COMMUNICATION, ENERGY & PAPERWORKERS UNION OF CANADA (CEP), LOCAL 911 UNIFOR SASKATCHEWAN, LOCAL 911, Applicant v. ISM INFORMATION SYSTEMS MANAGEMENT CORPORATION, Respondent and THE GOVERNMENT OF SASKATCHEWAN, Intervenor

LRB File Nos. 119-14; August 5, 2014
Chairperson, Kenneth G. Love Q.C.; Members: Don Ewart and Bert Ottenson

For the Respondent: Brian Kenny Q.C.
For the Applicant: Ronni Nordal
For the Intervenor: Curtis Talbot

Interim Application – Unfair Labour Practice – Employer files unfair labour practice alleging that Union has failed to negotiate in good faith towards the conclusion of a collective bargaining agreement. Part of relief sought by Employer is a declaration that bargaining impasse had not occurred and for an order quashing the appointment of a conciliator appointed by the Minister of Labour Relations and Workplace Safety. Union brought interim application to Board seeking a declaration that the Board had no jurisdiction to make such order.

Premature application – Board reviews application and finds that the question posed in the interim application is premature and hypothetical. Board must first find an unfair labour practice application has occurred, before consideration can be given as to whether or not it is necessary or desirable to inquire as to whether it has the jurisdiction to make the order requested by the Employer.

Board also considers options available to the Employer and Union to determine whether the conditions precedent to the Minister's authority under *The Saskatchewan Employment* Act were satisfied.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love Q.C., Chairperson:** Unifor, Local 911, formerly Communication, Energy & Paperworkers Union of Canada (CEP), Local 911, (the "Union") is

certified as the bargaining agent for a unit of employees of ISM Information Systems Management Canada Corporation (the "Employer"). The Employer filed an unfair labour practice application with the Board alleging that the Union had failed to bargain collectively for a renewal of their collective bargaining agreement. In its application, the Employer asked that the Board declare a notice of impasse, provided by the Union to the Minister pursuant to subsection 6-33(1) of *The Saskatchewan Employment Act* (the "*SEA*"), to be invalid, void and of no effect. The application also asked the Board to rescind a ministerial appointment of conciliator, Jim Jeffrey made by the Minister pursuant to subsection 6-33(2) of the *SEA*.

[2] In response to this application, the union, in its reply raised as preliminary matter, the Board's jurisdiction to make the requested order. These reasons deal only with that preliminary matter. Because this was a preliminary matter, no evidence was heard. The Board heard only argument from the parties.

[3] For the reasons which follow, we dismiss the Union's application.

Facts:

[4] The following facts were alleged in the Application:[1]

> (1) The employees of the Applicant are represented by the Respondent Trade Union pursuant to a certification order issued by the Saskatchewan Labour Relations Board.
>
> (2) The Applicant and the Respondent are parties to a collective bargaining agreement that expired on December 31, 2013.
>
> (3) The Applicant and the Respondent have met to attempt to negotiate revisions to the expired collective bargaining agreement but they have not yet concluded a new collective bargaining agreement.
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> (4) On May 21, 2014 the Respondent wrote to the Minister of Labour Relations and Workplace Safety and advised the Minister that the Union believes "the two parties are at impasse" and asked for "the services of mediation" pursuant to Section 6-33 of *The Saskatchewan Employment Act.*

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[1] Some edits have been made to the facts as outlined in the Application.

(5) On May 21, 2014 the Applicant wrote to the Minister of Labour Relations and Workplace Safety and advised the Minister that the Applicant:

a) does not agree that the parties are at impasse;
b) believes the parties have spent insufficient time and effort in attempting to bargain collectively;
c) believes that there is room for progress at the bargaining table through negotiations;
d) objects to the requested appointment.

(6) On June 16, 2014, the Applicant received a letter dated June 10, 2014 from the Minister of Labour Relations and Workplace Safety advising that Mr. Jim Jeffrey had been appointed to assist the Parties pursuant to *The Saskatchewan Employment Act,* Section 6-33.

(7) The Applicant and the Respondent have met to conduct collective bargaining on a number of dates but the time spent in actual face-to-face bargaining discussions between the parties has been limited.

(8) The Respondent has, on a number of occasions in the bargaining discussions, failed or refused to engage in substantive or meaningful discussions of bargaining proposals.

[5] The Respondent specifically denies paragraphs 6, 7 & 8 above and admits the other paragraphs with the qualification that its admission that the Applicant wrote to the Minister on May 21, 2014 should not be taken as any admission to the merits of that position.

Relevant statutory provision:

[6] The relevant provisions of *The Saskatchewan* Employment Act, April 29, 2014, are as follows:

Notice of impasse and mediation or conciliation required before strike or lockout
6-33 *(1) If an employer and a union are unable, after bargaining in good faith, to conclude a collective agreement, the employer or union shall provide a notice to the minister that they have reached an impasse.*

(2) As soon as possible after receipt of a notice pursuant to subsection (1), the minister shall appoint a labour relations officer or a special mediator, or establish a conciliation board, to mediate or conciliate the dispute.

(3) No strike is to be commenced and no lockout is to be declared:

(a) unless a labour relations officer or special mediator is appointed in accordance with subsection (2) or a conciliation board is established pursuant to subsection (2);

(b) unless either:

(i) the labour relations officer, special mediator or conciliation board has informed the parties that the labour relations officer, special mediator or conciliation board does not intend to recommend terms of settlement; or

(ii) the parties have not accepted the recommended terms of settlement by the date set by the labour relations officer, special mediator or conciliation board;

(c) unless the labour relations officer, special mediator or conciliation board has informed the minister and the parties in a report that the dispute has not been settled; and

(d) until the expiry of a cooling-off period of 14 days after the date the labour relations officer, special mediator or conciliation board has informed the minister pursuant to clause (c).

(4) If it appears to the labour relations officer, special mediator or conciliation board that settlement of the dispute is unlikely before a strike or lockout, the labour relations officer, special mediator or conciliation board shall discuss with the union and the employer whether it is necessary to establish a shutdown protocol that preserves the plant, equipment and any perishable items.

2013, c.S-15.1, s.6-33.

Board Powers and Duties

General powers and duties of board
6-103 *(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*

Board powers
6-104 *(1)(c) requiring any person to do any of the following:*

(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;

(ii) to do any thing for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board;

Union's arguments:

[7] The Union filed a written argument and book of authorities which we have reviewed and found helpful. The Union argued that the Board was without jurisdiction to make the orders requested by the Employer. It argued that Section 6-33 of the *SEA* should be read in its entire context and in its grammatical and ordinary sense, harmoniously with the scheme of the Act, in accordance with the Supreme Court of Canada decision in *Rizzo & Rizzo Shoes Ltd.*[2]

[8] It argued that the proper interpretation of Section 6-33 leads to the conclusion that the legislature intended that notice of impasse could be given by one party to the dispute. In

[2] [1998] 1 S.C.R. 1

support, the Union cited comments by the Minister of Labour to the Legislature which supported this interpretation.

[9] The Union also argued that the Board did not have jurisdiction over the dispute citing *McNairn v. U.A. Local 179*[3]. The Union also cited *Thorn's Hardware Ltd. v. R*[4], in support of its view that the proper forum for determination of this issue was the courts.

[10] The Union argued that the Board, as an administrative tribunal, did not have the original jurisdiction necessary to review an act of Ministerial discretion such as the appointment of Mr. Jeffries as mediator of the dispute pursuant to Section 6-33 of the *SEA*. In support, the Union cited *Maple Farms Ltd. v. Canada*[5] and *Ocean Port Hotel Ltd. v. British Columbia*[6] and other cases.

Employer's arguments:

[11] The Employer filed a written brief and book of authorities which we have reviewed and found helpful. The Employer argued that the Minister was a person and as such, could be ordered by the Board pursuant to its authority under Section 6-104 to "any thing" for the purpose of rectifying the alleged unfair labour practice that the Union was not bargaining in good faith.

[12] The Employer also argued that the Board had authority under subsection 6-103(1) to utilize its powers which are "incidental to the attainment of the purposes of the *SEA*. In support, the Union cited *SJBRWDSU v. Dairy Producers Co-operative Ltd.*[7] and *Saskatoon (City) v. Amalgamated Transit Union, Local No. 615*[8].

[13] The Employer agreed with the Union that *Rizzo Shoes* set out the proper test for statutory interpretation in this case. However, it argued that the proper interpretation of the various statutory provisions supports its argument that the Board has jurisdiction to invalidate the Minister's appointment of Mr. Jeffries.

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[3] [2004] SKCA 57 (CanLII)
[4] [1983] S.C.R. 106
[5] [1982] 2 S.C.R. 354
[6] [2001] SCC 52 (CanLII)
[7] [1990] S.J. No 447
[8] [2013] S.J. No. 739

[14] Finally, relying upon a recent fiat issued by Madam Justice McMurtry in *City of North Battleford v. North Battleford Fire Fighters Association, Local 1756* and *City of Swift Current v. Swift Current Fire Fighters Association, Local 1318*[9] they argued that that decision supported their argument that the Board, and not the Courts were the proper jurisdiction to have this matter resolved.

Intervenor's arguments:

[15] The Intervenor made oral arguments and filed cases in support of its argument. The Intervenor suggested two issues to be considered by the Board. The first was whether the Board has authority to inquire into whether or not the conditions precedent to the Minister's Order appointing Mr. Jeffries were met. The answer to that question, they argued was: "Yes". That is, the Board could inquire as to whether or not an unfair labour practice had occurred in this case.

[16] The second issue the Intervenor raised was whether or not the Board has authority to rescind the decision of the Minister. The answer to that question, they argued was: "No".

[17] The Intervenor agreed with the Union and the Employer that *Rizzo Shoes* was the proper test for statutory interpretation in this case. The Intervenor argued that the Minister had no discretion with respect to the appointment of Mr. Jeffries upon application by the Union.

[18] The Intervenor argued that the Board and the Minister have discreet roles under the *SEA* and neither sits in review of the other. The Intervenor argued that the Board had no authority to review the Minister's decision. This, it argued, required clear statutory authority which the statute did not provide. The Intervenor argued that the Court of Appeal in *Dairy Producers* drew a line with respect to the Board's "incidental" powers and that the Board must not cross that line.

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[9] Unreported decision dated December 2, 2013, Q.B.G. 1666/2013 J.C.R.

***Public Service Alliance of Canada v. Canada* [2013] FC 918 (CanLII)**

[19] At the conclusion of the arguments, the Board provided copies of the above noted decision from the Federal Court of Canada, pointed the parties particularly to paragraph [52] *et seq*, and requested their opinion on the applicability of that case to the current fact situation.

[20] The Union argued that this decision dealt with a discretionary power granted to the federal Minister of Labour and was therefore distinguishable.

[21] The Employer agreed with the Union that the decision was distinguishable because the authority granted to the federal Minister was discretionary. In this case, there is no right to be heard before the Minister makes an appointment. They argued that there were too many potential forums where this matter could be resolved and suggested that it made sense for the Board to assume jurisdiction and determine the issue.

[22] The Intervenor also agreed that in this case, the Minister had no discretion in making the appointment after receipt of the notice of impasse.

Analysis:

[23] For the reasons which follow, we decline to make the order requested by the Union. The application in this case raises a hypothetical question regarding the Board's jurisdiction. The application ask us to decide, without the benefit of evidence and argument on that evidence if, given a certain set of alleged facts, the Board has the ability to fashion a remedy in respect of a potential unfair labour practice, in which allegations set out in that application have not, at this stage, been proven.

[24] In *Gladstone Petroleum Ltd. v. Husky Oil (Alberta) Ltd.*, the Saskatchewan Court of Appeal dealt with a similar situation. In that case, the defendant plead facts and then applied to the Court to have the question raised by those facts determined as a point of law. That point was whether or not, based upon those facts, the Court had jurisdiction over the matter in question. In rendering his concurring judgment, Mr. Justice Hall made the following comments at paragraph [41]:

> *[41] The point of law which the learned chambers judge has here ordered to be tried rests entirely on allegations of fact raised by the plaintiff itself. In my opinion, it is not the purpose of the Rule to permit a plaintiff to test his view of the law before presenting his case. If it were, the courts would continually be trying what would in reality be hypothetical questions of law.*

[25] For the issue of jurisdiction to grant a remedy to come before us, there must first be a proven unfair labour practice. That unfair labour practice, if proven, may have, as an underlying fact, whether or not an impasse had occurred. However, it is also possible that the unfair labour practice may be proven on facts which do not disclose whether or not an impasse has occurred.

[26] Additionally, even if an impasse has occurred, the Board, in determining the appropriate remedy must consider numerous factors, including the fact of impasse and its relationship to the unfair labour practice. At this stage of the application, it cannot be taken as given that the appropriate remedy would be that sought by the Employer, notwithstanding the issue of whether the Board has jurisdiction to make such an order. A finding of an unfair labour practice does not, *ipso facto* give rise to a determination that an impasse has or has not occurred.

[27] The Union has gotten the cart before the horse in this case. The application is also premature. The question of jurisdiction is, in our opinion, more properly raised during the remedy portion of the hearing, should the Board determine that an unfair labour practice has been found.

[28] Alternatively, there are other avenues open to the Union and the Employer in this case. As noted in *Public Service Alliance of Canada v. Canada*[10], it is possible that the Minister was entitled and should have made an inquiry to determine if an impasse had been reached. In doing so, the principles of natural justice would have required that he conduct a hearing for that purpose. Conceivably, that concept could have been explored and appropriate application brought in the Court of Queen's Bench to determine that point.

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[10] [2013] FC 918 (CanLII)

[29] Similarly, the jurisdiction purportedly granted to Mr. Jeffery by the Minister's Order may be subject to challenge before him. Should Mr. Jeffery conduct a hearing to determine if he has proper jurisdiction (ie that the prerequisites for his appointment – an impasse – are present) before he commences his conciliation? Again, it may be possible for Mr. Jeffery's jurisdiction to be challenged before Her Majesty's Court of Queen's Bench.

[30] The Employer cited the fiat issued by Madam Justice McMurtry in the *City of North Battleford v. North Battleford Fire Fighters Association, Local 1756* and *City of Swift Current v. Swift Current Fire Fighters Association, Local 1318*[11] to support its contention that this Board was the correct forum to determine whether an impasse had occurred. With respect, the factual situation in that case was somewhat different and did not involve the Minister issuing an order based upon the Union's submission that an impasse had occurred.

[31] We are being asked to presume that the issuance of that order was invalid or incorrect. We cannot make that assumption. The statute provides clear authority for the Minister to make the order appointing Mr. Jeffery as a conciliator in this case. If the parties wish to test whether or not he had the necessary jurisdiction to make the order, or had made a sufficient inquiry to determine if the conditions precedent to his authority had been met, that inquiry is not something that the *SEA* explicitly grants this Board the right to review.

[32] The preliminary application brought by the Union is dismissed. This is a unanimous decision of the Board. An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this **5th** day of **August, 2014.**

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Chairperson

[11] Unreported decision dated December 2, 2013, Q.B.G. 1666/2013 J.C.R.