The Labour Relations Board
Saskatchewan

COMMUNICATION, ENERGY AND PAPERWORKERS UNION OF CANADA, Applicant v. J.V.D. MILL SERVICES, Respondent

LRB File No. 030-11; July 22, 2011

Chairperson, Kenneth G. Love, Q.C.; Members: John McCormick and Ken Ahl

For the Applicants:

Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers, the United Brotherhood of Carpenters and Joiners of America, Local 1985, and the United Brotherhood of Carpenters and Joiners of America (Millwrights Union, Local 1021) and Local 01 Saskatchewan of the International Union of Bricklayers & Allied Craftworkers and its parent organization the International Union of Bricklayers & Allied Craftworkers (BAC)	Drew Plaxton

For the Respondents:

Communication, Energy And Paperworkers Union of Canada:	Bruce Laughton, Q.C.
J.V.D. Mill Services Inc.:	Kevin Wilson, Q.C.

Reconsideration – Board reviews criteria on which Board will reconsider previous decision – Board reviews in detail grounds for request for reconsideration advanced by Applicants.

Practice and Procedure – Board examines standing of Applicants to bring application for reconsideration – Board reviews and determines if Applicants are directly affected by the Board's determination in decision which is subject of review.

Practice and Procedure – Board reviews timeliness of Application – Board determines that Applicants mistaken in their belief that they could/should not have made an earlier application, but does not dismiss application based on timeliness.

DECISION

Background:

[1] **Kenneth G. Love, Q.C. Chairperson:** The Communications, Energy and Paperworkers Union of Canada ("CEP") were certified by the Board on January 24, 2011,[1] as the bargaining agent for "all employees of J.V.D. Mill Services Inc. in Saskatchewan except office, sales managers and supervisors."

[2] Prior to the Board's determination of the certification issue, the Applicants in this case applied for intervenor status. The Board granted status only to the Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers, the United Brotherhood of Carpenters and Joiners of America, Local 1985, and the United Brotherhood of Carpenters and Joiners of America, Millwrights Union Local 1021 (collectively referred to as the "Carpenters") and to Local 01 Saskatchewan of the International Union of Bricklayers & Allied Craftworkers (the "Bricklayers"). Intervenor status was not granted to the International Union of Bricklayers & Allied Craftworkers (BAC) (the "Bricklayers International"). The international chartering organization for Local 01 of the Bricklayers in this case applied for and were granted intervenor status as Public Law Intervenors. The participation of the intervenors in the certification hearing was limited to presentation of argument. They were not permitted to cross-examine witnesses, nor call evidence with respect to the proceedings. The Board granted this intervenor status by an oral decision on August 10, 2010, which oral decision was supplemented with written reasons on September 27, 2010.[2]

[3] The Applicants applied on February 11, 2011 for a reconsideration of both of the Board's decisions in this matter. Specifically, that application provided as follows:

> 1. *The applicants seek reconsideration of the following:*
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> *a. The Board's orders concerning intervention limiting the participation of the intervenors to the presentation of argument and denying further participation.*
> *b. The Board's order or orders allowing the applicant, Communications, Energy and Paperworkers Union of Canada (hereinafter CEP) to reopen its case after it had been closed and allowing the employer to split its case where there was neither good nor sufficient reason for same.*
> *c. The Board's determinations that:*

[1] LRB File No. 087-10, [2011] CanLII 2589 (SK LRB)
[2] LRB File No. 087-10, Decision dated September 27, 2010.

i. The unit applied for was an "all employee unit" when the same was not an all employee unit but was an under-inclusive unit.
ii. The unit applied for by the applicant, CEP, was an appropriate bargaining unit.
iii. The bargaining unit would include all trades employed or to be employed by the employer whether present at the work place at the time of application or not.
iv. The appropriate bargaining unit to would not be either site specific, municipal or a project unit.
v. A provincial bargaining unit was appropriate.

[4] The Applicants grounds for making its application were as follows:

2. The applicant seeks reconsideration on the following grounds:

a. At the hearing of the matter, crucial evidence concerning the appropriateness of collective bargaining units in the construction industry was not adduced as the intervenors were prevented from calling any evidence or otherwise meaningfully participating in the proceeding. The evidence that was adduced was not subject to any meaningful cross-examination nor was it otherwise tested.

b. The decisions of the majority of the Board turned on conclusions of law and general policy under The Trade Union Act and The Construction Industry Labour Relations Act which were not properly interpreted by the panel.

c. The decisions of the majority of the Board were tainted by a breach of natural justice.

d. The original decisions are precedential and amount to a significant policy adjudication which the Board may wish to refine, expand upon, or otherwise change.

[5] In its reply to the Application, CEP challenged the standing of the applicants to bring this application and took issue with the Applicant's allegations that the Board should reconsider its decisions. A similar reply was filed by the Employer who also took issue with the timeliness of the application. CEP and the Employer replied in their submission that the grounds put forward by the Applicants were not sufficient to support a reconsideration of the Board's decision.

