Saskatchewan
Labour Relations Board

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1318 and LOCAL 1756, Applicants v. THE CITY OF SWIFT CURRENT and THE CITY OF NORTH BATTLEFORD, Respondents

LRB File Nos. 008-14 & 009-14; March 13, 2014
Chairperson, Kenneth G. Love, Q.C.; Members: Duane Siemens and Jason Beaman

For the Applicants:	Mr. Sean McManus
For the Respondents	Ms. Meghan McCreary

Practice and Procedure - Delay – Application by Union under s. 12.1 of *The Trade Union Act* asking Board to refuse to hear Employers' unfair labour practice application due to delay – Employers originally filed application with Court of Queen's Bench – Court held that it did not have jurisdiction and directed the parties to the Board – 90 day time period had passed – Union asserts Board should refuse to hear application due to delay – Board finds delay cannot be considered excessive – Both parties believed that Queen's Bench was appropriate forum for original application – No litigation prejudice or labour relations prejudice experienced through delay – Board exercises its discretion under s. 12.1 to allow the Application to proceed.

Practice and Procedure – Board again examines factors which it will consider in the exercise of its discretion under s. 12.1 of *The Trade Union Act*.

Section 12.1(1) of *The Trade Union Act*

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** The International Association of Fire Fighters, Local 1318 and Local 1756, (the "Unions") are certified as the bargaining agent for fire fighters employed by the City of Swift Current and the City of North Battleford (the "Employers").

[2] The Respondents each filed an unfair labour practice application on January 15, 2014. These applications alleged that the Applicants had failed to bargain in good faith and as a result they had refused an/or failed to bargain to impass, something the Respondents alleged was required pursuant to *The Fire Departments Platoon Act.*[1]

[3] The present application is brought by the Applicants as a preliminary motion requesting that the Board exercise its discretion under Section 12.1 of *The Trade Union Act*[2] (the ("*Act*") and refuse to hear the unfair labour practice applications.

Facts:

[4] The facts in this matter are not in dispute. I have therefore relied heavily upon the facts as presented in the brief filed by the Respondents counsel in the outline which follows.

[5] The fact patterns in each of these cases are similar, but not identical. Each of the Respondent cities acted independently at first, but later combined in their response to the Applicant's request that their bargaining issues be referred to an interest arbitrator pursuant to *The Fire Departments Platoon Act.*

Swift Current

[6] The City of Swift Current and the Respondent, Local 1318 ("Local 1318") began collective bargaining on October 22, 2012. They met again for bargaining on October 23, 2012. Following these 2 bargaining sessions, the parties agreed to suspend negotiations for an unspecified period of time.

[7] On May 25, 2013, the Local 1318 sent a letter to the City of Swift Current which advised that Local 1318 was referring all matters of dispute to a board of arbitration pursuant to Section 9(4) of *The Fire Departments Platoon Act.* The City of Swift Current did not accept that an impasse had been reached and reserved its right to apply to this Board to allege bad faith bargaining.

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[1] RSS 1978, c. F-14
[2] RSS 1978 c. T-17

North Battleford

[8] In North Battleford, four (4) bargaining sessions were held. These occurred on March 14, 2013, April 15, 2013, April 30, 2013 and May 23, 2013. At the final bargaining session on May 23, 2013, a dispute occurred respecting the protocol the parties had set for bargaining. On that date (May 23, 2013), the Respondent, Local 1756 ("Local 1756") also delivered a letter to the City of North Battleford referring all matters in dispute to interest arbitration pursuant to Section 9(4) of *The Fire Departments Platoon Act*. The City of North Battleford took a position similar to that of the City of Swift Current with respect to this notice.

