The Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant, v. WAL-MART CANADA CORP., Respondent

LRB File No. 166-10, December 6, 2011
Vice-Chairperson, Steven Schiefner; Members: Mr. Ken Ahl and Mr. John McCormick

For Applicant Union: Mr. Drew Plaxton
For Respondent Employer: Mr. John R. Beckman, Q.C. and Ms. Catherine A. Sloan

Collective Agreement - First Collective Agreement – Proceedings before the Board – Employer seeks to have Union's first collective agreement application adjourned pending proceedings before Court of Appeal involving certain of Board's procedural rulings – Board concludes proceedings in Court of Appeal are not sufficiently intertwined such that the Board ought to hold its proceedings in abeyance – In balancing competing interests, Board concludes that greater prejudice would occur through delay.

REASONS FOR DECISION – PROCEDURAL MATTERS

[1] **Steven D. Schiefner, Vice-Chairperson:** In these proceedings, the United Food and Commercial Workers Union, Local 1400 (the "Union") has made application to the Saskatchewan Labour Relations Board (the "Board") and seeks assistance in concluding a first collective agreement with Wal-Mart Canada Corporation (the "Employer") with respect to a unit of employees working at the Employer's store in Weyburn, Saskatchewan.

[2] Section 26.5 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*"), allows either party to a newly certified bargaining relationship to seek the assistance of the Board in reaching a first collective agreement. The Board has adopted a two-stage procedure for hearing and making determinations in exercising its discretion pursuant to this authority. The first stage involves the appointment of a Board agent with a mandate to perform two (2) separate yet related tasks, namely; to meet with and assist the parties, if possible, in exploring whether or not they are able to resolve the collective bargaining issues in dispute; and, if not, to report to the Board on the progress of collective bargaining and to make recommendations firstly on whether or not the Board should intervene to assist the parties to conclude a first collective agreement and, if so, the potential terms of said intervention. See: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1996] Sask. L.R.B.R. 36,

L.R.B. File No. 201-95. Under the Board's procedure, the second stage occurs following the receipt of the Board agent's report. The Board agent only has the power to make recommendations and this occurs only if the parties are unable to voluntarily agree on the terms of a collective agreement and if the agent believes that intervention by the Board is appropriate. The final determination as to whether or not it is appropriate for the Board to assist the parties through intervention in their collective bargaining processes is that of the Board and this determination only occurs at this second stage in the process. See: *Saskatchewan Indian Gaming Authority Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, 2002 SKQB 267, 221 Sask. R. 79.

[3] The parties appeared before the Board on January 11 and 24, 2011 in Regina, Saskatchewan, at which time the Board heard argument *on, inter alia,* the appropriateness of the Board appointing an agent to meet with the parties and to report to the Board on the status of collective bargaining between the parties. In Reasons for Decision dated February 8, 2011[1], the Board agreed to appoint an agent to inquire into the issues of: (1) whether the Board should intervene in the collective bargaining process by imposing any term or terms of a first collective agreement; and (2) if so, what terms should be imposed. The Board agent met with the parties ten (10) times over a period of 150 days and filed his report with the Board on July 8, 2011.

[4] In accordance with the Board's usual practice, the matter was set down for hearing on November 8, 2011 at stage-two (i.e.: a determination as to whether or not the Board should exercise its discretion to intervene). However, at the outset of the hearing, the Employer took the position that the within proceedings were automatically stayed by operation of law because of proceedings occurring in the Saskatchewan Court of Appeal. Particulars of the Court of Appeal proceeding are set forth later in these Reasons for Decision. In the alternative, counsel for the Employer asked the Board to exercise its discretion to adjourn the proceedings pending the resolution of the matters in issue before the Court of Appeal; matters which the Employer argued had a direct impact on the within proceedings. The Union opposed any delay in the consideration of their application for assistance in concluding a first collective agreement.

[5] Upon hearing from the parties on November 8, 2011, the Board reserved its decision on the Employer's request that these proceedings be held in abeyance pending the

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[1] *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp*., [2011] CanLII 27607, LRB File No. 166-10.

outcome of the proceedings in the Court of Appeal. These Reasons for Decision deal only with that procedural matter.