[6] The parties were in agreement that the Board's decision in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et al*[3] established the Board's criteria which, if satisfied, the Board

[3][1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93.

may grant leave to apply for reconsideration of a decision. This case established that the process for review was a two stage process involving an initial hearing in which the applicant needed to satisfy the Board that its decision should be reconsidered. If satisfied that one or more of the criteria set out in *Remai* had been met, then the Board would grant leave to the applicant to bring forward its case for reconsideration of the decision. The criteria for which leave would be considered, as set out at p. 6 of the *Remai* decision are as follows:

> 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
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> 2. if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or
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> 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
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> 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
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> 5. if the original decision is tainted by a breach of natural justice; or
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> 6. if the original decision is precedential in nature and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.

[7] The Applicants clarified the grounds on which they sought leave to have the two decisions overturned during argument, which are as follows:

> In respect of the Board's decision regarding Intervenor status, Criteria 4 & 6.
>
> In respect of the Board's certification decision, Criteria 2, 4, 5, & 6.

Arguments of the Parties:

[8] The Applicants filed cases in support of their application which we have reviewed and for which we are appreciative.

[9] In their argument, the Applicants argued that they had been denied the ability to call crucial evidence with respect to the certification application as a result of the limitations placed upon their intervenor status by the Board in its earlier decision. This limitation, they argued, placed them in a position whereby, in their submission, the Board did not have all the appropriate evidence to form its decision of the scope of the appropriate unit of employees which is the Board's primary function. This limitation on their participation, it argued, because the Board did not have the evidence the Applicants would have produced at the hearing lead to the Board's failure to complete the polycentric analysis suggested by the Supreme Court of Canada in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92.*[4] In that decision, at paragraph 28, Major J. says:

> *The LRC seeks to regulate and resolve labour disputes in the most efficacious and least disruptive way. Generally, the resolution of labour relations disputes by the Labour Relations Board requires "polycentric" decision making which means it involves a number of competing interests and considerations, and calls for solutions that balance benefits and costs among various constituencies: see Pushpanathan, at para. 36. By contrast, proceedings before an arbitrator do not require the consideration of broad policy issues. Instead, the role of the arbitrator is to resolve a two-party dispute. In this appeal, that dispute related to the employer's obligation to hire dispatched workers. Even so, this factor suggests a deferential standard of review.*

[10] The Applicants argued that without full standing, and the right for them to bring forward evidence and cross-examine witnesses, the Board could not complete such a polycentric analysis. The Applicants argued that they had evidence which they could have brought forward that would have assisted the Board in completing that analysis.

[11] The Applicants argued that the Board's decision in *Regina Police Association v. Regina Board of Police Commissioners and City of Regina*[5] sets out that intervenor status should be considered on the basis of "fairness", and the Applicants argued that the Board should

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[4] [2004] 1 S.C.R. 609, [2004] S.C.J. No. 2, 2004 SCC 23.
[5] [1994] 1st Quarter Sask. Labour Rep. 86, LRB File Nos. 159-93 & 160-93.

base its granting of intervenor status on a case by case basis, rather than attempting to classify it as the Board had done in its ruling respecting the grant of intervenor status in this case.

[12] In respect of the certification application, the Applicants argued that the Board should take the opportunity to revisit and refine the decision. They based this argument on the fact that it is the first decision of the Board under the amended *Construction Industry Labour Relations Act* (the "*CILRA*") and is, therefore, of significant precedential value.

[13] The Applicants also argued that the Board had misinterpreted Section 4(2) of the *CILRA* by making an Order for less than an "all employee" unit by excluding office staff from the appropriate unit. The Applicants argued that the Board was restricted by s. 4(2) to certify an appropriate unit comprised of:

> (i) employees of an employer in more than one trade or craft; or
> (ii) all employees of an employer

which the applicants argued meant that an appropriate unit must include "all employees" of an employer without exception.

[14] Again, relying upon its argument set out above, the Applicants argued that they were estopped from providing relevant evidence to the Board which could have better established the appropriate unit of employees as well as the geographic scope of the unit. The Applicants argued that this situation called for a full hearing with full participation from the Applicants so that the Board could get a correct view of the situation.

[15] The Applicants also argued that they had both standing to bring this application for reconsideration and that their application was timely. On the issue of timeliness, the Applicants argued that they could not, or should not have applied for review of the Board's decision regarding standing as it was a preliminary ruling. It pointed to the Boards and the Court of Queen's Bench's admonitions in that regard in *United Food and Commercial Workers, Local*

No. 1400 and Walmart Canada Corp et. al.[6] and in *Tora Regina (Tower) Ltd. (c.o.b. Giant Tiger, Regina) v. Saskatchewan Labour Relations Board.*[7]

[16] In respect of the standing question, the Applicants argued that the Regulations[8] allowed for the Applicants to apply for status as intervenors. Those Regulations, first promulgated in 1972, precede the statutory amendments which permitted the Board to reconsider its decisions. Since no changes had been made to the Regulations since the Board began to reconsider its decisions then, *ipso facto*, the Applicants argued that they were entitled to status to apply for reconsideration.

[17] Secondly, the Applicants argued that they should have been granted full party status in the intervenor application, and hence should have the right to bring an action for reconsideration. They also argued that since they could have applied for judicial review of the Board's decision, that status should also entitle them to apply for reconsideration.

[18] CEP challenged the Applicants status to bring the applications, and also questioned the timeliness of the application. While having raised these issues in their Reply to the application, CEP adopted the arguments made by the Employer in this respect. In particular, they argued that the Bricklayers International, not having been granted any status to intervene, should not be a party to this application.

