**Labour Relations Board**
**Saskatchewan**

**BETHANY PIONEER VILLAGE INC., operating as BIRCH MANOR, Applicant v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333, Respondent**

LRB File No. 036-06; July 23, 2008
Chairperson, Kenneth G. Love, Q.C.; Members: Gerry Caudle and Clare Gitzel

For the Employer: Kevin Wilson
For the Union: Drew Plaxton

**Reconsideration – Criteria – Board reviews second, third, fifth and sixth criteria for reconsideration – Board concludes criteria not met and dismisses application for reconsideration.**

**Reconsideration – Practice and Procedure – Party applying for reconsideration must first establish sufficient grounds to warrant reconsideration before Board will proceed to hear and determine reconsideration – Reconsideration not to be used as an appeal – Board determines insufficient grounds to warrant reconsideration and dismisses application.**

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

## REASONS FOR DECISION

**Background:**

**[1]** Service Employees International Union Local 333, (the "Union") filed an application with the Board on March 24, 2006, 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 Bethany Pioneer Village Inc., operating as Birch Manor (the "Employer") described as follows:

> *all employees of Bethany Pioneer Village Inc, employed at Birch Manor in or near the village of Middle Lake, Saskatchewan save and except persons excluded by the Saskatchewan Trade Union Act, such as Administrator, co-ordinator and confidential secretary.*

**[2]** By a decision dated November 6, 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 of Bethany Pioneer Village Inc. operating as Birch Manor at or near Middle Lake, Saskatchewan, except the administrator, coordinator and confidential secretary, are an appropriate unit of employees for the purpose of bargaining collectively;*
>
> *(b) that Service Employees International Union, Local 333, 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) Bethany Pioneer Village Inc. operating as Birch Manor, 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 on January 4, 2008, which application has been adjourned by the parties *sine die* pending the outcome of this application

**[4]** The Employer then applied to the Board for a reconsideration of the certification Order pursuant to ss. 5(i) and 13 of the *Act* and made application to the Board for an interim Order staying the operation of the certification Order pending the outcome of the application for reconsideration.

**Facts:**

**[5]** Bethany Pioneer Village owns and operates a special care home near the Village of Middle Lake, Saskatchewan under the name "Aspen Manor". The Saskatchewan Association of Health Organizations ("SAHO") is the bargaining agent for the Employer with respect to Aspen Manor pursuant to *The Health Labour Relations Reorganizations (Commissioner) Regulations,* R.R.S. c. H-0.03 Reg 1 (the "Dorsey Regulations). Employees of Aspen Manor are represented by the Union for the purposes of collective bargaining.

**[6]** Prior to the Order of the Board made on November 6, 2007 employees at Birch Manor were unrepresented. Birch Manor, as an entity, while owned by the Employer, was not a facility which was covered by the Dorsey Regulations. As a result, SAHO would not be the collective bargaining representative for the Employer in respect of this certification.

**[7]** The Board took 19 months to render its decision in respect of the certification application.

**[8]** During the period of time that the Board's decision was reserved, the Employer alleges that considerable change occurred with respect to the workplace. As at March 24, 2006, when the application for certification was filed there were 15 employees in the bargaining unit. During the 19 months which the Board took to make its decision, one employee retired as at August 4, 2007, one employee was terminated as at August 1, 2007 and seven additional employees were purportedly hired as well.

**[9]** During the period following the issuance of the certification Order, the parties had agreed that they would await the outcome of Court of Appeal proceedings that had been initiated in *United Food and Commercial Workers, Local 1400 v. Tora Regina (Tower) Limited (Giant Tiger, Regina),* [2008] SKCA 38 (CanLII), LRB File No. 026-04. That same decision was also the subject of an application for reconsideration (unreported) before the Board. The decision was issued on June 2, 2008, just shortly after the hearing of this matter.

**[10]** The Reasons for the above noted reconsideration Decision relate to:

(a) The Employer's application for reconsideration; and
(b) The Employer's application for a stay pending resolution of this issue.

**Preliminary Issues:**

**[11]** 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 application for reconsideration was not brought in a timely fashion; and

(c) That the Board ought not to hear the application for reconsideration since the Employer failed to provide the Board with the information that it now relies upon prior to the release of the decision of the Board; and

(d) 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.

**[12]** The Board had previously considered these matters in a reconsideration application *The North West Company and Tora Regina (Tower) Limited o/a Giant Tiger v. United Food and Commercial Workers, Local 1400*, [unreported] June 2, 2008, LRB File No. 041-08 and has made its rulings in this case consistent with the rulings in that case.

**[13]** 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

**[14]** The Board also determined, as it had done in the *Giant Tiger, supra*, reconsideration case that it was desirable that the application for reconsideration and the Union's application for interim relief be heard together.

**Statutory Provisions:**

**[15]** 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:**

**<u>The Employer's Applications for Reconsideration</u>**

**[16]** 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.*

**[17]** 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 reconsideration or some other disposition of the matter is appropriate.

**[18]** 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:*
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> 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.*

**[19]** In the Employer's submissions to the Board, counsel relied upon the following criteria as the grounds for reconsideration by the Board:

a) That there was certain crucial evidence which was not adduced at the hearing for good and substantial reasons; and

b) The Board's order has operated with unintended effect; and

c) The delay of 19 months constituted a breach of Natural Justice; and

d) The Original decision was precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon or otherwise change.

**[20]** Based on the facts in this case, the Board has the following comments.

**Crucial Evidence**

**[21]** In *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale, and Department Store Union et al* [1993] S.L.R.B.D No. 50. [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, the Board considered this criteria 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."

**[22]** The Employer argued before the Board, 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 19 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 in *Giant Tiger, supra*:

> *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.*

**[23]** 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.*

**[24]** 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.*

**[25]** However, no such unusual circumstances have been shown in this case. The evidence presented at the hearing showed that the turnover in staff at Birch Manor was not unusual. As a result, the Board is unable to find any exceptional circumstances which in this case would justify the reconsideration of its earlier decision

**Unanticipated Operation of the Board's Order**

**[26]** The Employer also argued that the Board's Order had an unanticipated effect, because it applied to employees whom the Board was not aware had been hired between the certification application and the issuance of the decision. As noted above, in *United Steelworkers Local 5917 v. Doepker Industries Ltd., supra*, this is not an unusual occurrence and often happens in certification applications. Again, this ground advanced by the applicant must fail.

**Breach of Natural Justice**

**[27]** The Board also feels that this ground can be of no assistance to the Employer. The Court of Appeal was clear in its decision in *Giant Tiger, supra,* 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.*

**[28]** The Board concurs with this statement.

**Significant Policy Adjudication**

**[29]** 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.

**Employer's Application for Interim Relief**

**[30]** Given our decision concerning the reconsideration of this matter, it is unnecessary to deal further with the application for a stay requested by the Employer.

**Conclusion:**

**[31]** For the foregoing reasons, the application for reconsideration is dismissed.

**[32]** Mr. Clare Gitzel, Board Member, dissents from these Reasons.

**DATED** at Regina, Saskatchewan, this **23rd** day of **July, 2008**.

**LABOUR RELATIONS BOARD**

Kenneth G. Love, Q.C.
Chairperson