour Relations Board including any applications for reconsideration or a stay of the certification order between the parties for so long as it is or remains in breach of the certification order in question and/or its obligations pursuant to The Trade Union Act;*
>
> *(f). For the expedited hearing of the matter within;*
>
> *(g). Abridging the time for service of documents and/or for substitutional service if the same should be required;*
>
> *(h). Such further order or orders as may be just.*

[71] The affidavit evidence of the Union was supplemented by *viva voce* evidence of each of the deponents. The Employer did not call either of its deponents in reply.

[72] The affidavits and the *viva voce* evidence presented by the Union provide an overview of the difficulties faced by the Union in obtaining recognition of the bargaining rights granted to it pursuant to the Board's Order of July 4, 2007.

[73] One week after the issuance of the Board's Order, on July 11, 2007, the Union wrote to the managers of both store locations asking the Employer to comply with the terms of s. 36 of the *Act*, which provides for union security.

[74] The managers of the Employer did not respond to the Union's request. However, Ms. Milani responded that all communication regarding the Board's Order should be directed to her and she acknowledged receipt of the request for union security. In her evidence, Ms. Milani advised that she understood that she had a reasonable time to respond to the Union's request. She initially suggested she understood she had 30 days to respond (which period of time presumably was based upon the 30 day period within which an employee must become a member of the

union), but later in her testimony suggested that she had been advised by counsel that she had a reasonable time to respond.

[75] Rather than respond to the Union's request, the Employer filed its application for judicial review before the Court of Queen's Bench. When that application was successful, no further response was made to the Union's request.

[76] Following the Court of Appeal's decision on March 27, 2008, which restored the certification Order, the Union again, on March 31, 2008, wrote to Ms. Milani requesting *inter alia* compliance with s. 36 of the *Act*. That correspondence also requested information concerning the current employees employed at both locations as well as information concerning wages and benefits currently in place.

[77] No response was received by the Union to that request but, on March 31, 2008, the Employer, through its counsel, made the within application for reconsideration as well as an application for interim relief. That interim application was initially heard on April 4, 2008 and the Board declined to hear the interim application at that date, preferring to hear the interim application and the application for reconsideration together.

[78] At the hearing on April 4, 2008, the Board advised the parties that the *status quo* would prevail between the April 4, 2008 and the date set for the hearing of this matter on April 16, 2008. The Board advised the parties that *status quo* meant that the Order of the Board remained in full force and effect in accordance with the decision of the Court of Appeal.

[79] The Union then did two things, following the hearing on April 4, 2008. Firstly, it visited the Giant Tiger stores in Regina as outlined in paragraphs 25-30 *supra,* and, on April 8, 2008, it sent another letter to Ms. Milani demanding that the Employer comply with s. 36.

[80] No response was received to the request of April 8, 2008. Ms. Milani, when asked to justify her lack of response, relied upon her understanding that she had a reasonable time to provide a response, and that the matter was pending before the

Board. Her evidence was that she felt that there would be significant disruption in the workplace and concern among employees if the Union began to contact them regarding its certification rights. This disruption is mentioned as well in the affidavits of both Mr. Coates and Mr. Sedlacek filed by the Employer in response to the interim application by the Union.

[81] The obligations with respect to s. 36 have been discussed on numerous occasions by the Board. See *Canadian Union of Public Employees, Local 4195 & Board of Education of the Saskatchewan Rivers School Division No 119*, [2000] Sask. L.R.B.R. 104, LRB File No. 202-98 and *United Food and Commercial Workers, Local 1400 v. Impact Security Group Inc.*, [2006] Sask. L.R.B.R. 517, LRB File No. 081-06. An interference with the Union's rights under s. 36 and/or a refusal to provide information concerning union members to the Union was held in those cases to constitute an unfair labour practice. Given the facts in this case, it is clear that there is an arguable case that an unfair labour practice has been committed by the Employer in this case.

[82] The second leg of the test for interim relief is the balance of labour relations harm. The Employer argues that it will suffer harm if the Union is permitted to obtain access to the employees for the purposes of representing them for bargaining purposes due to the uncertainty which has been occasioned both from the delay in the Board's decision and in respect of the various court decisions which had the effect first of suspending the certification Order and then restoring it. The Employer argues that to impose the certification on the employees at this stage and to allow the Union access to the names, addresses and telephone numbers of the employees creates confusion and uncertainty in the workplace which is best addressed, based upon its application for interim relief, by the suspension of the certification Order pending determination by this Board of the application for reconsideration.

[83] The Union counters that if it is not permitted to obtain the names, addresses and telephone numbers of the employees and to assert its s. 36 rights, that it is effectively estopped from performing its function as bargaining agent for the employees. It will be prevented from demonstrating the benefits of union membership to the employees of Giant Tiger. It further argues that it has been denied the

opportunity to show the benefit of union membership to the employees of Giant Tiger as a result of the Board's delay and the actions of the Employer in refusing to recognize its rights under the certification Order or to allow the Union access to the employees so as to enable the Union to show the employees what the Union can do for them.

