The Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL NO. 1400, Applicant, and WAL-MART CANADA CORP., operating as WAL-MART, WAL-MART CANADA, SAM'S CLUB AND SAM'S CLUB CANADA, Respondent

LRB File No. 069-04; March 26, 2009
Vice-Chairperson, Steven Schiefner; Members: Mike Wainwright and John McCormick

For the Union: Mr. Drew Plaxton
For the Employer: Mr. John Beckman, Q.C., Ms. Catherine Sloan and Mr. Dean Dolan

> **Reconsideration – Criteria – Change in legislation – After union filed application for certification but before decision rendered by original panel, legislation changed adopting mandatory vote system for certification – original panel relied upon card evidence of support filed by Union at time of application – Board concludes original panel did not err in law in doing so – Board concludes that the method of determining majority support in certification application not merely procedural – Board concludes change in legislation affected tangible right of employees that had been relied and acted upon by parties – Board concludes that change in legislation was not intended to affect pending applications before the Board.**
>
> **Reconsideration – Criteria – Board third, fourth and sixth criteria for reconsideration – Board concludes criteria not met and dismisses application for reconsideration.**
>
> ***The Trade Union Act*, ss. 5(i), 6 and 13.**
> ***The Interpretation Act,* ss.34(1)(b) and (c), 35(1)(d) and (e).**

REASONS FOR DECISION

Background:

[1] **Steven Schiefner, Vice-Chairperson**: The United Food and Commercial Workers, Local 1400 (the "Union") filed an application with the Labour Relations Board (the "Board") on April 19, 2004 pursuant to Sections 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 Wal-Mart Canada Corp. (the "Employer") at its store in Weyburn, Saskatchewan.

[2] Soon thereafter a number of related applications were filed with the Board, including LRB File Nos. 122-04, 123-04, 124-04, 125-04, 126-04, 127-04, 128-04, 129-04 & 130-04. All of the applications were consolidated for hearing, which commenced on May 7, 2004,

before a panel of the Board consisting of Chairperson James Seibel (as he then was) and Board members Leo Lancaster and Gloria Cymbalisty (the "original panel").

[3] During the proceedings, a number of preliminary matters required resolution and direction from the Board, including, for example, the scope of the subpoena *duces tecum* served by the Union on the Employer, the production of documents by the Employer, and an application by the Employer to amend its Reply. On more than one occasion, applications were made to superior Courts; one such application was made during the proceeding, it seeking judicial review of the Board's Order respecting the production of documents; and another application was made following the last day of hearing alleging a reasonable apprehension of bias on the part of the Board. Both applications were subject to appeals to the Saskatchewan Court of Appeal and then to the Supreme Court of Canada.

[4] The last day of hearing on the application proper was December 13, 2005. The concomitant judicial review proceedings came to a conclusion on April 19, 2007 when the Supreme Court of Canada denied an application by the Employer seeking leave to appeal a decision of the Saskatchewan Court of Appeal. See: *Wal-Mart,* [2007] S.C.C.A. No. 22. The significance of these facts is not the substance of the judicial proceedings but rather the chronology of events.

[5] By decision dated December 4, 2008, the original panel issued a certification Order in the following terms:

> ***THE LABOUR RELATIONS BOARD****, pursuant to Section 5 (a), (b) and (c) of The Trade Union Act,* ***HEREBY ORDERS:***
>
> *(a) THAT all employees of Wal-Mart Canada Corp. in Weyburn, Saskatchewan, except department managers, those above the rank of department manager, employees in the pharmacy and office staff, are an appropriate unit of employees for the purpose of bargaining collectively;*
>
> *(b) THAT the United Food and Commercial Workers, Local1400, 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) Wal-Mart Canada Corp., 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).*

[6] On December 15, 2008, the Employer applied for reconsideration of the original panel's decisions with respect to the granting of the certification Order on the grounds set forth herein.

[7] The Employer's reconsideration application was heard by the Board on February 2, 2009. Counsel for both the Employer and the Union filed briefs of law and written argument, for which the Board is thankful.

Statutory Provisions:

[8] The 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:

[9] The Board recognizes that in every application for reconsideration there is a need to achieve a balance between the Board's authority to reconsider its own decisions and the general importance of finality in its decision-making in promoting stability in labour relations. To which end, the Board has resolved to exercise sparingly its jurisdiction to review its decisions under ss. 5(i) and 13. This 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.*

[10] For example, the Board has clarified that a request for reconsideration is neither an appeal nor an opportunity to re-argue or re-litigate an unsuccessful application before the Board. See: *Grain Services Union (ILWU – Canada) v. Saskatchewan Wheat Pool, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC Communications Inc.*, [2003] Sask. L.R.B.R. 454, LRB File No. 003-02.

[11] As to the circumstances under which the Board will examine its prior decisions, 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 identified six (6) criteria (or grounds) in which it would give favourable consideration to an application for reconsideration. The 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.*

[12] This Board utilizes a two (2) step approach for applications for reconsideration, which process requires the applicant to first establish solid grounds for reconsideration before a decision is made as to whether reconsideration or some other disposition of the matter is

appropriate. The reason why such a stringent test is applied by the Board was set out in *City of North Battleford v. Canadian Union of Public Employees, Local 287,* [2003] Sask. L.R.B.R. 288, LRB File No. 054-01.

[13] The Employer's application for reconsideration was taken under the third, fourth and sixth ground as adopted by this Board in *Overwaitea, supra*. Counsel on behalf of the Employer advanced four arguments (or what Counsel described as fundamental flaws in the original panel's decision) in support of the Employer's application for reconsideration:

> **1.** *The process used by the Board to determine support for the Union's certification application was contrary to The Trade Union Act.*
> **2.** *The unit certified by the Board was inappropriate because it was under-inclusive.*
> **3.** *The delay in certifying the workplace has been prejudicial to labour relations in the workplace and brings the reputation of The Trade Union Act regime into disrepute.*
> **4.** *The panel that rendered the original decision was not properly constituted.*

[14] The Board will deal with each of the Employer's arguments in turn.

<u>The Process used by the Board to Determine Support was Contrary to the *Act*</u>

[15] The Employer's position was the original panel's decision turned on a fundamental error of law; namely the Board's failure to apply s. 6 of the *Act*, as amended by *The Trade Union Amendment Act, 2008*, which amendment became effective on May 14, 2008 (7 months before the original panel rendered its decision). The Board is satisfied that, if the original panel erred in its interpretation of s. 6 of the *Act*, an arguable case for reconsideration would exist. The question being; did the original panel commit such an error; specifically, did the original panel err in the process used to determine majority support for the Union's certification application?