Application to Court of Queen's Bench

[9] On September 6, 2013, the Cities jointly applied to the Court of Queen's Bench for a determination of the following issues:

> *(a) Does the Court have jurisdiction to hear these applications?*
>
> *(b) Does the "opinion" of the party referring the negotiations to interest arbitration under section 9(4) of The Fire Departments Platoon Act have to be reasonably held?*
>
> *(c) Was the opinion of the party referring the negotiations to interest arbitration under section 9(4) of The Fire Departments Platoon Act reasonably held in this case?*

[10] In the Fiat issued on December 2, 2013, the Court said:

> *In my view, the legislature did not intend the court to exercise original jurisdiction over issues arising out of collective bargaining between fire fighters, and only fire fighters, to the exclusion of all other workers in Saskatchewan.*
>
> *For these reasons, I find that the court does not have jurisdiction to deal with the cities' complaint and that it must be addressed in the first instance by way of an appropriate complaint to the SLRB under The Trade Union Act.*

[11] Following the Court's ruling on December 2, 2013, the Respondents made this application on January 15, 2014.

Applicant's arguments:

[12] The Applicants filed a written argument, which we have reviewed and found helpful. The Applicants argued that the factors set out by the Board in *Saskatchewan (Re:)*[3] should lead to the conclusion that the application should be allowed and the unfair labour practice applications by the Respondents should be declared to be out of time.

[13] The Applicants argued that *Saskatchewan (Re:)* held that applications which were out of time should be dismissed unless there were countervailing considerations which would lead the Board to exercise its discretion to permit the application to proceed. On review of the considerations set out in that case, the Applicants argued that there were no countervailing considerations which should lead the Board to exercise its discretion.

[14] In addition to *Saskatchewan (Re:),* the Applicants also argued that the applications should be dismissed for delay regardless of the application of Section 12.1(1) in accordance with the Board's jurisprudence in *Dishaw (Re:)*[4].

[15] In summary, the Applicant's argued:

(a) that the Respondents were sophisticated applicants who were represented by counsel throughout;
(b) that there were insufficient extenuating circumstances or aggravating circumstances to justify the delay;[5]
(c) that the delay has caused actual litigation prejudice or labour relations prejudice to the Applicants;[6]

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[3] [2009] CanLII 30466, S.L.R.B.D. No. 22, CLLC para. 220 – 047, 169 C.L.R.B.R. (2d) 273
[4] [2009] CanLII 507, S.LR.B.D. No. 1,
[5] The Applicants relied upon *Warner v. Saskatchewan (Workers Compensation Board)* [2007] SKQB 76, S.J. No. 25, 292 Sask R. 283, *Peter Grabowski v. IATSE Local 210* [2003] A.L.R.B.D. No. 25, Alta L.R.B.R. LD-020, *Marsh v. Calgary Police Association and Koenig* [2006] A.L.R.B.D. No. 36, Alta. L.R.B.R. LD-015, and *Forbes v. AUPE* [2009] A.L.R.B.D. No. 9, *Re Gagne* [2003] C.I.R.B.D. No 47 and *Provost v. Canada (A.G.)* [200] F.C.J. 222 in support of its contention that a party should not be able to claim "extenuating circumstances when it deliberately chooses a alternate avenue for recourse or as a result of delay due to commencing proceedings in the wrong forum first.
[6] The Applicants argued that the result of the delay has been that the fire fighters in North Battleford have been without a renewal agreement for more than one year and the firefighters in Swift Current have been without a renewal agreement for more than two years. Furthermore, it argued that upcoming interest arbitrations may have to be postponed.

(d) that where there is a balance of rights as between the parties that the importance of the fire fighters right to timely resolution of their issues favoured the Applicants.

Respondent's arguments:

[16] The Respondents also filed a written brief which we have reviewed and found helpful. The Respondents also cited the Board's decision in *Saskatchewan (Re:).*

[17] The Respondents argued that the ongoing refusal of the Applicants constituted continuing unfair labour practices which would not be estopped by the provisions of Section 12.1(1).

[18] In the alternative, the Respondents argued that even if the refusal to bargain could be seen as a one time issue, that the allegations arose on June 18, 2013 in respect of the City of Swift Current and June 20, 2013 in respect of the City of North Battleford as these dates were the date of the last correspondence challenging the referral to interest arbitration. Moreover, the Respondents argue that they did, with the concurrence of the Applicants, proceed to take the matter for adjudication by the Court of Queen's Bench within 90 days of those dates.

[19] The hearing in Queen's Bench occurred on October 31, 2013, but no decision was rendered until December 2, 2013. Upon receipt of that decision, the Respondents argue that they proceeded forthwith to bring these applications to the Board.

[20] The Respondents also argued that it would be extremely unfair and prejudicial if the unfair labour practice complaints were dismissed as being out of time, given the complexity of those issues and the Court of Queen's Bench direction regarding the proper jurisdiction for those issues to be determined.

Relevant statutory provision:

[21] Relevant statutory provisions are as follows

> *12.1(1) Subject to subsection (2), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew, or in the opinion of the board ought to have known, of the action or circumstances giving rise to the allegation, unless the respondent has consented in writing to waive or extend the deadline.*

Analysis and Decision:

[22] In support of its application, the Applicant cited the Saskatchewan Court of Queen's Bench decision in *Warner v. Saskatchewan (Workers Compensation Board*[7]*)*. That decision rejected an application for certiorari with mandamus in aid due to undue delay in making the application (four (4) years). This Board has also rejected applications due to lengthy delay.[8]

[23] In *Grabowski v. I.A.T.S.E, Local 210,*[9] the Alberta Labour Relations Board, relying upon its provision which is similar to our Section 12.1(1), dismissed an application which had been filed some two (2) years following the incident which gave rise to the application. In that case, the Alberta Board determined that a complainant who brings such late complaints must show compelling reasons to justify the Board allowing the complaint to proceed to a hearing. In that case, the Board found that there was no reasonable explanation for the delay in bringing the application to the Board.

[24] In *Re: Marsh*[10] a delay of forty-five (45) months without any extenuating circumstances was again found by the Alberta Labour Relations Board to be too long and it again exercised its discretion to bar the application as being untimely. That decision also referenced the *Toppin* decision.

[25] In *Re Forbes*[11]*,* the Alberta Board, again relying on the principles in *Toppin*, found a delay of 10 months without any explanation to have been too long and dismissed the application.

[26] In *Re: Gagne,*[12] the Canada Industrial Relations Board dismissed an application as being out of time. In *Gagne*, the applicant first filed a complaint with the Quebec Department of Labour. He was advised by that department that his claim fell within the federal jurisdiction. He subsequently filed an application with the Canada Board. The Board relied upon its earlier decision in *Windfield Porter* [2002] CIRB No. 176, 81 CLRBR (2d) 48. That case determined that

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[7] [2007] SKQB 76, S.J. No. 25, 292 Sask R. 283.
[8] See *Re Dishaw* [2009] CanLII 507 (SK LRB), S.L.R.B.D. No 1.
[9] [2003] A.L.R.B.D. No. 25, Alta L.R.B.R. LD-020.
[10] [2006] A.L.R.B.D. No. 36, Alta. L.R.B.R. LD-015.
[11] A.L.R.B.D. No. 9.
[12] [2003] C.I.R.B.D. No 47.

the limitation provided for in the federal legislation is not suspended if a complaint is filed in the wrong jurisdiction. Based upon that decision and another decision of the Canada Board[13], the application was found to be untimely.

[27] The Canada Board in *Gagne* then went on to consider whether it can exercise its discretion to allow an extension. In the final analysis, the Canada Board found that the applicant did not exercise due diligence and refused to grant an extension to him.

[28] None of these decisions are directly on point, and we are left with our earlier decision in *Re: Saskatchewan.*[14] At paragraph 26, the Board set forth guidelines adopted from the *Toppin* decision as follows:

> 1. *The 90-day time limit is a legislative recognition of the need for expedition in labour relations matters.*
> 2. *"Labour relations prejudice" is presumed to exist for all complaints filed later than the 90-day limit.*
> 3. *Late complaints should be dismissed unless countervailing considerations exist.*
> 4. *The longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed. There is no separate category of "extreme" delay.*
> 5. *Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:*
>   (a) *Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?*
>   (b) *Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?*
>   (c) *Has the delay caused actual litigation prejudice or labour relations prejudice to another party?*
>   (d) *And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complaint?*

[29] The onus of showing that there are countervailing considerations falls to the person seeking to have the Board exercise its discretion, in this case the Cities of Swift Current

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[13] *Yvonne Misiura* [200] CIRB no. 63, 59 CLRBR (2d) 305
[14] Supra note 3

and North Battleford. In this case, the applications are clearly outside of the 90 day period provided for the filing of unfair labour practice applications.

[30] The Respondents rely heavily on the fact that they filed their application in the Court of Queen's Bench within the ninety (90) day time period. They also argue that they forthwith filed their application with this Board upon the decision of Madam Justice McMurtry being given on December 2, 2013. They also argue that there was no prejudice to the Applicant's arising out of the delay. The Applicants argue the contrary. The Respondents also argue that the unfair labour practice alleged (failure to bargain in good faith) is an ongoing failure and was, therefore, in the nature of a continuing offence.

[31] If the Board accepts that the triggering event was the Applicant's letters of May 23, 2013 (North Battleford) and May 25, 2013 (Swift Current), the ninety (90) day time period would have expired about August 21, 2013. If measured from the later date that the Cities responded to these letters, June 18, 2013 (Swift Current) and June 6, 2013 (North Battleford), only the Swift Current judicial review application was filed within ninety (90) days (September 6, 2013).

[32] No objection was taken to the judicial review process invoked by the Cities. It appears from the decision of Madam Justice McMurtry, that the Applicant did not challenge her jurisdiction to determine the issues in dispute. The Respondents in this application relied upon that fact to show that both parties assumed that they had made the correct choice of forum for their dispute.

[33] However, Madam Justice McMurtry declined to make the requested determinations and referred the matter to this Board. The hearing of the matter was on October 31, 2013 and the Court's decision made on December 2, 2013. This process, the Respondents say, was the reason for the delay in making the application to this board.

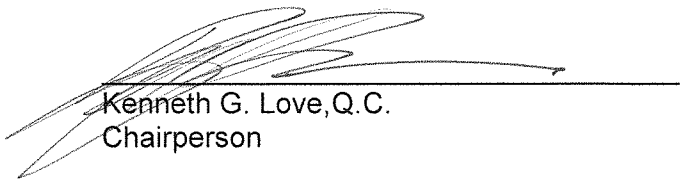
[34] It appears that both parties were of the view that the Court of Queen's Bench had the appropriate jurisdiction in this case. The question put to this Board is whether that reliance, which ultimately turned out to be unfounded, should result in a finding that the time limits in Section 12.1 have expired, and that we should or should not, in these circumstances, exercise our discretion to allow the applications to proceed.

[35] Looking at the matter through the lens of the facts above, the delay cannot be considered to be extreme. Nor, we think, can the Applicants be considered to have been prejudiced insofar as they were willing participants in the process of going to the Court of Queen's Bench. There has not, in our opinion, been any actual litigation prejudice or labour relations prejudice. The issue between the parties is not so factually driven that we need be concerned over the loss of witness memories due to effluxion of time due to delay. The issue is, based upon a relatively straight forward fact situation, whether or not the arbitration provisions of *The Fire Departments Platoon Act* can be invoked in this fact situation, or whether that fact situation gives rise to a finding that the Applicants refused to engage in good faith bargaining. On the other hand, the Respondents in this case are not unsophisticated and were represented by experienced counsel throughout.

[36] On balance, we find that, in this situation, sufficient countervailing considerations have been raised by the Respondents. Accordingly, we exercise our discretion pursuant to Section 12.1(1) and allow the unfair labour practice applications filed by the Respondents to proceed.

DATED at Regina, Saskatchewan, this **13th** day of **March, 2014**.

LABOUR RELATIONS BOARD



Kenneth G. Love,Q.C.
Chairperson