[84] The Board agrees with the Union that it has wrongfully been denied access to the employees of Giant Tiger by the Employer. With that in mind, the Board has fashioned a somewhat unusual Order that will allow the Union to have access to the employees for the purpose of attempting to demonstrate the benefits of union membership but, at the same time, ordering a vote of the employees affected by the Order to determine if those employees wish to continue to be represented by the Union for collective bargaining purposes.

Conclusion

[85] In making its decision to order a vote, the Board is mindful that the open period for filing an application for decertification by the employees of Giant Tiger runs from May 4, 2008 to June 3, 2008. A rescission application may well be filed during that period by the employees. The Board is also mindful of the fact that it should not order a vote of employees which would have the effect of decertifying the Union on the application of the Employer. Nevertheless, in the circumstances, and given the decision to reconsider the original certification application, the Board is of the view that the proper procedure, given the new evidence which gave rise to the decision to reconsider the original application, is to allow a secret vote of the affected employees to determine if they wish to be represented by the Union for collective bargaining purposes.

[86] In ordering the vote, however, the Board wishes to, as much as possible, level the playing field so that the Union is not disadvantaged in its desire to represent this group of employees. For that reason, we have granted, in part, the Union's application for interim relief to ensure that it has access to current employee information so as to allow it to campaign for retention of the Union as certified bargaining agent for the employees of Giant Tiger.

[87] There will an order or orders of the Board as follows:

(a) That within twenty-four (24) hours of its receipt of the Board's Order and these Reasons for Decision, the Employer shall post a copy of the Board's Order and these Reasons for Decision in both of the Giant Tiger workplaces in a location where the documents are visible to, and may be read by, as many employees as possible. Such posting is to remain until the final determination of this matter following the vote of the employees;

(b) Directing, pursuant to s. 6 of the Act, that an agent of the Board conduct a secret ballot vote of employees of Giant Tiger employed as of March 27, 2008, being the date the certification Order was reinstated by the Court of Appeal.

(c) Directing the Employer to immediately provide to the Board and the Union, a statement of employment listing the names, addresses and telephone numbers of all employees set out in (a) above. The information provided by the Employer to the Union shall be kept confidential by the Union and used for no purpose other than to contact employees with respect to the vote to be conducted by the agent of the Board;

(d) That the Employer provide to the Union on company time and at each of the company's premises space for the Union to conduct meetings with employees for the purposes of advising them on the benefits of union membership. For the purposes of this provision of the Order, the Union shall be permitted to use the company's lunch room facilities to meet with employees on a voluntary basis on not less than three business days, at each of the Giant Tiger stores (to be determined by the parties in consultation or, if they are unable to agree, then by the Executive Officer of the Board on application of either party);

(e) That, pending the outcome of the secret ballot of employees, the Union shall be restrained from enforcing any of its rights under the certification Order save and except as provided herein;

(f) That the Board shall remain seized of this matter for the purposes of determining any issues associated with the implementation of its orders.

[88] John McCormick, Board Member, dissents in this matter for the following reasons.

REASONS FOR DISSENT

[1] I have read the Reasons for Decision of the majority in this case. In addition, I have considered the evidence, the submissions of the parties as well as the authorities cited by the parties in support of their respective positions. While I do not have any concern with the majority decision as it relates to the Union's interim application (LRB File No. 041-08), I find that I do not agree with the reasoning used or the conclusion reached by the majority of the Board in relation to the Employer's application for reconsideration (LRB File No. 026-04).

Background:

[2] I do not take issue with much of the background to and facts from this case as set out by the majority in paragraphs 1 through 20 and 25 through 30 of the majority's Reasons for Decision and, except where noted herein, I have relied on that background and those facts in the analysis which follows.

Statutory Provisions:

[3] In addition to the statutory provisions identified as being relevant by the majority in its Reasons for Decision, it is my opinion that the following provisions of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") are also relevant to the determination of the Employer's application for reconsideration:

> *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> *. . .*
>
> *5 The board may make orders:*
>
> *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
>
> *(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
>
> *(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*

Analysis and Decision:

[4] The Employer applies to reconsider the Board's decision of July 4, 2007. Reconsideration of a previous decision of the Board is, as noted by the majority, to be exercised sparingly. It is also clear from the Board's case law and from the wording of s. 13 of the *Act* that the Board's reconsideration power is a discretionary one.

[5] It is clear from the Board's Reasons for Decision dated July 4, 2007 that the application for certification was essentially uncontested. The Employer filed a reply but the Employer and the Union later agreed to a bargaining unit description and to the composition of the statement of employment. The hearing was required only because of the replies filed by interested employees alleging improper organizing tactics on the part of the Union. The Employer chose not to take part in the hearing.

[6] In its Reasons for Decision dated July 4, 2007, the Board concluded that the claims made by the interested employees were "tainted by management interference or influence" as a result of activity engaged in by an employee who the Board concluded was "tantamount to an agent of the Employer."

[7] In the decisions of the Court of Queen's Bench and the Court of Appeal, it is noted that, in the months that followed the conclusion of the hearing and preceded the Board's decision of July 4, 2007, the Employer did not take any steps to notify the Board of any change in its circumstances or to inquire as to the status of the case.