Background:

[6] Certain background information is relevant. The within application is one (1) of six (6) applications that came before the Board for hearing at approximately the same time involve the same parties. All of these applications relate to the Union's continuing efforts to organize and represent a unit of workers at the Employer's store in Weyburn, Saskatchewan.

[7] A relatively concise statement of the background for each of these applications was set forth by the Board in Reasons for Decision dated December 9, 2010[2] in *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp., et. al.* (2010) CanLII 90104, LRB File Nos. 096-04, 038-05, 001-09, 166-10, 177-10 & 184-10, at paras. 1 to 18:

> *[1] These Reasons for Decision involve the procedural interrelationship between six (6) separate, yet related, applications before the Saskatchewan Labour Relations Board (the "Board") involving the applicant Union, being the United Food and Commercial Workers, Local 1400 (the "Union"); the employer, being Wal-Mart Canada Corp., (the "Employer"); and Mr. Gordon Button, the applicant in LRB File No. 177-10.*
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> *[2] All of the involved applications relate to, or find their genesis in, the Union's organizing efforts at the Employer's store in Weyburn, Saskatchewan. While not directly the subject matter of the within application, some background on the Union's certification application is relevant. On April 19, 2004, the Union applied to the Board seeking to represent a unit of employees of the Employer at its store in Weyburn, Saskatchewan. On December 4, 2008, the Board rendered a decision; determined the appropriate composition of the Statement of Employment; and concluded that the Union enjoyed the support of the majority of employees in the appropriate bargaining unit. In concluding that the Union enjoyed the majority support of affected employees, the Board relied upon the card evidence of support filed by the Union at the time the certification application was filed with the Board. No representative vote within the meaning of s. 6 of The Trade Union Act, R.S.S. 1978, c. T-17 (the "Act") was conducted by the Board.*
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> *[3] At the time the Union filed its application for certification (on April 19, 2004), and at the time argument on the Union's application before the original panel concluded (on December 13, 2005), s.6 of the Act did not mandate that a representative vote be conducted and the Board's practice at the time was to determine whether or not a trade union enjoyed the support of a majority of the employees in a bargaining unit on the basis of card evidence of support (i.e. membership/support cards). At that time, the Act only compelled a*

[2] Corrigendum released March 31, 2011.

representative vote in limited circumstances; circumstances not present before the original panel.

[4] With the passage of The Trade Union Amendment Act, 2008, Saskatchewan adopted a mandatory vote regime, wherein a representative vote is now required to be held (by secret ballot) each time the Board is called upon to determine what trade union, if any, enjoys the support of a majority of employees in a bargaining unit. In so doing, Saskatchewan moved from what had previously (and somewhat inaccurately) been referred to as an "automatic certification" system to a "mandatory vote" system.

[5] On December 15, 2008, the Employer filed an application for reconsideration with the Board alleging the Board erred in certifying the Union. Prior to a hearing on its application for reconsideration, the Employer sought and obtained, by Order of the Board dated December 24, 2008, a partial stay of obligations on the Employer respecting disclosure of employee information. In addition, the Union sought and obtained an Order of the Board dated January 16, 2009 compelling the parties to meet and bargain collectively.

[6] The Employer and the Union met for purpose of collective bargaining on February 4, 2009 and March 4, 2009.

[7] On March 26, 2009, the Board rejected the Employer's application for reconsideration, concluding that the changes to s. 6 of the Act (that became effective on May 14, 2008) did not apply to applications filed with the Board prior to the change in legislation.

[8] On March 27, 2009, the Employer applied to the Saskatchewan Court of Queen's Bench seeking judicial review of this Board's decision to designate the Union as the certified bargaining agent. On March 31, 2009, the Saskatchewan Court of Queen's Bench issued a stay of the Board's certification Order. On June 23, 2009, the Saskatchewan Court of Queen's Bench concluded that the Board erred in relying on membership cards for purposes of determining whether or not the Union enjoyed majority support in certifying the Employer's store in Weyburn. Simply put, the Court concluded that the amendments to s. 6 of the Act ought to have been given retroactive application by the Board and, thus, the Board erred in failing to conduct a representative vote. The Board's certification Order dated December 4, 2008 was quashed and the matter was remitted back to the Board.