[16] The original panel dealt with the issue of majority support by concluding that the Union had the support of a majority of the employees in the unit it determined to be appropriate. In so doing, the original panel relied upon the evidence of support filed by the Union at the time it filed its application for certification (*ie.* support cards). In so doing, the original panel utilized and relied upon the provisions of the *Act* that existed prior to the coming into force of *The Trade Union Amendment Act, 2008*. The original panel did not provide reasons for doing so.

[17] At the time the Union filed its application for certification (on April 19, 2004), and at the time of the hearing before the original panel (May, 2004 to December, 2005), s. 6 of the *Act* read as follows:

> *6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
>
> *(2) Where a trade union:*
>
> *(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and*
>
> *(b) shows that 25% or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining*
>
> *the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:*
>
> *(c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit; or*
>
> *(d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.*
>
> *(3)* ***Repealed.***

[1] On May 14, 2008, *The Trade Union Amendment Act, 2008* was given Royal Assent and, in so doing, s. 6 of the *Act* was amended to read as follows:

> *6(1) Subject to subsections (1.1) and (2), in determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board must direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
>
> *(1.1) No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application.*

(1.2) The board must require as evidence of each employee's support mentioned in subsection (1.1) written support of the application, as prescribed in the regulations made by the Lieutenant Governor in Council, made within 90 days of the filing of the application.

(2) Where a trade union:

(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and

(b) shows that 45% or more of the employees in the appropriate unit have within 90 days preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining

the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:

(c) ***Repealed.***

(d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.

(3) ***Repealed.***

[18] As indicated, the original panel rendered its decision and issued a certification Order on December 4, 2008.

[19] The Employer's position was that, because the change to the legislation became effective prior to the original panel rendering its decision, it erred in law by utilizing the process of determining majority support provided for in the *Act* prior to the amendment (*ie.* card evidence). The Employer argued that *The Trade Union Amendment Act, 2008* changed the procedure or method to be used by the Board in determining majority support and that s. 6 of the *Act*, as amended, gave no discretion to the Board to do anything other than direct that a representative vote be taken. In other words, the Board was procedurally mandated to order a vote of employees to determine the question of "what trade union, if any, represents a majority of employees in an appropriate unit of employees." In failing to do so, the Employer argued that the original panel erred in law.

[20] In taking this position, the Employer relied upon the decision of the Saskatchewan Court of Appeal in the case of *University of Saskatchewan v. Women 2000* (2006), 48

Admin.L.R. (4th) 110. In that case, our Court of Appeal was called upon to consider the effect of a change in legislation with regard to a pending application before the Saskatchewan Human Rights Commission. In so doing, the court reviewed the common law presumptions associated with the application of changes in legislation to pending applications. The Court concluded that the new provision should apply to the pending application because the change in legislation did not involve any vested or substantive rights. Rather, the Court concluded that the changes went to the "process" used by the Commission to handle a complaint and thus relied upon the presumption associated with "procedural" changes in legislation, as noted by the Court at para.17:

> *There is a second common law presumption which must also be considered in assessing the University's argument. It is to the effect that procedural legislation has an immediate effect and applies to all matters, including those commenced or initiated before the legislation came into force. This rule has been expressed by some writers as meaning there is no vested right in procedure. See, for example: Côté, The Interpretation of Legislation in Canada, 3rd ed. (Scarborough: Carswell, 2000) at p. 178. It was explained in the following terms in Wright v. Hale (1860), 6 H.& N. 227, at p. 232, 158 E.R. 94:*
>
> > *… where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.*

[21] The Employer also relied upon s. 35(1)(d) and (e) of *The Interpretation Act, 1995*, S.S. c.I-11.2. The Employer argued that the change in legislation only affected the procedure used by the Board and, as such, the original panel was bound to adapt that procedure to the proceedings before.

[22] The Employer also relied upon the decision of the British Columbia Labour Relations Board in the case of *Campbell River Fibre Ltd.,* BCLRB No. 356/2001. The Employer argued that the circumstances before the B.C. Board in *Campbell River Fibre Ltd., supra,* were virtually identical to the facts before the original panel in the present case.

[23] In *Campbell River Fibre Ltd., supra,* the trade union had applied for certification under the British Columbia *Labour Relations Code*. At the time of the union's application, the B.C. *Code* provided for certification without a vote if the applicant union tendered sufficient evidence of card support. After the trade union's application had been filed and before the board could hear the matter or render a decision, the B.C. *Code* was amended to remove the board's previous authority to grant certification without a representative vote, with the new legislation

directing that votes be taken in all certification applications (meeting the prescribed threshold). In *Campbell River Fibre Ltd., supra,* the B.C. Board concluded that the determination of the wishes of employees for purposes of a certification application was purely a procedural matter and thus the legislative changes must be applied to all pending applications before it, including the trade union's application for certification.

[24] Simply put, the Employer's position was that the change to s. 6 introduced by *The Trade Union Amendment Act, 2008* was "procedural" within the meaning ascribed by the Saskatchewan Court of Appeal in *Women 2000, supra,* and thus, should have been applied by the Board to the Union's application for certification, as was done by the B.C. Board in *Campbell River Fibre Ltd., supra.* The Employer's position was that the original panel should have ordered a representative vote of employees to determine majority support for the Union's certification application and that its failure to do so was an error of law.

[25] The Union's position was that the original panel did not err in law by relying upon the card evidence of support for the Union's application nor did it err in not applying the provision of s. 6 of the *Act,* as amended. Rather, the Union argued that the Board would have erred in law if it had attempted to direct that a representative vote be conducted either based on the amendments to s. 6 or upon its previous discretion prior to the legislative changes.

[26] The Union observed that *The Trade Union Amendment Act, 2008* did not contain a transition provision providing for the retroactive application of the changes set forth therein nor did it contain other express language dealing with the issue of retrospectivity. As a consequence, the Union took the position that the Board correctly relied upon the common law presumption that a legislature does not intend legislation to operate in circumstances were its application would interfere with vested rights or be construed to have retrospective operation unless such construction is expressly provided for in the language of the enactment (which, in this case, no such provision was contained). In this regard, the Union relied upon the decision of the Supreme Court of Canada in *Gustavson Drilling v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271.

[27] The Union argued that the only exception to this well-known common law presumption involves legislative change dealing "purely" or "wholly" with procedure and the Union took the position that the change to s. 6 of the *Act* was anything but procedural.

[28] The Union argued that, prior to *The Trade Union Amendment Act, 2008*, employees had the right to "automatic certification" based on card evidence of sufficient support. The Union argued that, by acting upon this right (by filing an application for certification with card evidence), this right became "vested" or "accrued" and could not be interfered with by the legislature except with express language to that effect.

[29] Simply put, the Union's position was that the original panel correctly applied the law that was applicable to the Union's certification application at the time.

[30] In taken this position, the Union relied upon the decision of this Board in *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. K.A.C.R. (A Joint Venture)*, [1983] November, Sask. Labour Rep. 56, LRB File No. 275-83. In *K.A.C.R.*, *supra,* the trade union filed an application for certification. After the application had been filed but before hearing and/or a decision by the Board, *The Trade Union Act* (as it was then) was amended barring applications for certification within six (6) months from a previous unsuccessful certification application by the same union respecting the same or a substantially similar unit of employees (without abridgement of time by the Board). In *K.A.C.R.*, *supra,* the Board concluded that the amendments to the *Act* were more than procedural in nature on the basis that the substituted legislation effectively removed a right which existed prior to the change in the legislation (specifically, the right to file an application for certification without any time restriction on it). As a consequence, the Board in *K.A.C.R., supra,* concluded that the trade union's application for certification was not barred by the time restrictions in the new legislation. The Union also noted that the decision of the Board in *K.A.C.R., supra,* was upheld by the McIntyre, J. of the Saskatchewan Court of Queen's Bench in *K.A.C.R. (An employer joint venture) v. International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 and Saskatchewan Labour Relations Board*, [1983] S.J. No. 1102, 30 Sask. R. 16.

[31] The Union also relied upon the decision of the Ontario Labour Relations Board in *Canadian Union of Public Employees v. City of Scarborough*, [1994] O.L.R.B. Rep. March 300. In that case, a raiding trade union applied for certification during the open period of a collective agreement. Subsequent thereto, a notice was filed under the *Social Contract Act*, which notice had the effect of reviving and extending the collective agreement and, in so doing, altering the open period. This notice was given after the trade union had filed its application for certification

but before disposition of the matter by the Ontario board. As a consequence, the board was called upon to determine whether or not the provisions of the *Social Contract Act* could have the effective of closing the open period retroactively. The Ontario board concluded that, in the absence of express language by the enactment, the legislation could not be given a retroactive effect; could not interfere with the vested rights of the trade union to bring its application for certification.

[32] The Union summarized the issue before the Board as turning on whether or not the amendments to s. 6 were procedural or not. With this summary, the Board concurs. Whether or not the original panel erred in law by relying on card support in granting the Union's application for certification (without directing a vote as now required by to s. 6 of the *Act*, as amended) turns on whether or not the change to s. 6 provided for in *The Trade Union Amendment Act, 2008* interferes with substantive rights of employees and/or trade unions or merely prescribed new procedures to be followed by the Board.

[33] *The Trade Union Amendment Act, 2008* did not contain a transition provision providing for the retroactive application of the changes set forth therein nor did it contain other express language dealing with the issue of retrospectivity. The only legislative aides available to the Board are the provisions of *The Interpretation Act, 1995*, R.S.S. c.I-11.2. Specifically, ss. 34(1)(b) and (c) and 35(1)(d) and (e), which provide as follows:

> ***Repeal***
> *34(1) The repeal of an enactment does not:*
>
> *. . .*
>
> *(b) affect the previous operation of the repealed enactment or anything done or permitted pursuant to it;*
> *(c) affect a right or obligation acquired, accrued, accruing or incurred pursuant to the repealed enactment;*
>
> ***Repeal and replacement***
> *35(1) Where an enactment is repealed and a new enactment is substituted for it:*
>
> *. . .*
>
> *(d) a proceeding commenced pursuant to the repealed enactment shall be continued pursuant to and in conformity with the new enactment as far as is consistent with the new enactment;*
> *(e) the procedure established by the new enactment shall be followed as far as it can be adapted in relation to the matters that happened before the repeal;*

[34] The Saskatchewan Court of Appeal in *Women 2000, supra,* observed that s. 34(1)(b) and (c) of *The Interpretation Act, 1995* merely reflect and codify the common law

presumption that the legislature does not intend legislation to be applied in circumstances where its application would retroactively interfere with vested rights; the presumption articulated in such cases as *Spooner Oils Ltd v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629; and *Gustavson Drilling v. Canada (Minister of National Revenue)*, *supra.*

[35] The policy rationale for the presumption against interference with vested rights was articulated by Judith Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Canada: Buttersworth, 1994) ("*Driedger*") at p. 530 as follows:

> *To deprive individuals of existing interests or expectations that have economic value is akin to expropriation without compensation, which has never been favoured by the law. To worsen the position of individuals by changing the legal rules on which they relied in arranging their affairs is arbitrary and unfair. Where the application of new legislation creates special prejudice to some, or windfalls for others, the burdens and benefits of the new law are not rationally or fairly distributed. These effects may be hard on the individuals involved and they undermine the general security and stability of the law. For these reasons interference with vested rights is avoided in the absence of a clear legislative direction.*

[36] Similarly, our Court of Appeal in *Women 2000, supra,* also observed that the second common law presumption (that "procedural" changes in legislation have immediate effect and applied to all pending applications, including those commenced or initiated before the change in legislation came into force) was reflected and codified in s. 35(1)(d) and (e) of *The Interpretation Act, 1995*.

[37] The policy rationale for the presumption that procedural changes in legislation have immediate effect was also articulated by *Driedger, supra,* at p. 543 as follows:

> *There is a common law presumption that procedural legislation applies immediately and generally to both pending and future facts. This presumption is formulated in a variety of ways: (1) persons do not have a vested right in procedure; (2) the effect of procedural changes is deemed to be beneficial to all; (3) procedural provisions are an exception to the presumption against retrospectivity; (4) procedural provisions are ordinarily intended to have immediate effect.*

[38] Which common law presumption is attracted by a legislative change must be determined in the circumstances of each case; by the nature of the provision and the circumstances of its application to the facts of the case. Although criteria have been enumerated

by academics to guide in such determinations, not many judicial attempts at a clear definition can be found.