[19] CEP argued that when a party is given only public interest standing, it cannot takeover the case and highjack the process. CEP argued that the Board had made no order which impacted any rights of the Applicants. In support it quoted from the Federal Court of Canada's decision in *League for Human Rights of B'Nai Brith Canada v. Canada*[9] wherein the Court stated that, on judicial review in the Federal Court, applicants must demonstrate that they are "directly affected by the matter in respect of which relief is sought."

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[6] [2009] CanLII 11242 (Sask LRB), LRB File No. 038-05 decision dated March 17, 2009 at paras 16-17.
[7] [2008] S.J. No 441, 2008 SKQB 285, [2008] CLLC paras 220-046, 327 Sask. R. 284, 170 A.C.W.S. (3rd) 74 at paras 63-65.
[8] Section 10(1) of *The Regulations and Forms, Labour Relations Board.*
[9] [2008] FC 732 at paras. 24 and 25.

[20] CEP argued that, by analogy, this requirement for "direct interest" in a matter should also be applicable where a party who is not directly affected by a matter before the Board should not be able to apply to have that decision reviewed or reconsidered.

[21] On the merits of the Applications, CEP argued that in making its decision regarding granting of intervenor status, that the Board was exercising its discretion as provided in section 19(3) of the *Act*. They argued that the Board has full control over its hearing process, including to whom it grants standing to appear and participate.

[22] CEP also argued that the Board correctly categorized the interests of the parties. The Applicants were not directly affected by the Board's determinations and did not demonstrate any exceptional status. They argued that the limited status afforded to the Applicants, based upon the Board's wish to have input on the interpretation of the new provisions, was suitable in the circumstances. They argued that the Applicants, in a normal situation, would not have been granted status in the application since it was a fairly routine certification application. However, CEP recognized that the Board wished to allow limited status to the Applicants since this was the first application under the new legislative framework. In providing the Applicants with this limited status, CEP argued that the Board had properly exercised its discretion with respect to the granting of intervenor status.

[23] CEP questioned the suggestion that the Applicants had evidence which would be of assistance to the Board. Any such evidence would have to be extrinsic evidence as to how the new provisions were to be interpreted, something the Board had determined was not necessary in its decision.

[24] CEP argued that the Board was exercising its principle jurisdiction in determining what unit of employees was appropriate for collective bargaining with this employer. In so doing, CEP argued, the Board properly analyzed the amendments to the *CILRA* as noted in its decision commencing at paragraph 114.

[25] CEP noted that the Construction Labour Relations Association, the principle bargaining agent under the *CILRA*, by its lack of interest in these proceedings showed that it had

no concern over the chaos argument made by the Applicants, which was dealt with by the Board in its decision at paragraph 157.

[26] The Employer filed a brief of law with supporting cases which we have reviewed and for which we are appreciative.

[27] On the issue of standing to bring this application, the Employer argued that section 10(1) of the Regulations provides that only persons "directly concerned" may apply to the Board for an amendment to an order or decision of the Board.

[28] The Employer supported the argument of CEP, arguing that the Bricklayers International, in particular, had not been granted any standing and hence should not be an applicant in this case.

[29] The Employer also cited the *B'Nai Brith Canada*[10] case in support of its argument that the Board should look to the interpretation given to the words "directly affected" in the *Federal Courts Act.*[11] In that decision, at paragraph 24, the Court, following the Federal Court of Appeal ruling in *Pall Mall Canada Ltd. v. Minister of National Revenue*[12] found that in order to be directly affected, "the decision at issue must be one which directly affects the party's rights, imposes legal obligations on it, or prejudicially affects it directly."

[30] The Employer argued that since the words "directly affected" and the words "directly concerned" as used in the Regulations were similar that the interpretation put to those words should be applied to the words in the Regulations. It argued that the Applicants do not satisfy the test of being "directly concerned" because the Board's decision and order do not directly affect the rights of the Applicants, do not impose legal obligations on the Applicants, and do not prejudice the Applicants.

[31] The Employer disagreed with the Applicants, arguing that they would have the right to bring this issue forward for judicial review as the test, they argued, for standing to bring an application for judicial review is similar to the test outlined above. In support of its position, the Employer cited a decision of the Alberta Court of Queen's Bench in *Alberta Liquor Store*

[10] *Supra*, note 9.
[11] R.S.C. 1985, c. F-7.

Assn. v. Alberta (Gaming & Liquor Commission).[13] It argued that in matters of review of administrative actions, the test, as established at paragraph 7 of that decision is "whether the applicant is a 'person aggrieved' by the administrative decision."

[32] The Employer argued that the Applicants were neither persons who were "directly concerned", nor "persons aggrieved" by the Boards decision or order. As such, they suffered no prejudice and therefore had no standing to apply for a reconsideration of the Board's decision.

[33] The Employer also argued that the Applications were untimely and should be rejected based upon a lapse of 4 ½ months between the time the Board's decision on the granting of standing was given and the date the application was made by the Applicants. It rejected the Applicants arguments that until the matter was finally determined, that it could not or should not have made an application for reconsideration of the Board's decision on standing granted to the Applicants. It pointed to the Board's decision to reconsider a preliminary ruling made in *United Brotherhood of Carpenters and Joiners of America, Local 1985, et al. v. Graham Construction and Engineering Ltd., et al.* [14]

[34] The Employer argued that to reconsider the decision concerning intervenor status, at this stage of the proceedings, would tend to disrupt the stability sought by the Board in the issuance of its decision and would destabilize labour relations and promote uncertainty in the finality of the Board's decisions. In support of that argument, it cited the Saskatchewan Court of Queen's Bench decision in *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. (c.o.b. Wal-Mart).*[15]

[35] The Employer argued that the Board's decision granting intervenor status to the Applicants was correct insofar as the decision was a reasonable exercise of the Board's discretion. It argued that the Board had authority under the *Act* to allow intervention "upon such terms as it deems just"[16] and that this authority is discretionary.

[36] The Employer argued that the Board had made no error in the exercise of its discretion insofar as its ruling regarding both direct interest and exceptional status. It argued that

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[12] [1976] 2 F.C. 500 (Fed C.A.).
[13] [2006] ABQB 904.
[14] [2002] Sask. L.R.B.R. 295, LRB File No. 227-00; decision dated July 5, 2002.
[15] [2010] SKQB 61 at paras 14 and 15.

the Board could, in its discretion, refuse any form of standing to the Applicants, but noted that the granting of limited status to the Applicants was within the Board's jurisdiction and discretion.

[37] The Employer also argued that the Board had not denied the Applicants a fair hearing contrary to the rules of natural justice as alleged by the Applicants. The Employer argued that the Applicants had had full opportunity to prepare and make submission to the Board in accordance with the standing they had been accorded. Furthermore, the Employer argued that there had been no procedural unfairness or natural justice issues in the hearing of the original application.

[38] The Employer also argued, contrary to the position taken by the Applicants, that the decision regarding granting of intervenor status was not precedential in nature. It argued that the Board did not make any novel determination, but merely clarified and rationalized the Board's previous practice regarding intervenor status. The Employer argued that the ultimate decision was a fact based determination.

[39] With respect to the certification decision, the Employer argues that no crucial evidence concerning the appropriateness of units in the construction industry was missed. The Employer argued that in the Board's normal practice in respect of uncontested certification applications, like the one here, is that evidence is not usually required to be heard. In this case, the Board determined, that since it was the first case heard under the new rules in the *CILRA*, that it wished to hear evidence. The adjournment granted to the parties, who were caught by surprise, was not a breach of natural justice, or a splitting of the case, but rather a recognition by the Board that justice required that the parties have time to prepare their case and to provide witnesses to give testimony to the Board.

[40] The Employer argued that there was no evidence which the Board required from the intervenors, being non-parties to the Application, as the Application was for CEP to represent employees of the Employer and for the Board to determine that if the legislation permitted them to represent employees in the construction industry, what unit of employees was appropriate for CEP to represent.

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[16] S. 19(3).

[41] The Employer argued, contrary to the position taken by the Applicants, that the Board did not err in its determination of the appropriate unit of employees or that the Board misinterpreted the law, or general policy of the Board. The Employer argued that the Board was granted broad discretion with respect to determination of appropriate units for collective bargaining. It relied upon the Saskatchewan Court of Queen's Bench decision in *Saskatchewan Federation of Labour et al. v. Saskatchewan Government et al*.[17] in support of its argument that the Board "has an absolute discretion to determine appropriate bargaining units."

[42] The Employer also argued that there was no breach of natural justice with respect to the certification application. As noted in paragraph 39 above, the Employer argued that the adjournment granted to CEP and the Employer was not a situation of "case splitting", but rather a recognition of the parties being caught by surprise.

[43] The Employer argued that the denial of the Applicants wishes to cross-examine witnesses and present evidence to the Board was not a denial of natural justice, but rather a natural limitation imposed upon the process by the Board in accordance with the proper exercise of its discretion.

[44] The Employer argued that it is not unusual that the evidence presented at the hearing was not challenged to any great extent because the application for certification had been uncontested.

[45] The Employer again argued that this decision was not precedential as suggested by the Applicants. It argued that, at its foundation, the decision was based upon an uncontested certification application which was being determined under newly established legislation. It argued that the decision was in keeping with the law as determined by the Board and in accordance with its general policies regarding determination of appropriate units. The decision, it argued, was merely a continuation of the Board's prior decisions and policy considerations as espoused by the Board in numerous previous decisions. In support of its position, the Employer quoted from numerous prior decisions of the Board.[18]

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[17] [2010] SKQB 390 at paras. 59 and 60.
[18] See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, 2009 CanLII 13640, LRB File No. 069-04*, H.E.R.E., Local 206 v. El Rancho Food & Hospitality Partnership*, [2001] Sask. L.R.B.R. 383, LRB

[46] The Employer also argued that this application was nothing more than an attempt to re-litigate previously settled issues. The Employer argued that the Applicants, not satisfied with the earlier decisions, were now trying to get a second "kick at the can". The Employer argued that a reconsideration "is neither an appeal nor an opportunity to re-argue or re-litigate an unsuccessful application before the Board."[19]

[47] The Employer argued, in response to the Applicant's argument concerning the bargaining unit being under inclusive, that the issue had been dealt with by the Board in its decision at paragraphs 142 – 145.

[48] With respect to the geographic scope of the unit, the Employer argued that the Board's determination with respect to this aspect of the bargaining unit was also based on sound reasoning and principles and should not be reconsidered.