[9] On July 22, 2009, the Union filed an application with the Saskatchewan Court of Appeal seeking to overturn the decision of the Court of Queen's Bench. On October 14, 2010, the Court of Appeal granted the Union's application, concluding that the changes to s. 6 of the Act did not apply to applications filed and argued before the Board prior to the change in legislation. In so doing, the Court of Appeal re-instated the Board's certification Order.

[10] As indicated, there are six (6) applications involved in the within proceedings.

[11] The first application was filed with the Board on May 3, 2004 by the Union alleging that the Employer committed one or more unfair labour practices within the meaning of the Act. The basis of this application is alleged interference by the Employer in the certification efforts of the Union at the Employer's store in Weyburn, Saskatchewan. The remedies requested by the

Union include, inter alia, access to employee information and access to the workplace by representatives of the Union, together with the opportunity to meeting with employees. This application was adjourned and no hearing was conducted on the merits of the application. The certification process culminated in the certification of a unit of employees by this Board on December 4, 2008. While the Union was designated as the certified bargaining agent for the employees, no disposition was made of the Union's unfair labour practice application.

[12] The second application was filed with the Board on February 28, 2005 by the Union (amended June 9, 2005) and alleges that the Employer committed an unfair labour practice in Saskatchewan by reason of its threat of closure, and then actual closure, of its store in Jonquiere, Quebec. In this application, the Union alleges that the Employer's action in closing its store in Jonquiere was intended to intimidate Wal-Mart employees at its stores, including stores in Saskatchewan, from attempting to organize. The remedies requested by the Union include, among other things, access to employee information and access to the workplace by representatives of the Union, together with the opportunity to meeting with employees. This application was the subject matter of a preliminary determination by the Board that we have jurisdiction to hear the application notwithstanding the fact that the impugned actions of the Employer occurred outside of the province. This determination was subject to an unsuccessful application for reconsideration and was upheld on judicial review by the Saskatchewan Court of Queen's Bench. This application remains to be heard by the Board.

[13] The third application was filed with the Board on January 12, 2009 by the Union and alleged that the Employer committed an unfair labour practice by failing to meet and bargain collectively with the Union following the certification Order of this Board dated December 4, 2008. The remedies requested by the Union included an Order directing the Employer to identify members of its bargaining team and for that team to meet and commence collective bargaining with the Union. Two (2) interim orders were granted by this Board pursuant to this application; the first dated December 24, 2008 and the second dated January 16, 2009. The application remains to be heard by the Board.

[14] Following the decision of the Court of Appeal, a number of things happened. For example, the Union renewed its demands that the Employer comply with the union security provisions of the Act by letter dated October 15, 2010. The Union also sought the employee information that the Board had directed that the Employer collect but that the Union had been enjoined from receiving pursuant to the Order of this Board dated December 24, 2008. The Union also demanded that the Employer return to collective bargaining with the Union and sought dates when members of the Employer's bargaining team were available.

[15] In addition, on October 15, 2010, the Union filed an application seeking assistance from the Board toward the conclusion of a first collective agreement pursuant to s. 26.5 of the Act. This application is the fourth application involved in the within proceedings and has not yet been determined by the Board.

[16] The fifth application was filed with the Board on October 29, 2010 by Mr. Gordon Button, who applied for a rescission of the certification Order

> *of the Board dated December 4, 2008. Mr. Button's rescission application was filed during what would normally be the open period; being the eleventh (11th) month following this Board's Order (or anniversary thereof) certifying the Union as the bargaining agent for the unit of employees of which he is a member. This application has not yet been determined by the Board.*
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> *[17] The sixth application was filed with the Board on November 8, 2010 by the Union and alleged that the Employer committed one (1) or more unfair labour practices by failing to comply with its obligations under the Act following the decision of the Saskatchewan Court of Appeal reinstating the certification Order of this Board dated December 4, 2009.*
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> *[18] On November 9, 2010, the Union filed a procedural application with the Board asking that its four (4) unfair labour practice applications and its application for first collective agreement assistance be heard and determined by the Board prior to the Board proceeding with the rescission application filed by Mr. Button and prior to the conduct of a representative vote pursuant to that application.*

[8] In that decision, the Board determined the process that we would follow in hearing these six (6) interrelated applications. Paragraphs 31, 37 and 38 of that decision contain the Board's conclusions regarding procedure:

> *[31] Having considered the arguments of the parties, we have concluded that the Union's application to delay either the hearing of Mr. Button's rescission application and/or the conduct of a representative vote must be dismissed. On the other hand, the Board is also not prepared to delay the processing of the Union's application for first contract assistance. In our opinion, there is no reason in law or policy to delay proceeding with any of the applications.*
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> *[37] In our opinion, the Union's four (4) unfair labour practice applications and Mr. Button's rescission application should be combined and set down for hearing concurrently. There is considerable overlap of factual allegations. Processing these applications separately would involve duplication of effort and an inefficient use of the scarce resources of both the parties and the Board. Therefore, the Board's registrar shall be directed to work with the parties to ensure that these matters are set down for hearing as expeditiously as possible and, in any event, to start within not less than ninety (90) days.*
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> *[38] With respect to the Union's application for first collective agreement assistance, we can also see no reason to delay this application. Another policy conclusion that should be apparent from this Board's decision in Lesyk, supra, is that hearings with respect to applications involving the same parties need not be conducted in a purely linear fashion. Rather, multiple applications may be processed (in some cases, ought to be processed) at the same time. In Lesyk, supra, after concluding that Mr. Lesyk's rescission application should not be delayed, the Board went on, over the objection of the employer in that application, to appoint an agent to assist the parties in attempting to negotiate a first collective agreement. In that case, the Board concluded that there was no reason in law or policy to delay the processing of*

> *the first contract application merely because a representative vote had been ordered by the Board and Mr. Lesyk's rescission application had the potential of ending the trade union's representative role in that workplace. As in Lesyk, supra, we can see no reason in law or policy to delay the processing of the Union's application seeking assistance from the Board toward the conclusion of a first collective agreement. As a consequence, the Board's Registrar shall also be directed to work with the parties to ensure that this matter is set down for hearing as expeditiously as possible and, in any event, within not less than sixty (60) days.*

[9] As these Reasons indicated, the result of this decision was that the Union's request to have its first collective agreement application heard and determined by the Board before the members of the bargaining unit would be called upon to vote on the representative question was denied. Rather, the Board directed that the Union's first collective agreement ought to be heard in a parallel fashion to Mr. Button's rescission application (together with the Union's outstanding unfair labour practice applications). The Board directed that the representation wishes of members of the bargaining unit be captured by way of a pre-hearing vote. Because the representation vote was to occur prior to hearing, the Board also directed that the ballots box remain sealed and the ballots not be tabulated. The representation vote was conducted on December 22, 2010. In accordance with the Board's direction, the representation vote was not counted at that time.

[10] As indicated, the Union's first collective agreement application was initially heard by the Board in January of 2011. On February 8, 2011, this Board appointed an agent pursuant to s. 26.5 of the *Act*. The Board agent met with the parties over a period of 150 days and filed his report with the Board on July 8, 2011.

[11] Mr. Button's rescission application and the Union's unfair labour applications were heard by the Board in March and April of 2011. On June 23, 2011, this Board rendered a decision on these applications[3]. In this decision, the Board dismissed each of the Union's allegations that the Employer had committed various unfair labour practices and denied the Union's request to dismiss Mr. Button's rescission application pursuant to s. 9 of the *Act* (i.e.: on the basis of alleged employer influence). The Board then directed that the ballots from the pre-hearing vote be tabulated. However, before the votes could be tabulated, the Union applied for and obtained an interim stay of the Board's proceedings. The ballots from the representation

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[3] *Gordon Button v. United Food and Commercial Workers, Local 1400 and Wal-Mart, et. al.*, (unreported), LRB File Nos. 096-04, 038-05, 001-09, 117-10, 184-10 & 224-10.

vote have not been tabulated and the ballot box remains sealed in the custody of the Board Registrar.

[12] On June 28, 2011[4], the Union applied to the Saskatchewan Court of Queen's Bench for judicial review of this and other related decisions of the Board. The scope of the Union's application for judicial review is apparent in the relief requested from the Court:

> *An order quashing and/or setting aside certain orders and reasons of the majority of the panel of the Labour Relations Board in LRB File Nos. 096-04, 038-05, 001-09, **166-10**, 177,-10 and 224-10, **including an interim ruling concerning procedural matters dated the 9th day of December, 2010**, the reasons, decisions and orders of the Labour Relations Board dated the 23rd day of June 2010, and the verbal direction or order of the Labour Relations Board dated 27 June 201[1] directing the results of the vote be counted. (**Emphasis added)***

[13] On September 29, 2011, Justice Mills of the Court of Queen's Bench rendered a decision on the Union's application for judicial review. In this decision, Mills J. quashed this Board's Orders with respect to LRB File Nos. 096-04, 001-09 & 194-10 (being three of the Union's unfair labour practice applications) and directed that these matters be returned to the Board for determination. The Court also quashed the vote conducted by the Board in Mr. Button's rescission application (being LRB File No. 177-10) and directed that this matter also be returned to the Board for determination regarding the timing of that vote. However, the Court dismissed the Union's application for judicial review in respect of LRB File No. 166-10; which involved the Union's position that the Board was <u>required</u> to hear and determine its first collective agreement application <u>before</u> the members of the bargaining unit would be called upon to vote on the representative question.

[14] On October 25, 2011, the Union filed an appeal of Justice Mills' decision with the Saskatchewan Court of Appeal. In its appeal and of relevance to these proceedings, the Union seeks the following relief:

> *An order quashing and/or setting aside all orders and reasons of the majority of the panel of the Labour Relations Board that have not already been quashed and set aside that were brought under judicial review in LRB File Nos. 096-04, 001-09, **166-10**, 177-10, 184-10 and 224-10 and directing the Labour Relations Board rehear, reconsider, and reach such determinations or decisions according to law as may be appropriate; (**Emphasis added)***

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[4] See: Q.B. No. 897 of 2011. The Union's notice of motion was amended on July 22, 2011.

[15] In its Notice of Appeal, the Union took the position that the Learned Chambers Judge erred in failing to determine that the "*Board committed reviewable error in not hearing and concluding that the first collective agreement application prior to the rescission application being heard*".

[16] As indicated, the Union's first collective agreement application came back before the Board on November 8, 2011; at which time the Employer argued that the within proceedings must be or ought to be held in abeyance pending disposition of the proceedings in the Court of Appeal. It should be noted that, as of that date, the Employer had not filed an appeal of the decision of the Learned Chambers Judge. However, the parties subsequently advised the Board that on or about November 9, 2011, the Employer filed a Notice of Cross-Appeal with the Saskatchewan Court of Appeal. Among other things and of relevance to these proceedings, the Employer, in its cross-appeal, has taken the position that the Learned Chambers Judge erred in setting aside the Board's representative vote.

[17] Both parties brought this new information to the Board's attention and were granted leave to file written submissions on the significance, if any, of this new development on or before November 29, 2011.

Argument of the Parties:

[18] The Employer argued in the first instance that the within proceedings are automatically stayed by operation of Rule 15 of the *Court of Appeal Rules*, which provides as follows:

> ***Stay***
> ***15****(1) Unless otherwise ordered by the judge appealed from or by a judge, the service and filing of a notice of appeal does not stay the execution of a judgment or an order awarding mandamus, an injunction, alimony, or maintenance for a spouse, child or dependant adult.* ***Unless otherwise ordered by a judge, the service and filing of a notice of appeal stays the execution of any other judgment or order pending the disposition of the appeal****. (Forms 5a and 5b)*
> *(2) Where leave to appeal from an interlocutory order is granted, the judge hearing the application may give directions as to staying proceedings.*
> *(3) Where a writ of execution has been issued but is stayed after being issued because of an appeal, the appellant is entitled to obtain a certificate from the registrar that the execution of the writ has been stayed pending the appeal. On the deposit of the certificate with the sheriff, the execution of the writ is stayed but the execution debtor shall pay the sheriff's fees, and the amount so paid shall be allowed to the execution debtor as part of the costs of the appeal.*

> *(4)* ***Where the execution of a judgment or order is stayed pending an appeal, all further proceedings in the action, other than the issue of the judgment and the taxation of costs under the judgment, are stayed, unless otherwise ordered****. (****Emphasis added)***

[19] The Employer took the position that, in light of the Union's filing of a Notice of Appeal naming these proceedings (and, in particular, this Board's decision regarding the timing of the decertification vote and the procedure for hearing the Union's first collective agreement application), the Board's processes with respect to those determinations are now automatically stayed by operation of Rule 15 of *The Court of Appeal Rules*.

[20] The Employer argued that, precisely because of the Union's appeal, this Board's procedural rulings and all matters in Justice Mills' decision are now intertwined. The Employer relied upon the decision of Cameron J.A. of the Saskatchewan Court of Appeal in *Benson v. Benson*, [1994] S.J. No. 349, 123 Sask. R. 122, C.A. No. 1144 as authority for this proposition. The Employer argued that Sandomirsky J. of the Saskatchewan Court of Queen's Bench came to a similar conclusion in analogous circumstances in *Re: L(M.S.D.)*, 2007 SKQB 200, F.S.M. No. 71/1995.

[21] In the alternative, counsel for the Employer argued that, even if our proceedings are not caught by the automatic stay, we should exercise our discretion to adjourn our processes in light of the proceedings before the Court of Appeal. Counsel for the Employer filed written submissions, which we have read and for which we are thankful.

[22] The Union, on the other hand, argued that its first collective agreement application should not be delayed for any reason and reminded the Board of the long history of its efforts to organize and represent the members of this bargaining unit. The Union argued that the employees have already waited too long to obtain the benefits of collective bargaining and took the position that the Employer was responsible for a significant portion of that delays and much of the frustration the Union experienced in attempting to organize this workplace. The Union argued that the Board should view the current application by the Employer as yet another example of a delay tactic.

[23] The Union took the position that there was no impediment in law or otherwise preventing this Board from continuing to hear its first collective agreement application notwithstanding the proceedings occurring in the Saskatchewan Court of Appeal. Firstly, the

Union took the position that Rule 15 of the *Court of Appeal Rules* only stays Orders of a lower Court that require "*execution*". The Union noted that Rule 15 does not provide for an automatic stay of all proceedings; only those proceedings that require execution. The Union argued the decision of Mills J. does not require execution and, as such, it is not caught by the automatic stay. Secondly, the Union noted that Rule 15 provides a specific exemption for an order of *mandamus* or an injunction or similar orders; which the Union argued was the proper characterization of Justice Mills' orders. The Union relied upon several decisions including *Mayrand v. Mayrand*, [1982] S.J. 861, 20 Sask. R. 263, C.A. No.7959; *Kennibar Resources Ltd. v. Saskatchewan (Minster of Energy and Mines)*, [1990] S.J. No. 540, 90 Sask. R. 127, C.A. No. 704; *Saskatchewan Trust Co. (Liquidator of) v. Darwall Enterprises Ltd*., [1995] S.J. 348, 134 Sask. R. 68, C.A. No. 2078.; and *Saskatchewan Union of Nurses v. Sherbrooke Community Centre*, [1996] S.J. No. 135, 141 Sask. R. 161, C.A. No. 2294.

[24] The Union argued that it would suffer prejudice if the within application was delayed in a variety of forms, mostly notably through the unfavourable impression that further delay would leave with the members of the bargaining unit as to the value of unionization.

[25] The Union asked that its first collective agreement application be set down for hearing without further delay.

Analysis and Conclusion:

[26] In its application[5] to the Saskatchewan Court of Queen's Bench, the Union sought judicial review of, *inter alia*, this Board's procedural ruling of December 9, 2010 regarding the timing of the Union's first collective agreement application and the conduct of the representation vote in Mr. Button's rescission application. The force of the Union's argument before the superior court was that, based on the past jurisprudence of this Board, we ought to have heard and determined the Union's first collective agreement before the members of the bargaining unit were called upon to decide the representation question in a rescission application. The Union now argues before the Court of Appeal that the Learned Chambers Judge committed reversible error in failing to adopt this argument.

[27] While Mills J. did not accept the Union's argument on this particular point, the Learned Chambers Judge did, nonetheless, quash the representative vote conducted by the

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[5] Q.B.G. No. 897/2011.

Board and directed the Board to exercise (re-exercise) its discretion with respect to the conduction of the representation vote; this time in light of the knowledge that the Board has discretion pursuant to the *Act* to delay the timing of a representative vote in certain circumstances[6]. While the Union did not appeal this aspect of the Learned Chamber Judges determination, the Employer has in its cross-appeal.

[28] It is noted that the Learned Chamber Judge both quashed and upheld certain aspects of our procedural rulings involving the hearing of the within application and the timing of the representative vote in Mr. Button's rescission application. The aspect of our procedural ruling that was quashed by the Court of Queen's Bench was our decision that the representative vote ought to occur immediately regardless of the other outstanding proceedings before the Board. The aspect of our procedural ruling that was upheld by the Court of Queen's Bench was our conclusion that the Union's first collective agreement application need not necessarily be heard and determined by this Board prior to the occurrence of the representative vote. Both of these determinations by the Learned Chambers Judge have now been appealed to the Court of Appeal. The Union is appealing the latter and, in its cross-appeal, the Employer is appealing the former. Neither the Union's appeal nor the Employer's cross appeal have been heard.

[29] The two (2) aspects of our procedural rulings now before the Court can be seen as two (2) inconsistent theories as to the interrelationship between a first collective agreement application and a rescission application before the Board. One (1) theory (a theory advanced by the Union) is that its first collective agreement must be heard and determined in priority to the rescission application filed by Mr. Button. The other theory; the theory that formed the basis of this Board's impugned procedural rulings; is that representative votes in rescission applications ought to be conducted as soon as possible regardless of other proceedings before the Board, including first collective agreement applications and/or outstanding unfair labour applications. With the Employer's appeal, both aspects of our procedural rulings are now before the Court of Appeal, placing both theories squarely before the Court.

[30] It is upon this insecure procedural footing that we must now decide whether or not to proceed with the second stage of the Union's first collective agreement application.

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[6] For example, until the occurrence of certain events (i.e.: the dissemination of the results of this Board's determinations regarding first collective agreement applications, alleged unfair labour practices, etc. to members of the bargaining unit).

[31] The Union argues that the portions of Justice Mills' decision that are relevant to these proceedings are not something that requires execution and therefore they are not captured by the automatic stay described in Rule 15 of the *Court of Appeal Rules*. In our opinion, the Union's analysis is sound. In coming to this conclusion we note that the facts in *Saskatchewan Union of Nurses v. Sherbrooke Community Centre, supra*, although not identical, are very similar. In that case, Madam Justice Jackson, J. A. concluded that a decision of the Court of Queen's Bench that quashed an arbitration board's procedural ruling (i.e.: to adjourn certain proceedings) was not the kind of order or ruling that was automatically stayed by operation of Rule 15 of the *Court of Appeal Rule*.

[32] We also note the unreported fiat of Madam Justice Jackson, in *Wal-Mart Canada Corp. v. United Food and Commercial Workers, Local 1400, et. al.*, C.A. No. 999. In that case, which involved the judicial review of previous procedural rulings of this Board (related to discovery and production of documents) involving these same parties, Jackson J.A. (in Chambers) concluded that the automatic stay of execution set forth in Rule 15 did not apply to the application before it because there was nothing from the lower court's decision to stay. In that case, the lower court's decision had set aside the Board's procedural rulings that were the subject of the appeal to the Court of Appeal.

[33] Both of the above determinations by Madam Justice Jackson are recent and involve similar circumstances. Based on these determinations, we conclude that the within application is not automatically stayed by operation of Rule 15 of the *Court of Appeal Rules*.

[34] For the foregoing reasons, we do not accept the Employer's argument that the within proceedings must be held in abeyance because of the *Court of Appeal Rules*. Therefore, we are left with the question of whether or not this Board should exercise its own discretion to delay the within proceeding pending resolution of the matters currently before the Saskatchewan Court of Appeal. In making this determination, we are called upon to balance a number of competing interests, including the potential injury or prejudice if the Union's first collective agreement application is delayed relative to the injury or prejudice that could arise in proceeding in advance of the Court's determinations on our procedural rulings.

[35] The Union asks the Board to press on with its application regardless of the outstanding matters before the Court of Appeal and describes the prejudice it is likely to

experience as the potential that members of the bargaining unit will view further delay as evidence that the Union is incapable of delivering the fruits of collective bargaining. The Union's efforts to organize and represent the employees at this particular workplace date back to 2004. As this Board has previously noted, a number of factors have interfered with and delayed the Union's efforts to do so over the intervening years. In these circumstances, the Union's concern that further delay would injure its reputation is understandable. The question for this Board is whether or not this concern outweighs the potential risks for the parties of proceeding with the Union's application on an insecure procedural footing.

[36] Having considered the arguments of the parties, in our opinion, the greater prejudice rests with delay.

[37] In coming to this conclusion, we note that the proceedings before the Court of Appeal do not deal with the substances of the application currently before this Board. For example, we note that none of the proceedings before the Court of Appeal involve the question of whether or not this Board should intervene pursuant to s. 26.5 (or, if we do so, upon what terms). Also, the issue of when we should hear the Union's first collective agreement is also not, strictly speaking, before the Court of Appeal. Rather the issue before that Court is the timing of the representative vote relative to that application (and other applications before the Board); not when the Union's first collective agreement ought to be heard, *per se*. By way of example, if the Union is successful in its appeal, proceeding now with the second stage of the within application will not likely produce an injurious result as we will be proceeding with the very application that the Union argues should be determined first. On the other hand, if the Employer is successful in its cross-appeal, proceeding now with the second stage will also not likely produce an injurious result, as the ballots from the pre-hearing vote conducted by the Board are available to be counted and are unaffected by the within application. If neither party is successful, proceeding now will also not likely produce an injurious result because this Board never said in its procedural rulings that the members of the bargaining unit should not know the results of the Union's first collective agreement application before being asked to decide the representative question; our ruling was that the representative question should not be delayed merely to obtain those results.

[38] On the other hand, we acknowledge that there is certain degree of risk for the parties in the Board proceedings at this time in light of the challenges to our procedural rulings. However, in balancing the competing interests, our conclusion is that the Union would suffer

greater prejudice if it is not allowed to proceed with its application. For this reason, the Employer's request that we adjourn the within application is dismissed. The Union's first collective agreement application shall be set down for hearing at the second stage.

[39] In proceeding with the next stage of this application, we remind the parties that, in appointing an agent, we noted that very little in the form of collective bargaining had been accomplished by the parties prior to the Union filing its application seeking assistance from the Board. In our Reasons for Decision dated February 8, 2011, we observed that, while a lack of progress at the bargaining table was not an impediment to the appointment of a Board agent, it was difficult for us to assess whether the unique circumstances of this collective bargaining relations make it more likely or less likely that intervention by the Board is appropriate or necessary. In continuing with the Union's application, the first issue to be determined by the Board is whether or not we should intervene pursuant to s. 26.5 of the *Act*.

DATED at Regina, Saskatchewan, this **6th** day of **December, 2011.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson