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

**CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4802, Applicant v. BOARD OF EDUCATION OF THE SUN WEST SCHOOL DIVISION No. 207, Respondent**

- and -

**OUTLOOK DIVISION SUPPORT STAFF ASSOCIATION, Applicant v. BOARD OF EDUCATION OF THE SUN WEST SCHOOL DIVISION No. 207 (formerly Outlook School Division, No. 32), Respondent, and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4802, Interested Party**

LRB File No. 113-06 & 061-07; February 24, 2009
Chairperson, Kenneth G. Love Q.C.; Members: Hugh Wagner and Marshall Hamilton

For the Applicant: Crystal Norbeck
For the Respondent: James McLellan

**Interim Order – Jurisdiction – Application for Stay of Direction for Vote pending judicial review of Board Decision – Board finds that it has no jurisdiction to grant relief sought in the absence of an underlying application to the Board for final relief.**

**In the alternative, the Board determines that it is unable to determine if a case for judicial review exists. Furthermore, the Board finds that the balance of labour relations harm does not support the requested relief.**

***The Trade Union Act*, ss. 5.3, and 42**

## REASONS FOR DECISION: APPLICATION FOR INTERIM RELIEF

**Background:**

**[1]** Effective January 1, 2006, the provincial government made a general restructuring of boards of education and their school divisions, pursuant to *The Education Act, 1995*. The restructuring was compulsory for the public school system and voluntary for the separate school system. The restructuring amalgamated 68 of 81 school divisions into 15 larger school divisions.

**[2]** Two applications were filed with the Board. One by Canadian Union of Public Employees, Local 4802, (the "Union"), LRB File No. 113-06, being an application

filed July 13, 2006, pursuant to s. 37 of the *Act,* requesting an order that it be designated as the bargaining agent for an "all employee" unit of the Sun West School Division, and the other being an application for certification filed on June 14, 2007 by the Outlook Division Support Staff Association, LRB File No. 061-07, to create a bargaining unit described as follows:

> *All Education Assistants, Librarians, Secretaries, Caretakers, Bus Drivers, mechanics Assistant Caretakers, Technical Support excluding Teachers in the former Outlook & Estin/Elrose School Divisions.*

**[3]** By its Reasons for Decision dated November 28, 2008, the Board determined that the unit applied for, with some minor variation, was an all employee unit and certified the following unit of employees:

> *All employees of the Employer, except the director of education, executive assistant to the director of education, superintendents of education, business and human resources, supervisor of business, supervisor of technology, supervisor of facilities, supervisor of transportation, and teachers employed and working as such.*

**[4]** The Board also ordered a representation vote to be held among all of the employees of the proposed bargaining unit.

**[5]** The Board, in concert with the parties, has been working to arrange for the conduct of the vote as ordered. However, the Board of Education of the Sun West School Division, No. 207 (the "Employer"), sought to have the Board's decision in this case reviewed by the Court of Queen's Bench. No application has been made to the Board to reconsider its decision and, at present, apart from some outstanding issues concerning the scope of the bargaining unit, there is no application pending before the Board related to the original successorship application or in respect of the conduct of the vote.

**[6]** On February 17, 2009, the Employer filed an application pursuant to s. 5.3 of the *Act* for interim relief, seeking, *inter alia*, the granting of a stay of the Board's

order dated November 28, 2008 directing a representation vote, pending the Employer's application for Judicial Review of the Decision.

**[7]** On February 17, 2009, the Employer also filed a Notice of Motion pursuant to Part 52 of the Rules of *The Court of Queen's Bench* seeking a judicial review the Board's Order dated November 28, 2008 directing that the Board erred as follows:

> 1. *in the interpretation of the Act and its application of the successorship provision of the Act;*
>
> 2. *by misconstruing and mischaracterizing the successorship provisions of the Act;*
>
> 3. *by misconstruing and /or mischaracterizing the evidence of the Employer;*
>
> 4. *by directing an employer wide representation vote, including employees who are already unionized, instead of a smaller vote amongst only those employees who are not already represented by the Union;*

**[8]** The parties advised that the judicial review application for a stay of the vote, which was originally scheduled to be heard on February 24, 2009 (the day after this interim application), is adjourned by consent of the parties to March 12, 2009. The representation vote is scheduled to be conducted by the Board during the week of March 9, 2009.

**Arguments:**

**[9]** James McLellan, counsel on behalf of the Employer, argued that the application for judicial review mirrored one made by the Union arising out of another decision of the Board in *Canadian Union of Public Employees, Local 5506 v. Prairie South School Division No. 210*, 2008 CanLII 47033 (SK L.R.B.). He further argued that the decision in this case should have been the same as the decision in *Prairie South*,

*supra,* and that any vote ordered should have been among those employees who were previously unrepresented by a union rather than the whole group of employees.

**[10]** Mr. McLellan also stated that a vote would be disruptive to the workplace as there are approximately 30 locations for which the vote would have to be conducted. He further provided that the vote would distract employees from the true dispute. The Employer argued that a short delay in the vote until the application for judicial review had been argued and decided would cause no labour relations harm to the Union and would preserve the status quo. He also argued that it would not be a prudent use of public funds to conduct the vote where the result may prove inconclusive if the application for judicial review succeeded.