[8] After the Board rendered its decision on July 4, 2007, the Employer did not apply for reconsideration. Instead, it chose to apply for judicial review. Only after the judicial review process was completed, in March 2008, did the Employer file this application for reconsideration.

[9] It is my opinion that, in the circumstances of this case, the Board should not exercise its discretion to reconsider its previous decision. I base my opinion chiefly on the fact that I believe that the Employer does not come to the Board with clean hands. The Employer's interference with the interested employees was the only reason a hearing of the application for certification was necessary in the first place. Although the Employer bears no responsibility for the Board's delay in rendering its decision, it is responsible for its failure to notify the Board about any change in circumstances that it felt should impact on the Board's decision, prior to that decision being made. Finally, the Employer is responsible for the choices it has made since the certification Order was issued in relation to its obligations under s. 36 of the *Act* as discussed in the Reasons for Decision of the majority.

[10] In addition to my concerns about the Employer's past actions and how they impact on its application for reconsideration, I am concerned about the propriety of the Board exercising its discretion to consider an application for reconsideration where the party applying for reconsideration chose to pursue judicial review first. I do not think that there is any requirement for a party before the Board to apply for reconsideration before making an application for judicial review. However, it is my opinion that, if a party chooses an application for judicial review rather than an application for reconsideration,

it should not subsequently (after it has been unsuccessful on its application for judicial review) be permitted to pursue reconsideration.

[11] I note the majority's indication that the Employer filed this application for reconsideration as a result of a suggestion made by the Court of Appeal. When I read the decision of the Court of Appeal, I do not see it as suggesting an application for reconsideration at this point in these proceedings. The Court of Appeal mentions an application for reconsideration as something that "might have been open" to the Employer which by implication suggests that it is not open to the Employer any longer. What is available to the employees of the Employer if they do not support the Union, according to the Court of Appeal, is an application for decertification. It is my opinion that pursuant to s. 3 of the *Act*, the employees should decide whether the certification Order should be rescinded and the Employer should have no part in that decision.

[12] I have said that I do not believe that the Board should entertain this application for reconsideration and I would dismiss the application for the reasons outlined above. However, I also have some comments to make about the Reasons for Decision of the majority relating to the application for reconsideration.

[13] The majority notes that an application for reconsideration involves a two step approach. The first step requires the applicant to establish grounds for a reconsideration. The majority has concluded that the Employer established that its corporate reorganization and opening of a second store amounted to crucial evidence that was not adduced for good and sufficient reason. I have a couple of concerns about this conclusion. I agree with the conclusions reached by the majority with respect to the other criteria argued by the Employer.

[14] First, I am not sure what is crucial about this evidence. I do not think the answer to this question is clear in the majority's Reasons for Decision. Second, even if this evidence is crucial (and I do not think it is), it is my opinion that the Employer has not provided a good and sufficient reason for not advising the Board of these changes. Although this evidence was apparently not available when the Board heard the application for reconsideration, it was available before the Board made its decision on

July 4, 2007 and, if the Employer wanted the Board to consider it, it should have asked the Board to do so.

[15] The second step on an application for reconsideration is for the Board to actually reconsider its decision. In this case, if you accept the majority's finding on the first step (which I do not), the second step would be for the majority of the Board to determine what, if anything, it would have done differently had it known about the Employer's corporate reorganization and opening of a second store before it decided the application for certification. I do not think that the majority has done this here.

[16] If the Board had known about the Employer's corporate reorganization before it issued the certification Order, it may have issued the certification Order using the Employer's new name rather than its old one. I think that, on the basis of its conclusions on the first step of the application for reconsideration, the majority could, after reconsidering the Board's decision of July 4, 2007 in light of the evidence relating to the Employer's corporate reorganization, have ordered the amendment of the certification Order to reflect the Employer's new name. It did not do so.

[17] If the Board had known about the opening of a second location before it issued the certification Order, it may have still issued the certification Order as it did (with municipal boundaries) or it might have issued a certification Order specific to the Employer's first location and ordered a vote of the employees in the Employer's second location or it might have simply issued a certification Order specific to the Employer's first location without ordering a vote of the employees in the Employer's second location. The majority, after reconsidering the Board's decision of July 4, 2007 in light of the evidence relating to the opening of the second store, could have made any of these orders. It did not do so.

[18] What the majority has done is to order a vote among all of the employees of the Employer working in both of its locations. This is not one of the possible options identified above and I do not see how this order can reasonably or logically flow from a reconsideration of the Board's July 4, 2007 in light of the evidence identified as crucial by the majority.

[19] In summary, I would dismiss the application for reconsideration for the reasons outlined in paragraphs 3 through 10 above. The comments I make in paragraphs 12 though 17 above should not be taken to mean that I agree with any of the majority's findings made as part of the two step reconsideration process – a process that I would never have embarked upon.

DATED at Regina, Saskatchewan, this **2nd** day of **June, 2008**.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.,
Chairperson