Statutory Provisions:

[49] Relevant provisions of the *Act* and Regulations include the following:

> ***TUA:***
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> *5 The board may make orders:*
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> *(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;*
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> *. . .*
>
> *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.*

File No. 089-00, *H.E.R.E., Local 41 v. Cavalier Enterprises Ltd. (o.a. Sheraton Cavalier*), [2004] Sask. L.R.B.R. 1, LRB File No. 123-02

[19] See *Wal-Mart Canada Corp*, *supra,* note 18

CILRA:

4(2) Nothing in this Act:

(a) precludes a trade union from seeking an order pursuant to clause 5(a), (b) or (c) of The Trade Union Act for an appropriate unit consisting of:

(i) employees of an employer in more than one trade or craft; or
(ii) all employees of an employer; or

(b) limits the right to obtain an order pursuant to clause 5(a), (b) or (c) of The Trade Union Act in the construction industry to those trade unions that are referred to in a determination made by the minister pursuant to section 9.

REGS:

10(1) Any trade union or any person directly concerned may apply to the board for an order amending any order or decision of the board.

(2) An application made pursuant to subsection (1) shall be in Form 6 and verified by statutory declaration.

(3) Any trade union or person directly concerned by an order or decision of the board made pursuant to clause 5(a), (b) or (c) of the Act may apply to the board for an order rescinding that order or decision.

(4) An application made pursuant to subsection (3) shall be in Form 6.1 and shall be verified by statutory declaration.

. . .

17(1) When an application for certification is made, any trade union claiming to represent any of the employees in the unit of employees in respect of which the application is made, may intervene by giving notice in writing to the board within 12 days after the date on which the application was received in the office of the board or within 10 days after the date on which a copy of the application was forwarded to such trade union by the secretary of the board, whichever is the later.

(2) The notice of intervention shall be in Form 10 and shall be verified by statutory declaration.

(3) The notice of intervention may contain a counter-application for certification.

(4) The intervening trade union shall comply with regulation 5(3).

Analysis and Decision:

[50] As noted above, all parties were in agreement that the criteria on which the Board will reconsider a previous decision of the Board are as set out in numerous decisions of the Board commencing with the Board's decision in *Remai Investment Corporation*[20].

[51] With respect to its application for reconsideration of the Board's decision regarding intervenor status, the Applicants relied upon criteria Nos. 4 & 6. In respect of the certification decision, the Applicants relied upon criteria Nos. 2, 4, 5 & 6.

Standing of the Applicants:

[52] The Board's power to reopen its decisions and to reconsider them is founded in Sections 5(i) & (j) of the *Act* and Section 10 of the Regulations to the *Act.* Section 5(i) provides the general power to reopen decisions made under subsections (d), (e), (f), (g) or (h) of Section 5 of the *Act*, while Sections 5(j)(ii) permits the Board to review decisions, like this decision under subsections (a), (b), and (c) of Section 5 of the *Act*. This power, as noted in numerous decisions of the Board, is to be exercised sparingly.[21]

[53] Section 10 of the Regulations provides the general authority for applications to the Board requesting an amendment of an order as contemplated in Section 5(i) of the *Act*. Section 42 of the *Act* also provides the Board with ancillary and incidental powers associated with the exercise of its powers and the performance of its duties under the *Act*. Section 17 of the Regulations allows for applications to be made by persons to intervene in an application which has been filed with the Board.

[54] Section 10 of the Regulations are clear. In order to make an application to the Board, a trade union, or any person must be "directly concerned" with respect to the order which the application seeks to amend. This means that the person or trade union seeking to amend an order must have a direct connection to that order such that the Order which they seek to amend directly affects their rights, imposes legal obligations on the Applicants, or, in some manner directly prejudices the Applicants.

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[20] *Supra* note 3.
[21] For the genesis of this statement, see p. 5 of the *Remai* decision *supra* note 3.

[55] In the *B'Nai Brith Canada*[22] case, in consideration of the term "directly affected", which we agree is analogous to the words used in Section 10 of the Regulations, the Federal Court says at paragraphs 24 - 25:

> *The jurisprudence establishes that, for a party to be considered to be "directly affected", the decision at issue must be one which directly affects the party's rights, imposes legal obligations on it, or prejudicially affects it directly.*
>
> *In Findlay v. Canada (Minister of Finance0 [1986] 2 S.C.R. 607 (S.C.C.), an appeal from the Federal Court of Appeal, the Supreme Court of Canada quoted with approval at page 623, the following passage from Australian Conservation Foundation Inc. v. Australia (1980) 28 A.L.R. 257 (Australia H.C.), when considering the existence of direct standing:*
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> > *A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.*

[56] In order to be "directly concerned", a party must be directly affected by the order or decision which they wish to have the Board amend or vary. The test as adopted by the Supreme Court of Canada from Australia coupled with the Federal Court's interpretation in *B'nai Brith* are instructive to the Board as to its interpretation of Section 10 of the Regulations.

[57] Also instructive is the Alberta Court of Queen's Bench decision in *Alberta Liquor Store Assn.*[23] At paragraph 7 of that decision, the Courts says:

> *Not every citizen is entitled, as of right, to challenge administrative action. Judicial review of administrative action is reserved for that class of citizen that is found to have a sufficient legally recognized interest in the matter to justify the judicial review application. It is said that the test for standing is* ***whether the applicant is a "person aggrieved" by the administrative decision****. If the applicant cannot establish that it is aggrieved, the applicant may still be able to convince the court that it should be entitled to challenge the administrative action in the public interest. The granting of public interest standing to an applicant is within the discretion of the Court.* ***[Emphasis added]***

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[22] *Supra* note 9.
[23] *Supra* note 13.