**[11]** Crystal Norbeck, counsel on behalf of the Union, raised two arguments. Firstly, the Union argued that the Board did not have jurisdiction to deal with the application under s. 5.3 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), because the Board's authority to issue interim orders was predicated upon there being an underlying application to the Board. Ms. Norbeck argued that the proper application would be under Rule 668(2) of the *Queen's Bench Rules of Court* which expressly contemplated a situation such as this.

**[12]** In the alternative, Ms. Norbeck provided that the present case did not meet the criteria established by the Board for the granting of interim relief, that is there was an arguable case and that the balance of labour relations harm favoured the issuance of the requested relief. The Union referred to the Board's seminal decisions concerning interim relief, arguing that, as in her argument concerning jurisdiction, the Board must find that there is an arguable case in the main case in respect of which the interim relief is requested and that there be a finding that the balance of labour relations harm favours the granting of the requested relief.

**Statutory Provisions:**

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

> *5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after*

> *giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*
>
> *. . .*
>
> *42 The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

**Analysis and Decision:**

**[14]** The Board, for the reasons which follow, agrees with the arguments of the Union that it has no jurisdiction to grant the requested relief. In order to do so, there must be some underlying application before the Board, which will be the foundation for its interim order. In addition, in order for the Board to examine the criteria for interim relief, as argued by the Union, it must do so based on the facts alleged in the application made which is the underlying application to the application for interim relief.

**[15]** Interim relief cannot be granted in a vacuum, that is that the Board does not have original jurisdiction to grant a stay of its orders absent a review of that order, or the underlying basis for that order, or absent another application to the Board which clothes the Board with jurisdiction under s. 5.3 of the *Act*.

**[16]** Section 5.3 contemplates that the Board may "make an interim order pending the making of a final order or decision." In the Board's view, this means that there must be an underlying application for a "final order or decision" which is the basis upon which the application for and the making of an interim order is founded. There is no original jurisdiction in s. 5.3 to make an interim order outside of those parameters. Nor is there jurisdiction in the situation contemplated here, to make an interim order in support of an application to the Court of Queen's Bench for judicial review.

**[17]** The Rules of Court in Rule 668(2) provide that where an application is made for judicial review, that the Court may grant a stay of the proceedings in respect of which judicial review is sought. The rule provides as follows:

> *An application for judicial review shall not constitute a stay of the proceedings to which the application relates, but the court may grant a stay of such proceedings on application made for such purpose.*

**[18]** Therefore, in the Board's opinion, the proper jurisdiction for this application is the Court of Queen's Bench under Rule 668(2). The Court may, if satisfied that such relief or stay is desirable in the circumstances of this case, grant the relief sought.

**[19]** Alternatively, even if we assume that the Board has the jurisdiction to make the requested order, we are of the view that the application fails based on the Board's usual tests for the provision of interim relief.

**[20]** The test to be met on applications for interim relief has been well established by the Board. (See: *Grain Services Union (ILWU – Canada) v. StarTek Canada Services Ltd.*, [2004] Sask. L.R.B.R. 128, LRB File Nos. 115-04, 116-04 & 117-04, at 135 through 139 and *Hotel Employees and Restaurant Employees Union Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn),* [1999] Sask. L.R.B.R. 109, LRB File No. 131-99.

**[21]** In applying the first part of the test for interim relief, that is, whether the main application reflects and arguable case under the *Act*. As noted above, there is no main case on which this application is predicated, only an application for judicial review pending before the Court of Queen's Bench. The Board cannot take upon itself the task of determining how a judge of the Court of Queen's Bench may view the application for judicial review. That is within the exclusive jurisdiction of the Court. There is no ability of the Board to determine if there is an "arguable case under the *Act*" as there is no application pending before it under the *Act*.

**[22]** In all of the Board's previous decision concerning interim relief, including the seminal decision by the Ontario Labour Relations Board in *Loeb Highland*, [1993] OLRB Rep. March 197, there must be a main application upon which the interim relief application is grounded and in respect of which the interim relief is sought. The Board

then must determine, based usually on affidavit evidence, whether there is an arguable case in that main application that justifies the Board making an interim order.

**[23]** In applying the second part of the test for interim relief, that is, the balance of labour relations harm, the Board is not persuaded that the requested relief, would be appropriate in the current situation. The Employer noted some inconvenience that may arise and some confusion, but no specific harm such as would, in the Board's opinion, justify it providing the requested stay. This is especially true when the Rules of Court specifically provide in Rule 668(2) that the Employer may make an application to have the Board's decision to conduct a vote stayed by the Court as a part of its application.

**[24]** The application for interim relief is therefore dismissed.

**DATED** at Regina, Saskatchewan, this **24th** day of **February, 2009**.

**LABOUR RELATIONS BOARD**

Kenneth G. Love, Q.C.
Chairperson