[39] Criteria for recognizing a vested or accrued right were articulated by *Driedger, supra,* at p. 530 and 531 as follows:

> ***Recognizing vested or accrued rights.*** *In their effort to determine what is a vested or accrued rights, the courts focus sometimes on the common law presumptions, sometimes on the language of the Interpretation Acts. Regardless of focus, the central problem is the same. The court must decide whether the particular interest or expectation for which protection is sought is sufficiently important to be recognized as a right and sufficiently defined and in the control of the claimant to be recognized as vested or accrued.*

[40] In *Driedger*, *supra,* the author goes on to cite with approval the guidance articulated by Vancise J.A. of the Saskatchewan Court of Appeal in *Scott v. College of Physicians & Surgeons of Saskatchewan* (1992), 95 D.L.R. (4th) 706:

> *Left with no definition, the courts have established two criteria or factors which will help determine whether a right is acquired, accrued or accruing. First, one must establish a tangible or particular legal right, the right cannot be abstract, it must be more than a mere possibility, more than a mere expectation; and second, establish that the right was sufficiently exercised or solidified before the repeal of the enactment to justify its protection.*

[41] The criteria for recognizing a procedural change in legislation were articulated by *Driedger, supra,* at p.545 as follows:

> *Whether a provision is procedural must be determined in the circumstances of each case. A provision may be procedural as applied to one set of facts and substantive as applied to another. To be considered procedural in the circumstances of a case, a provision must be exclusively procedural; that is, its application to the facts in question must not interfere with any substantive rights or liabilities of the parties or produce other unjust results. This point is emphasized repeatedly in the cases.*
>
> *. . .*
>
> *In determining whether a provision is "purely" procedural, the courts look to the substance of the provision and its practical impact on the parties. The important thing is not the label, but the effect. If the effect of a provision is to alter the legal significance of the facts of a case, it is not purely procedural.*

[42] With these criteria in mind, the next step is for the Board to examine the nature of the change to s. 6 of the *Act.*

[43] Prior to the amendment, the Board had the authority to order certification of an applicant trade union on the basis of card evidence of majority support (50% plus 1). The Board was only compelled to order a vote by secret ballot in the circumstances set forth in s. 6(2), which circumstances are not applicable to the present case. With *The Trade Union Amendment Act, 2008*, Saskatchewan adopted a mandatory vote regime, wherein the Board must now direct that a representative vote be taken (by secret ballot) to determine what trade union, if any, has the support of the majority of employees in the workplace. In so doing, the legislature moved Saskatchewan from what had previously (and somewhat inaccurately) been referred to as an "automatic certification" system to a "mandatory vote" system.

[44] The Employer characterized this change as "procedural" (merely defining the procedure or method to be used by the Board to determine majority support in a certification application). On the other hand, the Union characterized this change as taking away a "right" (the right to apply for and obtain certification if sufficient card evidence of support is tendered to the Board); a right that the Union and the employees previously could rely upon in gathering card evidence of support and had acted upon by filing applications for certification with the Board.

[45] Proponents of an automatic certification regime argue that it is the best method of providing easier access to collective bargaining for employees and to prevent employer interference in an employee's decision to join a trade union. Proponents of a mandatory vote system argue that it restores democracy to the workplace and prevents inappropriate organizing tactics by trade unions. The relative merits of these two (2) systems in achieving democratic results and/or fairness in the workplace and/or in protecting workers' right to organize has been extensive and publicly debated in this province and elsewhere where change has been made from one system to another. For the record, the relative merits of either system are not the issue before this Board (and in respect of which the Board makes no comment); the fact that there are relative merits to either system, and the fact that there has been extensive and public debate associated with the change from one system to another, would tend to indicate that the change to s. 6 of the *Act* was more than "procedural" according to the criteria enumerated in *Driedger, supra*.

[46] In the Board's opinion, the employees at this workplace, together with the Union, relied upon the state of the law at the time they gathered their evidence of support and they

collectively acted upon that state of the law when they applied to the Board for certification of the Union. At the point they did so; at the point the Union and the employees filed their application for certification, their reliance on the state of law crystallized into a right. This right (the right to rely on the card evidence of support filed with their application for certification) was not abstract; it was a tangible and particular legal right available at that time. Furthermore, in acting upon on that right (in filing an application for certification with the Board), that right became sufficiently "exercised" or "solidified" so as to justify its protection under the common law presumption against restrospectivety, according to the criteria established by the Saskatchewan Court of Appeal in *Scott, supra*. In coming to this conclusion, the Board is mindful that the Union and the employees completed all procedural steps within their control to complete prior to the change in legislation.

[47] The counter argument; the argument advanced by the Employer was that this was not a "right" and never become a right; rather it was merely an expectation or a desired possible outcome. The Employer argued that the employees and the Union never had a right to a certification Order based on their card evidence of majority support because, under the old legislation, the Board always had the discretion to order a representative vote. The Employer argued that, because the Board retained this discretion, card certification was never a "right"; it was merely one possible outcome of their certification application; and not something sufficiently tangible or crystallized to warrant protection under the common law presumption against retrospectivity. In the Board's opinion, this argument is not sustainable because it ignores the Board's long standing and clear jurisprudence respecting card certification and the labour relations significance of documentary evidence of support under a card certification process.

[48] The long standing jurisprudence of this Board was to accept card evidence of support and to only direct a representative vote in limited circumstances (ie. circumstances involving a raiding union, irregularities in membership evidence, or in the case of build-up) [1] and no such circumstances existed before the original panel. Granted, the original panel could have departed from the jurisprudence of the Board; but on what basis? There was no allegation or evidence of a raid and this was not the case of build-up in the workplace. While there were allegations of irregularities in membership evidence, the original panel dismissed each allegation based on a not-insignificant volume of evidence tendered during the hearing. Based on the

findings of fact of the original panel (which this Board will not disturb) there was no evidence before the original panel that would have triggered a representative vote under the Board's jurisprudence.

[49] Furthermore, the nomenclature of "automatic" certification arose in a labour relations context because of the general and consistent reliance by labour relations boards operating under a card certification system on documentary evidence in granting certification applications meeting the prescribed statutory requirements (ie. without the necessity of a representative vote). This general and consistent reliance on documentary evidence of majority support was done in the interest of expediency and to add greater certainty and predictability to the certification process in Canadian jurisdictions (operating under a card certification system). See: *Canadian Labour Law* (2nd edition), George W. Adams at 7.1110.

[50] In the Board's opinion, when the Union filed the application for certification, together with sufficient evidence of majority support in accordance with state of the law at that time, they completed all procedures within their control to complete under the procedures then in place. At that point in time, their reliance on the state of the law crystallized into a right; a tangible and particular legal right protected under the common law presumption against restrospectivety. To use the language of Saskatchewan's *Interpretation Act, 1995, supra*, in the Board's opinion, the Union and the employees had an "acquired" or "accrued" right pursuant to the repealed enactment (*ie.* the right to reply upon the documentary evidence of majority support filed with their application for certification) and this right was unaffected by any subsequent change in the legislation by virtue of the protection afforded to such rights by s. 34(1)(c) of *The Interpretation Act, 1995*, *supra*.

[51] In coming to this conclusion, the Board is mindful that, for a legislation change to be "procedural" within the meanings ascribed by the common law presumption, it must be purely and exclusively procedural. In other words, the practical impact of the change in the legislation should not interfere with any substantive right or produce an unjust result for the parties. Similarly, if the effect a provision is to alter the legal significance of the facts of the case, the change in legislation is not purely procedural. See: *Drieger, supra*.

---

[1] See: *Hotel Employees & Restaurant Employees Union v. Chi Chi's Restaurant Enterprises Ltd.* [1986] June Sask. Labour Rep. 31, LRB No. 035-86 and *S.J.B.R.W.D.S.U v. Saskatchewan Gaming Corporation – Casino Moose Jaw and Public Service Alliance of*

[52] In the Board's opinion, the change to s. 6 found in *The Trade Union Amendment Act, 2008* was not purely procedural as evident by the practical impact of the change in the legislation on the parties. If the original panel had proceeded in the manner suggested by the Employer and had directed a representative vote, the list of employees eligible to vote would have been confined to those employees within the unit (determined by the original panel) as of the date of the Union's application who continued to be employees of the Employer on the date of the vote. The evidence of the Employer was that, as of December 4, 2008, only thirteen (13) out of approximately eighty-nine (89) employees listed on the Statement of Employment continued to belong to the unit determined by the original panel[2]. In other words, unless the original panel departed from the Board's jurisprudence as to the conduct of a representative vote and/or the determination of eligible employees, the desired representative vote could only have captured the wishes of a distinct minority of employees at the workplace. On the other hand, if the Union's application had been filed under a mandatory vote system, the original panel, when faced with the number and range of preliminary matters that arose in this case, could have directed that the pre-hearing vote take place; sealing the ballots until matters had been resolved. In so doing, the wishes of the employees could have been captured on a timely basis. However, because of the timing of the legislative changes (occurring 49 months after the Union's application), this course of action was not available to the original panel. The point is not which process would have been better but rather the Board's observation that, in the circumstance of this case, the practical impact of the change in the legislation was dramatic and self-evident; which tend to indicate that the change in the legislation was not purely procedural according to the criteria enumerated in *Driedger, supra*.

[53] Similarly, the change to the legislation altered the legal significance of the facts of the case. Under the old legislation, the clear and consistent precedent of the Board was to grant certification based on the Union's card evidence of majority support. There was no evidence before the original panel that would have triggered a discretionary or mandatory vote under s. 6 of the *Act*. However, following the change, the Board can no longer rely on card evidence of support for purposes of certification. Such evidence now can be relied on only for purposes of determining whether or not the Union has achieved the prescribed threshold of support necessary for the conduct of a representative vote of employees. Furthermore, the change to the legislation also altered the time limit on gathering card evidence of support (reducing the

---

Canada, [2002] Sask. L.R.B.R. 601, LRB No. 187-02.

period from 6 months to 90 days). The retrospective operation of *The Trade Union Amendment Act, 2008, supra,* would also require the Board to re-examine the validity of the card evidence of support filed by the Union to determine if it was gathered within the reduced period. As can be seen, the change in the legislation altered the legal significance of a number of facts before the original panel, also indicating that this change was substantive and not merely procedural according to the criteria enumerated in *Driedger, supra*. On this basis, the Board is satisfied that the respective application of the legislative changes to s.6 of the *Act* to the Union's application for certification would produce an unjust result.

[54] These conclusions can be seen in contrast to the finding of Saskatchewan Court of Appeal in *Women 2000, supra*, wherein the Court concluded that the substance of the University's situation had not meaningfully changed under the new (and disputed) legislation. In *Woman 2000, supra*, the University complained that the removal of a preliminary determination process related to "probable cause" provided an assurance to respondents that frivolous complaints would not proceed. However, the court noted that, under the new legislation, the Chief Commissioner had the authority to dismiss any complaint falling below a "probable cause" threshold and, although this remedy was exercisable in a different manner, a protection against frivolous complaints continued to be afforded to respondents under the legislation. In so holding, the Court concluded that, in the circumstances of that case, the "probable cause" feature of the old system did not give rise to a vested or substantive right and, as such, the new legislation applied to pending applications before the Human Rights Commission. A key feature in the Court of Appeal's determination was the observation that the University's situation had not meaningfully changed under the new legislation.

[55] Similarly, the circumstance before the original panel can be seen in contrast to the circumstances before the B.C. Board in *Campbell River Fibre Ltd., supra.* In that case, the change in the legislation occurred within six (6) days of the Union's application for certification and a representative vote was conducted four (4) days thereafter. In other words, in *Campbell River Fibre Ltd., supra,* the B.C. Board was faced with a situation wherein it was choosing between reliance upon card evidence of support filed with the certification application and a representative vote conducted ten (10) days thereafter. It is difficult to image that the positions of the parties before the B.C. Board would have substantively changed within the short period of

---

[2] See: The affidavit of Kimberly Jaeger, sworn December 16, 2008 and filed with the Board in support of the Employer's application for a stay pending reconsideration.

time involved in that case. As a consequence, the facts and circumstances before the B.C. board are distinguishable from the facts and circumstances before the original panel, wherein the change in legislation occurred fourty-nine (49) months after the application for certification had been filed.

[56] Furthermore, the decision of the original panel is consistent with the finding of the Manitoba Labour Relations Board in the case of *Bakery, Confectionary and Tobacco Workers, International Union, Local 389 v. Gourmet Baker Inc.*(Letter decision dated February 5, 1993), Case No. 1103/92/LRA (unreported). In that case, an application for certification was filed with the Manitoba board on December 21, 1992, one (1) week prior to the coming into force of *The Labour Relations Amendment Act*, S.M. 1992, c.43. This amendment to Manitoba's *Labour Relations Act*, C.C.S.M. c.L-10, increased the prescribed level of support necessary for an automatic certification from 55% to 65% effective January 1, 1993. A hearing of the matter was conducted on January 29, 1993 and a letter decision rendered by the Manitoba board on February 5, 1993, wherein it concluded that the legislation, as it existed on the date of filing the application for certification, should govern the determination of the support level for that application.

[57] In the Board's opinion, upon filing their application for certification with the Board, the Union (and the employees) had an acquired or accrued right to rely upon the card evidence of support filed with their application for certification and that this right was not affected by the subsequent change in the legislation pursuant to the protection afforded to such rights by s. 34(1)(c) of *The Interpretation Act, 1995*. In addition (or in the alternative), the Board is satisfied that the employees and the Union relied upon the state of law at the time they gathered their evidence of support and that they collectively acted upon that state of the law in making their application for certification. In the Board's opinion, their right to do so was sufficiently tangible and exercised or solidified so as to crystallize that right and justify its protection under the common law presumption against the retrospective application of legislative changes. Furthermore, the Board is satisfied that the change to s. 6 of the *Act* provided for in *The Trade Union Amendment Act, 2008* was not merely procedural based on the practical impact on the parties of the change in the legislation and the observation that the change in legislation altered the legal significance of the facts before the original panel. In so holding the Board relies on the criteria enumerated by our Court of Appeal in *Scott, supra*, the finding of our Court of Queen's

Bench in *K.A.C.R., supra,* and the decisions of this Board in *K.A.C.R.,* supra, of the Manitoba board in *Gourmet Baker Inc., supra*, and of the Ontario board in *City of Scarborough, supra*.

[58] As a consequence of these findings, the Board concludes that, if the legislature had intended the change to s.6 of the *Act* to apply to pending applications before the Board, it would have included express language to that effect as it has done in other legislation. Because the legislature did not do so, the Board concludes that the original panel did not err in law in its reliance on card evidence of majority support in granting the Union's application for certification.

The Unit Certified by the Original Panel was Under-inclusive

[59] In its decision, original panel certified the following unit of employees as an appropriate unit for the purpose of collective bargaining:

> *THAT all employees of Wal-Mart Canada Corp. in Weyburn, Saskatchewan, except department managers, those above the rank of department manager, employees in the pharmacy and office staff, are an appropriate unit of employees for the purpose of bargaining collectively;*

[60] The Employer argued that the original panel departed from sound labour relations principles articulated by other Labour Boards in similar circumstances and the Board's own jurisprudence in defining what is an appropriate unit. In particular, the Employer argued that the original panel certified an "under-inclusive" unit and, in so doing, the panel departed from sound labour relations principles. The Employer argued that the excluded members of the unit (ie. department managers) were not "managers" in a labour relations sense and that they had a community of interest with the other associates (*ie.* other members of the unit). The Employer argued that the department managers had no discrete skill sets or boundaries that separated them from other employees. Finally, the Employer argued that the department managers intermingle with other employees and have overlapping duties.

[61] The Employer's position was that original panel's decision to exclude department managers from the bargaining unit conflicted with previous decisions of the Board and set a significant new precedent. See: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Centre of the Arts*, [1995] 4th Quarter Sask. Labour Report 52, LRB File No. 175-95.

[62] The Employer also argued that the original panel's decision was inconsistent with certification decisions involving units of employees of the Employer in other jurisdictions which did include department managers. For example, in British Columbia, their Labour Relations Board included department managers in *United Food and Commercial Workers International Union, Local 1518 v. Wal-Mart Canada*, [2004] BCLRB No. B291/2004, as did the Commission des Relations du Travail in the case of *Travailleurs et travaileuses unis de l'alimentation et du commerce, section locale 501 v. La Compagnie Wal-Mart due Canada St. Hyacinthe Establishment* [2005] File AM-2000-4281.

[63] The Union took that position that the original decision was not inconsistent with the Board's precedents and argued that the Board has certified under-inclusive units in the past. See: *Health Sciences Association v. Canadian Blood Services,* [2008] CanLII 47047 (SK L.R.B.), LRB File No. 030-08.

[64] The Union argued that, contrary to the Employer's assertions, the original panel's decision did not department from the Board's jurisprudence and indeed followed and applied the Board's established principles concerning collective bargaining units. The Union argued that the Board's established jurisprudence is that trade unions need not propose the "most appropriate" unit; just an appropriate unit, which the Union argued the original panel did.

[65] In the Board's opinion, there was nothing in the determination of the unit description that was precedential or that would otherwise merits reconsideration. The decision was within the Board's accepted jurisprudence. See: *Canadian Union of Public Employees v. The Board of Education of the Northern Lakes School Division No. 64*, [1996] Sask. L.R.B.R. 115, File No. 332-95, and *Graphic Communication International Union, Local 75M v. Sterling Newspapers Group, A Division of Hollinger Inc.,* [1998] Sask. L.R.B.R. 770, LRB File No. 174-98.

[66] The original panel's decision demonstrates that it reviewed the evidence presented by the parties, considered the authorities propounded by counsel, and reflected up both its own decisions and the decisions of labour relations tribunals in other Canadian jurisdictions (these latter decisions the panel noted were not easily reconcilable). The original panel was mindful of the counter-balancing considerations in a determination of an appropriate unit and its reasoning was reasonable, justifiable, and followed a transparent path within the Board's accepted jurisprudence for an initial certification of a new unit of employees. In the

Board's opinion, there is nothing in the original panel's decision regarding the description of the unit that warrants reconsideration.

[67] The Employer merely seeks to re-litigate an issue that was settled by the original panel. This Board has previously established that a request for reconsideration is neither an appeal nor an opportunity to re-argue or re-litigate an unsuccessful application before the Board. See: *Grain Services Union v. Saskatchewan Wheat Pool et al.*, *supra*.

Delay and Drastic Workplace Change

[68] The Employer argued that new evidence needed to be considered by the Board; evidence regarding the lapse of time that has occurred since the hearing of this matter by the original panel (which the Employer argued was 36 months) and evidence regarding the changes in the workplace that had occurred between the time the Union filed its application for certification with the Board and the original panel rendering its decision.

[69] Council on behalf of the Employer indicated that, in the event the Board was inclined to grant reconsideration of the original panel's decision on this ground, the Employer would be relying upon the Affidavit of Kimberly Jaeger[3] to establish the changes that had occurred at the workplace. Council argued that, while the Board's normal practice in an application for reconsideration is to utilize a two (2) stage process, the Employer took the position that, as it did not intend to tender any evidence other than the Affidavit of Kimberly Jaeger, the Board need not separate the preliminary question (demonstration of solid or sufficient grounds) from the merits of the issue before the Board. To which end, counsel on behalf of the Employer advanced arguments going to both stages of their application for reconsideration.

[70] The Affidavit of Kimberly Jaeger contained the following relevant evidence:

> *1. I am the Personnel Manager at the Weyburn store of Wal-Mart Canada Corp. (the "Employer"), and as such I have personal knowledge of the matters and facts deposed to in this my Affidavit . . .*
>
> *3. As of December 4, 2008 there were 106 Associates employed at the Weyburn store. Included in this group are 17 Department Managers including the Pharmacy OTC Manager, 1 Support Manager, 3 Specialty Manager, 2*

[3]The Affidavit of Kimberly Jaeger, sworn December 16, 2008and filed with the Board in support of the Employer's application for a stay pending reconsideration.

> *Personnel Managers, 1 Administrative Manager, 5 Office Associate and 4 Pharmacy Associates. In the above mentioned totals there is 1 Support Manager who was promoted to Shoe Manager on December 6, 2008. The former Shoe Manager is on a non working paid notice with a termination date of December 20, 2008. Of the 2 Personnel Managers; one was terminated on September 13, 2008 but remains on the Associate listing due to a clerical error.*
>
> . . .
>
> *5. As of December 4, 2008, only 27 of the employees listed on the appended Statement of Employment remain employed at the Weyburn store. Of this group of 27 Associates, 13 belong to the union's proposed bargaining unit and the remaining 14 Associates are comprised of 10 Department Managers, 2 Specialty Managers and 2 Office Associates.*

[71] The Employer took the position that the original panel's decision is operating in an unanticipated way and/or having an unintended effect because the majority of employees presently working at this workplace took no part in the Union's application for certification. The Employer argued that, because none of the employees who joined the workplace since the Union filed its application had an opportunity to express (or withhold) their support from the Union, granting certification without a vote is bad for employee morale, is prejudicial to labour relations in the workplace, and brings Saskatchewan's *Trade Union Act* into disrepute.

[72] The Employer argued that the original panel's delay in rendering a decision was inordinate and unreasonable and noted that it was unexplained. The Employer argued that the original panel's certification Order had the unintended consequence of disenfranchising the majority of employees at the workplace; most of which had commenced employment since the Union's application for certification was filed with the Board; a workplace that was uncertified at the time they commenced their employment.

[73] The Employer's argument was essentially two (2) fold; firstly, that there has been an overwhelming turnover of employees at the workplace causing the original panel's certification Order to operate in an unanticipated manner, within the meaning of the third ground articulated and adopted by this Board in *Overwaitea, supra*; and secondly, that the original panel's inordinate and unreasonable delay rendered its decision vulnerable as an abuse of process within the meaning ascribed by the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 S.C.C. 44.

[74] Simply put, the Employer's position was that, because of the original panel's delay in rendering its decision, there has been dramatic changes in the workplace, and that the Board

should exercise its discretion to set aside the original panel's certification Order and direct that a representative vote be conducted of the employees (*ie.* the current employees) in the workplace. To do otherwise, the Employer argued, would bring Saskatchewan's labour relations regime into disrepute and amount to an abuse of process.

[75] The Union took the position that there was nothing unusual or exceptional in the level of turnover of staff at the workplace that occurred pending the decision of the original panel. Furthermore, the Union argued that the Employer's own conduct (in bringing multiple applications for judicial review) was the cause of most of the delay in the present case. Counsel for the Union noted that it is not unusual to see a high turnover of employees in a retails sales establishment and propounded this Board's decisions in *Service Employees International Union, Local* 333 *v. Bethany Pioneer Village Inc. (c.o.b. Birch Manor)*, [2007] Sask. L.R.B.R. No. 25, LRB File No. 036-06 as an articulation of this Board's long standing policy of utilizing the date of application for purposes of determining majority support on a certification application.

[76] The Union argued that no exceptional circumstances of the nature accepted by this Board in *North West Company and Tora Regina (Tower) o/a Giant Tiger v. United Food and Commercial Workers, Local 1400*, 2008 CanLII 47050, LRB File Nos. 026-04 & 041-08 occurred in the present case to warrant reconsideration. The Union's position was that the changes that occurred at the workplace did not meet the threshold established by this Board in granting reconsideration.

[77] The Board acknowledges that the original panel's delay in rendering its decision was unfortunately but not as excessive as suggested by the Employer. In this regard, the Board notes that the judicial review proceedings came to a conclusion on April 19, 2007 and the original panel' released its decision on December 4, 2008; amounting to approximately a nineteen (19) month delay. Nonetheless, this Board has stated that the timely resolution of outstanding proceedings before the Board is an important component in maintaining amicable labour relations in the province. See: *Dishaw v. Canadian Office & Professional Employees Union, Local 397*, 2009 CanLII 507 (SK L.R.B.), LRB File No. 164-08. On the other hand, the Board notes that the original panel was not operating under the time limit now prescribed in s. 21.1 of the *Act*. Furthermore, the Saskatchewan Court of Appeal has held that delay alone is not a basis for reconsideration nor does it offend the principle of natural justice or procedural fairness giving rise to the remedy sought by the Employer in the present case. See: *Tora Regina*

(Tower) Ltd. (c.o.b. Giant Tiger, Regina) v. Saskatchewan (Labour Relations Board), [2008] S.J. No. 198 (C.A.).

[78] Furthermore, it is not an "unintended effect" (or even an unusual occurrence) for certification orders to apply to employees who have been hired during the intervening period between the filing of an application for certification with the Board and the granting of a certification Order; employees who, because of the timing of their employment, had no opportunity to express (or withhold) their support such certification. See: *U.S.A. Local 5917 v. Doepker Industries Ltd.,* [2000] Sask. L.R.B.R. 258, LRB File No. 016-00.

[79] In *Giant Tiger, supra*, the Board found that, during the forty-one (41) months that it took the panel in that case to render its decision, there had been a significant turnover of employees (not dissimilar to that in the present case). However, the Board also found that the Employer had undergone a corporate restructuring and had, under this new corporate structure, opened a new store within the geographic limits of the certification Order granted by the previous panel in that case. In that case, the Board concluded as follows:

> *[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.*

[80] While the original panel's delay in rendering its decision was unfortunate, the evidence of employee turnover presented by the Employer was not unusual for the retail sector. The Board is unable to find any exceptional circumstances that would justify reconsideration of the decision of the original panel or the granting of the remedy sought by the Employer on this ground.

The Original Panel was not Properly Constituted

[81] The Employer's fourth and final ground in bringing its application for reconsideration was that the original panel was not properly constituted at the time it rendered its decision. The Employer argued that the composition of the original panel was not valid at the

time it rendered it decision because former Chairperson Seibel's appointment to the Board had been terminated by Order of the Lieutenant Governor in Council prior to the original panel rendering its decision. The Employer took the position that, because the former Chairperson's appointment was "terminated" or "cancelled" and did not "expire" in the ordinary course, his decision-making authority pursuant to the *Act* was not continued by s. 4(1.2) of the *Act*. As such, the Employer argued that the original panel was not properly constituted at the time it rendered it decision. In the alternative, the Employer argued that the early dismissal of the former Chairperson gave rise to a reasonable apprehension of bias.

[82] Council on behalf of the Employer indicated that, while the Employer was not prepared to abandon this ground, it did not wish to press either of these arguments before the Board.

[83] The Union's position was that the status of the original panel (specifically, the status of the former Chairperson Seibel) is out of this Board's hands. In this respect, we concur with the position stated by the Union.

[84] The Board is not prepared to inquire into nor comment on the constitution of the original panel other than to state the presumption that the original panel was properly constituted and authorized to act in accordance with the authority granted pursuant to the *Act* and that this presumption arose *ipso facto* upon the original panel accepting jurisdiction and rendering a decision.

Conclusion:

[85] In our opinion, the Employer has not adduced sufficient grounds to persuade us to exercise our discretion to embark upon reconsideration of the original panel's decision in the within proceeding. For the reasons stated herein, the Employer's application for reconsideration must be dismissed.

DATED at Regina, Saskatchewan, this **26th** day of **March, 2009.**

LABOUR RELATIONS BOARD

Steven Schiefner,
Vice-Chairperson

[86] **Dissent of Mike Wainwright, Board Member:** I have read the Reasons for Decision of my colleagues. I dissent from those Reasons on the basis that, in my opinion, the Employer has adduced sufficient grounds to persuade this Board to exercise its discretion (which I agree ought not to be used lightly) to reconsider the decision of the original panel in this case. My reasons for dissent rest on the following conclusions:

A. **Change in the Act in May 14, 2008** – *The Trade Union Act, supra,* at the time of the original application, contained the following words in s. 6, "*the Board may, in its discretion, subject to subsection (2), direct a vote be taken by secret ballot.*" Since the Board had the discretion to direct a vote, the concept of "automatic certification" cannot be upheld. There may have been an expectation of automatic certification; however, the language in the *Act* at the time clearly indicated that the procedure could also involve a vote, thus nullifying the substantive nature of the change in May, 2008.

   In my opinion, the change to s. 6 provided for in *The Trade Union Amendment Act, 2008* was procedural and, effective May 14, 2008, directing a vote was no longer discretionary, but rather mandatory. The *Campbell River Fibre Ltd.* case before the BC Labour Relations Board, while not binding on this Board, is directly on point (automatic certification versus mandatory representation vote) and concluded that the changes in the legislation were procedural and not substantive. The changes to the *Act* were made some seven (7) months before the Board issued its Order and the Board erred in not issuing an Order for a representation vote according to the revised statute.

B. **Procedure** – the procedure for a vote is determined when the Board issues its decision and makes its Order. By the time the Board issued its Order, the *Act* had changed and therefore the Board should have ordered a secret ballot vote, according to the then current provisions of the *Act*. While the significant delay in issuing the Order makes it extremely difficult to determine which employees should be entitled to vote, nevertheless,

the Board should have ordered a vote pursuant to the provisions of Article 6(1) of the amended *Act*.

C. **Undue delay on the part of the Board** - Neither the Employer nor the Union are innocent in this application, when it comes to the matter of delay. Both the Employer and the Union must take some level of responsibility for the legal delays that each may have caused. However, the most unreasonable delay was on the part of the Board - from the time of the last hearing date until issuing the Order (36 months). Therefore the reconsideration application should succeed. A time lapse of three (3) years to issue an Order (when taking into account that there were no further applications, delays, stays, etc. pertaining to this file before the Board in that time period) is simply unacceptable. At some point in time, the threshold for a decision has to time out – and in this case that threshold certainly has to have been exceeded.

The Board itself, by its unacceptable inaction has added to the climate of mistrust and confusion on a matter that is now almost five (5) years old, adding to the focus on Employer versus the Union, rather than focusing on the wishes of the employees. The employee mix has changed (as is customary in the retail business) and the employees who were on staff at the time of the original application constitute a minority of today's employee population. This Board must make a determination about what constitutes the democratic wishes of the employees in this particular certification application, in light of the changes to the *Act* and in light of the unacceptable time it took the Board itself to issue the Order.

D. **The secret ballot vote:** One of the issues facing the Board, if the matter is reconsidered, is who gets to vote if there is a secret ballot vote? If I were part of the panel to order a secret ballot vote, my recommendation is that such a vote be taken of those employees who were on payroll at the date of the Order being issued (December 4, 2008) and the date of the vote.

> I believe that s. 3 of the *Act* fundamentally refers to the rights of employees who are affected by any application or decision before the Labour Relations Board. There cannot be a period of excessive undue delay by the Board in issuing an Order. As each day and month passed during the three (3) year period from the time of the last hearing until the Order was issued, the employees who are affected by any Order had changed significantly – and continue to change today.

[87] In my opinion, the application for reconsideration should be granted and a representative vote ordered by the Board pursuant to s. 6 of the *Act*. In order to capture the wishes of the employees, an order for vote should be issued as quickly as possible so that the employees can express their wishes. If the matter is then further delayed by either of the parties, the ballot box may remain sealed until such time as all matters are resolved.

DATED at Regina, Saskatchewan, this **26th** day of **March, 2009.**

____
Mike Wainwright, Board Member