[58] Viewed through these lenses, it is clear that the Applicants[24] have demonstrated that they are directly concerned with respect to the Board's order granting them intervenor status, but lack a sufficient direct interest in the Board's order in respect of the certification.

[59] The Board's Order and decision concerning their intervenor status clearly impacts their rights, by imposing limitations upon their participation in the hearing process. The Applicants, if they can establish sufficient grounds on which the Board's Order or decision concerning their intervenor status should be reconsidered, may then have a greater opportunity to participate in the hearing process.

[60] On the other hand, it is also equally clear that the Applicants are not directly concerned with the certification application and its review. The only parties impacted and who may be directly impacted by that decision are CEP, the Employer and the employees covered by the Order. The Applicants rights are not affected by the certification decision. No legal obligations are imposed upon them by the Order or decision. Nor are they prejudicially affected directly. The Applicants have no greater interest than a member of the general public in the matter, or any of the other craft unions who may have been impacted by the amendments to the *CILRA.*

[61] In *Alberta Liquor Stores Assn.* at paragraph 10, the Court, relying upon the Alberta Court of Appeal decision in *Canadian Union of Public Employees, Local 30 v. Alberta (Public Health Advisory and Appeal Board)*[25] says at paragraph 10:

> *It is in this context (that is, how directly the administrative act will affect the applicant) that the courts have examined whether the applicant has an interest in the legality of the challenged administrative act that is greater than the interest of the public at large. To the extent that the applicant's interest is no different than that of any other citizen, the applicant is unlikely to be "aggrieved".*

[62] However, should the Applicants establish a sufficient case that the decision granting them intervenor status should be reviewed, and, upon review, should the Board determine that the original decision concerning their status should be adjusted in any way, then the Applicants may then have a sufficient interest (based upon their revised status as intervenors in the certification application) to justify status to challenge that decision.

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[25] [1996] 178 A.R. 297 at para. 18.

Timeliness of the Application:

[63] CEP and the Employer also raised an issue concerning the timeliness of, in particular, the application to reconsider the decision granting intervenor status to the Applicants. They say that the application should have been brought prior to the hearing of the certification application, while the Applicants say that the jurisprudence of the Board is that they should await the final decision of the Board as the decision concerning intervenor status was an interim decision.[26]

[64] The Applicants characterized the Board's decision regarding intervenor status as being an interim decision, one which the Board and the Courts have cautioned against early challenge. However, the Board, as pointed out by the Employer, has agreed to reconsider preliminary rulings in the past.

[65] We do not agree with the Applicants that the decision regarding their status as intervenors was in any way preliminary or interim in nature. It was a final determination of their status as parties to the proceedings and impacted on their ability to take part in the certification hearing. It impacted particularly the Bricklayers International who were denied the ability to participate at all in the hearing. Similarly the Board disallowed participation by the Construction Workers Union, Local 151 at the outset of the hearing of the certification application.[27]

[66] The rights of the Applicants to participate in the hearing were determined finally by the Board in its oral decision on August 10, 2010, which oral decision was supplemented by written reasons on September 27, 2010. The Applicants apparently accepted this ruling by the Board and participated, without complaint, in accordance with the Board's decision, in the resumption of the certification hearing on October 27, 2010.

[67] The Applicants could have requested that the Board reconsider its ruling on August 10, 2010 or applied for judicial review during the intervening period between the initial hearing of this matter on August 10, 2010 and the resumption of the hearing on October 27, 2010. However, in fairness to the Applicants, the Board did not provide its supplemental reasons to the parties until September 27, 2010. Nevertheless, the Applicants had a period of 30 days

[26] See paragraphs 15 and 33 above.

between the date reasons were released and the commencement date of the hearing to request either a reconsideration of the decision or a judicial review of the Board's decision. They chose not to make such an application.

[68] The period of delay, if calculated from the date of the original oral decision would be a 6 month delay. If calculated from the date of the Board's reasons being issued, it would be a 4 ½ month delay.

[69] The Board reviewed its jurisprudence with respect to delay in bringing applications forward in *Dishaw v. Canadian Office & Professional Employees Union, Local 397.*[28] In that case, the Board quoted with approval the following passage from the Ontario Labour Relations Board in *Evenlyn Brody v. East York Health Unit*, [1997] O.L.R.D No. 157, wherein the Ontario Board's opinion was as follows, at 19:

> *In determining whether the delay in a particular case is unreasonable or excessive, the Board will consider, among other things, such matters as the length of the delay, and the reasons for it, the time at which the applicant became aware of the alleged statutory violation, whether the remedy claimed would have a disruptive impact upon a pattern of relations developed since the alleged contravention, and whether the claim is such that fading recollection, unavailability of witnesses, and the deterioration of evidence would hamper a fair hearing in the dispute.* ***It is generally accepted that the scale of delay that the Board would find acceptable is to be measured in months rather than years*** *(see City of Mississauga, [1982] OLRB Rep. March 420). However, there is no specified limit with respect to delay, and the Board will consider the circumstances in each case to determine whether the delay is undue. [****Emphasis added****]*

[70] In the circumstances of this case, we do not consider that the delay was excessive or unreasonable. While in some circumstances, a 4 ½ or 6 month delay would be excessive (such as an unfair labour practice application under Section 12.1 of the *Act*), the explanation offered by the Applicants is sufficient to permit the Board to accept the application as timely. While we believe that the Applicants were mistaken in their belief that they could/should not have applied earlier, that mistaken belief should not result in their application being dismissed as being untimely.

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[27] See paragraph 5 of that decision, *Supra* note 1.
[28] 2009 CanLII 507 (SK LRB), LRB File No. 164-08.

Should the Board Reconsider its Decision on Intervenor Status?

[71] In *Bethany Pioneer Village Inc. (c.o.b. Birch Manor) (Re)*, the Board says at paragraph 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.*

[72] As noted above, the Applicants relied upon grounds 4 and 6 from the *Remai*[29] decision as justification for its application. For ease of reference, those grounds are:

> *4. if the original decision turned on a conclusion of law or [sic] general policy under the Code which law or policy was not properly interpreted by the original panel; or*
>
> . . .
>
> *6. if the original decision is precedential in nature and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[73] In *Remai*[30] at page 6, the Board discussed the 4th and 6th criteria. It says:

> *The fourth and sixth criteria reflect the concern of the Council with an issue which is of less significance in smaller jurisdictions such as ours, the issue of consistency and coherent development with respect to the articulation of public policy. Where there are numerous panels struck to determine similar cases, the concern for maintaining a uniform approach on matters of principle understandably becomes acute….*

Precedential Decision

[74] The Applicants argued that the Board took a novel and incorrect approach in its classification of the various forms of intervenor status before the Board. They argued that the decision was, because of its novelty, a precedential decision, one which the Board may wish to revisit and refine, expand upon or otherwise change. With respect, we cannot agree.

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[29] *Supra* note 3.
[30] *Supra* note 3.

[75] The Board's approach to the determination of intervenor status was fact based. The Board merely clarified its previous jurisprudence into those classes of intervenor as described by Shelia M. Tucker and Elin R.S. Sigurdson in *Interventions in British Columbia: Direct Interest, Public Law and 'Exceptional Intervenors'*.[31] The classifications suggested by the authors allowed the Board to organized its previous decisions in a logical and rational fashion. In addition, as developed in the Courts throughout Canada and in Saskatchewan, a somewhat new to the Board, classification of Public Law Intervenor was recognized by the Board.

[76] In its decision at paragraph 11, the Board outlines the three distinct classes of intervenor previously recognized by the Board. It says:

> *Intervenor status, whether granted by the Board or by a court, enables someone who is effectively a stranger to the application or litigation, to participate in the proceedings. Practice before the Board has generally recognized three distinct categories [sic] of persons interested and participating in proceedings. These are (a) persons added as parties to the application (b) parties with a direct interest in the proceedings, and (c) public law intervenors. In decisions of the Board, such parties have been variously referenced as "interested parties" or as "intervenors". The distinction between these two types of status has become blurred in their application. By this decision, the Board will attempt to clarify and rationalize both the distinction and its nomenclature.*

What was done in that instance by the Board was not precedential, but was merely, as the Board said, an attempt to clarify and rationalize the prior practices of the Board.

Improper Interpretation of Law or Policy

[77] Nor can it be said that the decision was premised on a conclusion of law or general policy under the *Act* which law or policy was not properly interpreted by the original panel. At the root of the decision was the exercise of the Board's discretion with respect to allowing or not allowing the Applicants to participate in the hearing. The exercise of that discretion was not improperly done by the Board and was determined based upon the facts of the particular case. From that analysis it was clear that the Applicants should not have been granted any status in the matter, but were accorded public law intervenor status based upon the unique situation where this case was the first to be heard under the amendments to the *CILRA* and, as stated at paragraph 30 of the decision:

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[31] Canadian Journal of Administrative Law and Practice, Vol. 23, No. 2, June 2010.

> *…However, as pointed out in the application by the Bricklayers, this is the first application for certification received by the Board since the proclamation of amendments to the CILRA on July 1, 2010. As such, the Board believes that granting public interest intervenor status in this case is appropriate.*

[78] The Board, then in the context of the exercise of its discretion, and in accordance with the rules set out by the Saskatchewan Court of Appeal in *R. v. Latimer*[32] to grant the Applicants intervenor status, but restricting their participation to presentation of argument since this is where the Board saw that the Applicants could provide valuable insight into the interpretation of the amendments to the *CILRA.*

[79] For the above reasons, the Board is of the opinion that the Applicants have not raised sufficient grounds to justify the Board reconsidering its decision regarding the granting of intervenor status, or in the case of the Bricklayers International, the denial of intervenor status. The application to reconsider that decision is denied.

Should the Board Reconsider its Decision to certify CEP to represent the employees of the Employer?

[80] As noted in paragraphs 59 and 61 above, the Applicants, absent a determination by the Board to reconsider and then modify the intervenor rights granted to the Applicants, would have no standing to attack the Board's decision with respect to the certification by the Board of CEP to represent employees of the Employer. Since those conditions have failed, the application for reconsideration of this decision is also denied.

[81] However, even if the Applicants had standing to challenge this decision, the application would have been denied. In its application, the Applicants relied upon grounds 2, 4, 5 & 6. Again, for ease of reference, those grounds are as follows:

> *2. If a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or*
>
> *. . .*
>
> *4. if the original decision turned on a conclusion of law or [sic] general policy under the Code which law or policy was not properly interpreted by the original panel; or*

[32] [1995] CanLII 3921, 128 Sask. R. 195 at 196-97.

> *5. if the original decision is tainted by a breach of natural justice; or*
>
> *6. if the original decision is precedential in nature and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

Crucial Evidence Not Adduced

[82] The Applicants allege that due to the restrictions placed upon them that (a) they were prevented from bringing forth evidence that would have been useful to the Board regarding the appropriateness of the unit applied for, and (b) that the evidence adduced by the parties was not at all in conflict or challenged.

[83] The first point in their argument is circular insofar as it requires that the Board concede that the Applicants should have been afforded the right to call evidence and cross-examine witnesses, something which the Board did not do. Furthermore, the parties gave no indication of the evidence which it could call if permitted, providing only speculation that it would be of probative value.

[84] The second point regarding the lack of challenge of the evidence overlooks the fact that this was a consensual certification by the Employer. As noted above, in such circumstances, evidence is usually not required by the Board. In this case, the Board made an exception as this was the first case under the amendments to the *CILRA*. It is, therefore, not unexpected that the evidence would be uncontested and essentially unchallenged.

[85] We see no reason to reconsider the decision on this ground.

Improper Interpretation of Law or Policy

[86] In respect of ground four, the Applicants argued that the Board erred in its interpretation of section 4(2) of the *CILRA*. They argued that the Board was required by that provision to chose a unit comprised of (a) “all employees of an employer in more than one trade or craft”, or (b) “all employees of an employer”. In choosing the appropriate unit which it did, the Applicants argued that the Board should have included the office staff in the unit as being employees of the Employer.

[87] Again, with respect, we disagree. Such a limited view of the Board's authority to establish appropriate units is contrary to the general authority granted to the Board in the exercise of its fundamental mandate. In the *Saskatchewan Federation of Labour* case, Mr. Justice Ball, a former chairperson of the Labour Relations Board, said at paragraph 55:

> *The SLRB is created by The Trade Union Act. Its powers are, and have always been, described in general terms. Unlike labour legislation in some other jurisdictions, The Trade Union Act is not and does not purport to be a code. The manner in which SLRB carries out its duties and responsibilities is very much dependent upon how its members exercise their discretion and implement what they perceive to be the policy goals of the statute.*

[88] This paragraph captures, in simple terms, the essence of the Board's powers and authority. It recognizes that the Board has discretion in many areas and should be permitted to exercise that discretion as circumstances require.

[89] Furthermore, the interpretation urged upon the Board by the Applicants cannot stand in the face of the modern rule of statutory construction articulated by the Supreme Court of Canada in *Rizzo v. Rizzo Shoes Ltd. (Re)*[33] which is that "the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament."

[90] The Applicants suggested interpretation ignores Sections 4(3) and 7 of the *CILRA*, as well as the general powers and duties of the Board to determine an appropriate unit under both the *CILRA* and the *Ac*t.

[91] Again, we see no reason to reconsider the decision on this ground.

Breach of Natural Justice

[92] The Applicants submit that the Board's decision was tainted by a breach of natural justice contrary to ground five of *Remai*, supra. Again, the Applicants argument in this regard is circular in nature. It postulates that because they were denied full participation in the hearing by the decision concerning intervenor status, and that this has resulted in a breach of natural justice insofar as they have not been able to present a full case to the Board. Again, this argument is based upon the premise that the Board was incorrect in the exercise of its discretion

in granting them status as public law intervenors, which, if that premise is accepted as correct, therefore proves the thesis advanced. We cannot agree with the premise proposed and hence this argument must fail.

[93] The Applicants say that the Board allowed CEP and the Employer to split its case when it allowed an adjournment following the Board's request that evidence be advanced. In our opinion, this was not a splitting of the case, but simply an adjournment to allow the parties to muster the witnesses and evidence requested by the Board.

[94] We see no reason to reconsider the decision on this ground.

Precedential Decision

[95] The final ground advanced by the Applicants is that the decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon, or otherwise change. We disagree with the Applicants attempt to categorize this decision as precedential and see no reason to reconsider the decision.

[96] While the decision may have been the first decision regarding the amendments to the *CILRA,* the Board is satisfied that the interpretation of those amendments was both reasonable and correct. Furthermore, the Board's determination of the appropriate unit was done in accordance with the Board's usual practice and jurisprudence in establishing appropriate units within the construction industry.

[97] The Board is empowered by Section 7 of the *CILRA* to "determine the appropriate unit of employees by reference **to whatever factors the board considers relevant to the application**" [emphasis added]. By section 7, this includes "the geographical jurisdiction of the trade union making the application" and whether or not to confine the certification to a particular project. In making those determinations, the Board is guided by its previous jurisprudence, and the facts in each case. There has been no suggestion that the Board erred in the application of those facts in its determination of the appropriate unit.

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[33] [1998] 1 S.C.R. 27.

[98] The arguments advanced by the Applicants were not new. They had been raised previously by the Applicants in the original hearings and, for the most part, had been dealt with by the Board in its rulings.

[99] The applications are dismissed.

DATED at Regina, Saskatchewan, this **22nd** day of **July, 2011.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson