AMALGAMATED TRANSIT UNION, LOCAL 615, Applicant v. CITY OF SASKATOON, Respondent

LRB File No. 211-14; October 29, 2014
Vice-Chairperson, Steven D. Schiefner; Members: Dennis Perrin and Don Ewart

For the Applicant Union: Mr. Gary L. Bainbridge
For the Respondent Employer: Ms. Patricia Warwick

Remedy – Interim order – City and transit union engage in collective bargaining – Parties unable to agree on changes to and funding for pension plan for members of union – Parties reach impasse - City issues notice and locks out members of transit union – City also passes bylaw to effect changes to pension plan for members of transit union - Union files application alleging lockout and changes to pension plan were actions taken contrary to restrictions set forth in *Saskatchewan Employment Act* – Transit union then files application seeking interim relief pending a final determination by the Board – Union asks Board to enjoin City from locking out its members and from changing pension plan pending a hearing of its application – Board satisfied that union has made out an arguable case that City engaged in actions when restricted from doing so pursuant to *Saskatchewan Employment Act* – Board satisfied that balance of labour relations harm favours enjoining the City from implementing or making further changes to the member's pension plan – Board not satisfied that balance of labour relations harm favours enjoining the City from locking out members of the transit union – Board grants interim relief.

***The Saskatchewan Employment Act*, ss. 6-62(l), 6-103(2)(d) & 6-111(2)(a).**

REASONS FOR DECISION – INTERIM APPLICATION

Background:

[1] Steven D. Schiefner, Vice-Chairperson: These proceedings involve an application by the Amalgamated Transit Union, Local 615 (the "Union") for interim injunctive relief against the City of Saskatoon (the "City"). The Union sought this relief pending a hearing and final determination by the Saskatchewan Labour Relations Board (the "Board") regarding the Union's allegation that the City has committed an unfair labour practice in an application bearing

LRB File No. 210-14. In this application, the Union alleged that the recent actions of the City in issuing lockout notice to members of the Union, in locking out those members, and in making changes to the bylaws governing the pensions of member of the Union were in contravention of the statutory freeze set forth in s. 6-62(1)(l)(i) of The *Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the "*Act*"). The Union argued that the City was prevented from taking these actions because an application involving the parties was "*pending*" before this Board thus invoking the so-called "application pending" statutory freeze. While the City acknowledged that applications involving the parties were before the Board, it disputed that either of these applications were the kind of applications capable of triggering the so-called "application pending" statutory freeze. In the alternative, the City argued that neither of these applications were "*pending*" at the relevant times because no formal hearing had been held by the Board into these matters. For these reasons, the City took the position that this was not an appropriate case for the Board to exercise its discretion to grant interim remedial relief. In the alternative, the City argued that the balance of convenience did not favour granting the desired relief.

[2] The Union's interim application was heard in Saskatoon on September 26, 2014. In support of its application, the Union filed an affidavit and supplemental affidavit of Mr. Jim Yakubowski, the Union's President and Business Agent. The Employer filed the affidavit of Mr. Marno McInnes, the City's Director of Human Resources.

[3] On September 26, 2014, the Board rendered its decision on the Union's interim application. The Order issued by the Board read as follows:

> ***INTERIM ORDER***
>
> ***HAVING READ*** *the Application for an Interim Order and/or Injunction, the submissions and the Affidavits of Jim Yakubowski, all of which were filed by the Applicant;*
>
> ***AND HAVING READ*** *the Affidavit of Marno McInnes and the submissions all filed by the Respondent;*
>
> ***AND HAVING HEARD*** *the submissions of Gary Bainbridge, counsel for the Applicant, and of Patricia Warwick, counsel for the Respondent;*
>
> ***THE LABOUR RELATIONS BOARD, PURSUANT TO THE SASKATCHWEWAN EMPLOYMENT ACT, HEREBY ORDERS:***
>
> *(1)* ***THAT,*** *effective this day, the Respondent, the City of Saskatoon, be enjoined from any further actions in respect of the Pension Plan changes as voted upon by City Council in respect of By-Law changes thereto;*

> *(2)* ***THAT,*** *this Order shall remain in effect until such time as the Board disposes of the Applications currently filed under the Saskatchewan Employment Act, which are, as of the date of this Order, deemed pending.*

[4] These are our Reasons for the above captioned decision.

Facts:

[5] The facts relevant to these proceedings are largely not in dispute. Many of the facts involve the Board's own proceedings.

[6] The Union is the certified bargaining agent for all employees of the Transit Branch within the City of Saskatoon (with certain exceptions). The parties have a long history of labour relations and have entered into numerous collective agreements. The most recent agreement between the parties expired on December 31, 2012. The parties exchanged notices and commenced collective bargaining in October of 2013. Although the parties have met on numerous occasions, they have been unable to agree on the terms of a new collective agreement. The primary issues in contention between the parties are changes to, and funding for, the member's pension plan.

[7] By way of background, members of the Union, together with eight (8) other unions and/or associations representing City employees, are included within the City's General Superannuation Plan. The particulars of this pension plan are currently set forth in *The City of Saskatoon General Superannuation Plan Bylaw, 2003*. A recent valuation conducted on the City's General Superannuation Plan found the plan to be significantly under-funded. Although the Union now disputes the accuracy of and assumptions contained in the valuation report, changes to and funding for the City's pension plans was the subject to collective bargaining with all of the City's unions/associations, including the Union. This particular issue was of sufficient import that all unions/associations agreed to bargain with the City at a common table in an effort to achieve common agreements on these important issues. The result of these negotiations was memorandums of agreement being signed between the City and eight (8) of the nine (9) unions/associations.

[8] While the other unions/associations all agreed to a pension and wage package proposed by the City, the Union did not. The members of the Union have repeatedly voted against acceptance of various versions of the City's offer. The parties have attempted to

negotiate a resolution but have been unable to do so. They have utilized the services of a conciliator without success. The City has made two (2) final offers, both of which have been voted down by the membership of the Union. Simply put, the parties are at, and have been at, an impasse for months. Repeated efforts at table have been unable to resolve their differences.

[9] By way of further background, on April 22, 2014, the Union filed an application (LRB No. 079-14) with the Board alleging that the City engaged in one or more unfair labour practices involving a member of the Union's bargaining unit. The essence of the allegations in this application are that the City failed to properly investigate an incident that occurred in the workplace involving that member; that the member was initially unfairly disciplined by the City; and that, although the City ultimately agreed to rescind the member's discipline, the member was threatened and/or discouraged by a City official at some point during the process from exercising protected rights. There was no dispute between the parties that the substance of this application was unrelated to the impasse between the parties at the bargaining table.

[10] When the City first received a copy of LRB No. 079-14, it requested further particulars. After considering this request, the Union was directed by the Board to do so. On May 6, 2014, the Union provided a letter outlining further and better particulars as to allegations set forth in LRB No. 079-14.

[11] On May 15, 2014, the City filed a Reply to LRB No. 079-14 denying that it had violated in the *Act* in any of its dealings with the employee named therein. In addition, the City also filed an application (LRB No. 097-14) seeking to summarily dismiss LRB No. 079-14 on this basis that, even if all of the allegations set forth in that application were assumed by the Board to be true, LRB No. 079-14 did not disclose an arguable case that the City had committed an unfair labour practice.

[12] On May 16, 2014, the Board Registrar provided the parties with the following description of the process the Board would be following in hearing and determining the City's request that LRB File No. 079-14 be summarily dismissed:

> *Good Morning:*
>
> *Further to the electronic confirmation of the Summary Dismissal Application, LRB File No. 097-14, the Board's process does not provide the opportunity to file reply in respect of this type of Application, which only comes later if so invited.*

The new legislation provides for the application of this nature to be filed, and upon that application, the Board will have an in camera panel only consider the Application for summary dismissal, and the application which is being sought to summarily dismiss, that being LRB File No. 079-14 to be considered. I respectfully refer to the process under the repealed legislation which is being adopted under The Saskatchewan Employment Act.

Revised Procedures for Summary Dismissal Applications under The Trade Union Act.

As stated in LRB file Nos. 188-12, 191-12, 192-12, 193-12, 198-12, 199-12, 200-12 & 201-12*, starting at paragraph [85]*

> ***[85]*** *As noted in paragraph [63] above, there have been some procedural issues surrounding the use of applications for summary dismissal. For the benefit of the Labour Relations community, we believe that it is important that, along with the restatement of the Soles test as outlined above, we provide guidance regarding how an application for summary dismissal should be made.*
>
> ***[86]*** *Given the procedure outlined above, it is clear that the Soles process is intended to be an in camera process, with the first hurdle being a determination that the matter is one that the Board thinks can conveniently be dealt with in camera. If the Board determines that the matter is not one that can conveniently be dealt with in camera, the application for summary dismissal would require a viva voce hearing before a panel of the Board and the application under s. 18(q) would be dismissed.*
>
> ***[87]*** *However, the practice of some counsel, in simply making reference to summary dismissal in their Reply to the application will no longer suffice to bring the matter before the Board. It will require an additional application (Motion), that will be required to address the facts in support, and the arguments as to why the applicant believes the matter can be dealt with by the Board in camera. So the respondent to that application will be afforded an opportunity to reply to that application, before the matter is considered by an in camera panel for determination. If the Board agrees with the applicant that the matter may be conveniently dealt with in camera, it will then requires submissions from the parties on the issue of whether or not the matter in the original matter should be summarily dismissed.*
>
> ***[88]*** *If the in camera panel determines that the matter is not one that can be conveniently dealt with in camera, then the Board will schedule the application for summary dismissal as a preliminary matter to the hearing of the main application. Alternatively, rather than go through the initial step of requesting the determination regarding summary dismissal to be conducted in camera, the parties may, by additional application (Motion), give notice that they wish to raise the issue of summary dismissal as a preliminary matter at the opening of the main hearing of the matter.*
>
> ***[89]*** *This process, in our Opinion, creates the necessary separation of the powers given to the Board under s. 18(p) and (q) as noted by Mr. Justice Popescul in Tercon supra.*

In the meantime, I will place only the application for summary dismissal (LRB File No. 097-14) and the application being sought for dismissal (LRB File NO. 079-

> *14), and the particulars provided to the request for particulars as provided, to an in camera panel. Should that panel determine that the matter does not establish or make out a prima facie case, assuming all the pleadings are factual, then the Applciation will be considered by a second panel and will the invite and consider the submissions, replies and rebuttal.*
>
> *In the alternative, should the matter not be considered as one to address void of viva voce evidence, the summary dismissal application, LRB File No. 097-14 will be placed before the panel set down for hearing, of LRB File No. 079-14 as a preliminary matter.*
>
> *Thank you and apologies for any confusion the invitation for Reply may have caused…we got slightly ahead of ourselves.*
>
> *Have a good long weekend…*
>
> *F. W. (Fred) Bayer, MBA, CHRP*

[13] On June 3, 2014, the Board Registrar wrote to the parties and advised them that a panel of the Board would be considering the City's application for summary dismissal later that day.

[14] On June 3, 2014, an *in camera* panel of the Board, comprised of Chairperson Love and Board members Hugh Wagner and Al Parenteau, considered the City's application for summary dismissal (LRB No. 097-14), together with the Union's application alleging an unfair labour practice (LRB No. 079-14) and determined that there was no need for the Board to conduct an oral hearing to make a determination on the City's application. Rather, the parties were asked to provide written submissions to the Board on a staggered basis. To which end, the Union filed its written submissions on June 13, 2014 arguing that its application, being LRB No. 079-14, should not be summarily dismissed. On June 24, 2014, the City filed its submissions in support of its application and in reply to the Union's written arguments.

[15] At the same time as the Board and the parties were dealing with LRB No. 079-14 and LRB No. 097-14, the parties continued to engage in collective bargaining and matters ancillary thereto. For example, on April 8, 2014, the Union sought and obtained a strike mandate from its members. No specific action was taken by the Union on that mandate.

[16] On May 7, 2014, the City proposed a last (aka: a "final" offer), which was rejected by the membership of the Union on May 9, 2014. In May of 2014, the City requested the assistance of a conciliator. Conciliation took place in June of 2014. However, no agreement was achieved by the parties. Thereafter, the City tabled an enhanced final offer and applied to

this Board for a vote on its enhanced final offer. The vote was conducted on August 15, 2014 but was again rejected by the membership of the Union. See: LRB File No. 164-14.

[17] On Thursday, September 18, 2014, the City served the Union with notice of its intention to lock out the Union's members (excluding those members specified by the parties in their essential services agreements pursuant to *The Public Services Essential Services Act*, S.S. 2008, c.P-42.2) commencing at 10:00 pm on Saturday, September 20, 2014 if the parties remained at impasse. Thereafter, the parties again engaged in collective bargaining with the assistance of a conciliator. However, the parties were unable to resolve their differences.

[18] On Saturday, September 20, 2014 at 10:00 pm, the City locked out the non-essential membership of the Union from the workplace affecting some 350 employees. On Monday, September 22, 2014, a special meeting of the City's elected representatives (City Council) was held to consider changes to *The City of Saskatoon General Superannuation Plan Bylaw, 2003*. This Bylaw governs pensions for the employees of the City of Saskatoon, including members of the Union. On September 22, 2014, City Council approved changes to *The City of Saskatoon General Superannuation Plan Bylaw, 2003*.

[19] As of September 18, 2014 (the date the City gave notice of its intention to declare a lockout), no determination has been made by this Board on application LRB No. 097-14, being the City's application that LRB No. 079-14 be summarily dismissed. The same is true for September 19, 2014, when the City gave notice of its intention to amend Bylaw No. 9226; and for September 20, 2014, when it locked out members of the Union; and for September 22, 2014, when Bylaw No. 9224 was passed by City Council.

[20] On September 22, 2014, the Union filed LRB File No. 210-14, in which the Union alleged the City violated the "application pending" statutory freeze. In addition, the Union also filed the within application, in which the Union sought interim remedial relief from this Board pending the hearing and final determination of LRB File No. 210-14.

[21] On September 23, 2014, the City withdrew LRB File No. 097-14 (its application for summary dismissal of LRB File No. 079-14). It also withdrew its Reply to LRB File No. 079-14 and admitted to the allegations of wrong doing set forth in that application. The Union responded

to the change in the City's position by indicating to the Board that it wanted to be heard on the issue of remedy.

[22] As indicated, the within application (i.e.: the Union's application for interim relief) was heard by this Board on September 26, 2014. On that date, this Board granted some (but not all) of the remedial relief sought by the Union in LRB No. 211-14. We gave brief oral reasons for the decisions we made in that application. Subsequent thereto, the Union has sought written Reasons for Decision, which is their right.

[23] It is also noted that LRB 210-14 was heard by this Board on October 14, 2014. On October 17, 2014, this Board issued an Order granting much (but not all) of the remedial relief sought by the Union in that application. On October 24, 2014, this Board issued our Reasons for the decisions we made in that application.

Relevant statutory provision:

[24] Relevant provisions of *The Saskatchewan Employment Act* include the following:

> ***6-62****(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> > *(l) to declare or cause a lockout or to make or threaten any change in wages, hours, conditions or tenure of employment, benefits or privileges while:*
> >
> > > *(i) any application is pending before the board; or*
> > >
> > > *(ii) any matter is pending before a labour relations officer, special mediator or conciliation board appointed pursuant to this Part;*
> >
> > *. . .*
>
> ***6-103***
>
> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
>
> > *. . .*
> >
> > *(d) make an interim order or decision pending the making of a final order or decision.*
> >
> > *. . .*
>
> ***6 –111****(2) For the purposes of this Part:*
>
> > *(a) an application is deemed to be pending before the board on and after the day on which it is first considered by the board at a formally constituted meeting until the day on which the decision of the board is*

> *made;*
>
> *(b) a matter is deemed to be pending before a conciliation board on and after the day on which the conciliation board is established by the minister until the day on which its report is received by the minister;*
>
> *(c) a matter is deemed to be pending before a special mediator on and after the day on which the special mediator is appointed by the minister until the day on which the special mediator's report is received by the minister; and*
>
> *(d) a matter is deemed to be pending before a labour relations officer on and after the day on which the labour relations officer is appointed by the director of labour relations until the day on which the labour relations officer's report is received by the minister.*

Applicant Union's arguments:

[25] In argument, counsel on behalf of the Union acknowledged that to be successful in its interim application, the Union must satisfy a two-part test. Firstly, the Union must demonstrate that its main application (being LRB File No. 210-14) reflects an arguable case that the City took prohibited action while the statutory freeze was in force. Thereafter, the Union must also satisfy the Board that more labour relations harm will result if its desired interim order is not granted compared to the harm that will result if it is granted.

[26] The Union took the position that s. 6-62(1)(l) of *The Saskatchewan Employment Act* prohibits employers from declaring or causing a lock out or making changes to the benefits enjoyed by members of a trade union while "*any application is pending*" before this Board. The Union relied on the decision of this Board in *R.W.D.S.U v. Canadian Linen Supply Co. Ltd.* [1990] S.L.R.B.D. No. 2, LRB File No. 150-89, as standing for the proposition that the meaning of "*any application*" as that term is used in s. 6-62(1)(l) is meant to be broadly applied and includes preliminary objections.

[27] The Union took the position that both its application bearing LRB File No. 079-14 and the City's application bearing LRB File No. 097-14 were "*pending*" before this Board when the City issued lock out notice to members of the Union on September 18, 2014, when it locked out those members on September 20, 2014, and when it made changes to the bylaws governing the pensions for members of the Union on September 22, 2014. The Union argued that either or both of these applications became "*pending*" on June 3, 2014 when the *in camera* panel of the Board began considering those applications, albeit merely for purposes of summary dismissal. The Union argued that this panel of the Board was "*formally constituted*" within the meaning of s.

6-111(2)(a) of *The Saskatchewan Employment Act* and the Union's application was "*first considered*" by the Board at that time. Finally, the Union noted that, as of September 18, 2014 (or at any time when the City engaged in the actions that the Union now disputes), this Board had not yet rendered its decision on either of the two (2) applications; being LRB File No. 079-14 or LRB File No. 097-14.

[28] For these reasons, the Union took the position that its main application patently demonstrates an arguable case that the statutory freeze set forth in s. 6-62(1)(l) of the *Act* applied when the City issued lock out notice to members of the Union, when it locked out those members, and when it made changes to the bylaws governing their pensions.

[29] With respect to the second part of the test, the Union argued that there are strong policy reasons for not permitting employers to lockout members of a trade union when an application is pending before the Board. The Union argued that the purpose of this provision is to prevent employers from penalizing unions for making applications to the Board or to otherwise "subvert access" to the Board by escalating tensions in a workplace through any of the actions set forth in s. 6-62(1)(l). The Union relied on the decision of this Board in *Mosaic Potash Colonsay ULC v. United Steelworkers Union, Local 7656*, (2013) 218 C.L.R.B.R. (2d) 44, 2012 CanLII 58952 (SK LRB), LRB File No. 165-12 as standing for the proposition that interim relief will be granted if there are overarching policy elements in a case and that these policy reasons can both supersede and supplement the balance of convenience analysis. The Union argued that the policy objectives of preventing employers from locking out workers when the statutory freeze is in place should be sufficient for it to obtain its desired injunctive relief. The Union argued that "wildcat" lockouts by an employer were analogous to "wildcat" strikes by employees which were enjoined by the Board on an interim basis in the *Mosaic Potash* case. The Union argued the "application pending" statutory freeze was of equal policy significance to the prohibition against wildcat strikes which was at issue in the *Mosaic Potash* case.

[30] In addition, the Union relied on its affidavit evidence in support of its assertion that the labour relations harm suffered by the Union if no injunction was granted would outweigh the harm suffered by the City if an injunction were granted. Firstly, the Union argued that the City would suffer little or no harm and the parties would merely be returned to their pre-lockout *status quo*. The Union argued that the parties have been engaged in collective bargaining for months and that waiting a little longer (i.e.: for a hearing to be conducted) would cause no labour

relations harm for the City. On the other hand, the Union argues that it was suffering and would continue to suffer significant harm, if the City's lockout was not restrained. In particular, counsel for the Union noted that some 350 employees would remain out of work without pay; that they would not be accruing seniority relative to those members of the Union (i.e.: those that had been deemed to be essential); and the risk that the City would continue implementing the changes it has already made to the disputed pension plan or that it would make and implement further changes that have not been agreed to by the Union. In addition, the Union noted that the lockout of its members was causing general disruption in the City; that it was extremely frustrating for transit users; and that it was injurious to the public's perception of the transit system.

[31] In particular, the Union argued that changes to the pension plan would be very difficult to "*unwind*" if further action is taken toward their implementation. For example, if the changes that were approved by City Council to *The City of Saskatoon General Superannuation Plan Bylaw, 2003* were presented to, and approved, by the Board of Trustees of the Pension Plan and/or filed with the Superintendent of Pensions, this Board may not have authority to undo those changes if they are subsequently determined to be unlawful. For these reasons, the Union argued that it could suffer irreparable harm because it may not be possible to undue the disputed changes if this Board subsequently determines that the statutory freeze was in place at the time the City began making the changes.

[32] The Union sought interim relief from this Board pursuant to s. 6-103(2)(d) of *The Saskatchewan Employment Act*. Specifically, the Union asked this Board to restrain the City from locking out its members Union and/or from making or implementing any changes to their pension plan until its main application, being LRB File No. 210-14 is heard and determined by this Board. Counsel on behalf of the Union filed a written brief which we found to be helpful.

Employer's arguments:

[33] The Respondent argued that this is not an appropriate case for the exercise of the discretion granted to this Board pursuant to s. 6-103(2)(d) of the *Act*. Firstly, the City took the position that this Board should keep in mind the general policy objective of s. 6-62(1)(l) of *The Saskatchewan Employment Act* in deciding whether or not to grant the interim relief sought by the Union. The City asserted that the policy objective of the restriction on lockouts (while applications are pending before the Board) was set forth by this Board in two decisions of this Board; namely in *Retail, Wholesale and Department Store Union, Local 454 v. Westfair Foods*

Ltd., [1993] 1st Quarter Sask. Labour Rep. 57, LRB File No. 007-93 and *Saskatchewan Association of Health Organization v. Health Sciences Association of Saskatchewan*, (2003) 87 C.L.R.B.R. (2d) 283, 2002 CanLII 52901 (SK LRB), LRB File Nos. 081-02 & 137-02. The City argued that the policy objective of the statutory freeze is "*to prevent one party from attempting to subvert the access of the other party to the Labour Relations Board by raising the stakes when an application is being brought there*". However, the City took the position that its lockout in no way prevents the Union from advancing LRB File No. 079-14 or otherwise subverts the Union's access to this Board for purposes of that application. Simply put, the City argued that the mischief that the statutory freeze was intended to prevent did not arise in the matters before the Board. Rather, the counsel for the City postulated that the Union was merely using s. 6-62(1)(l) of the *Act* to prevent the City from engaging in what would otherwise be a lawful lockout based on an application wholly unrelated and unaffected by the current impasse being experienced by the parties in collective bargaining. For these reasons, the City argued that this was not an appropriate case for this Board to exercise its authority to grant any form of relief until a full hearing of the matter had been conducted.

[34] In addition (or potentially in the alternative), the City argued that there was a fatal flaw in the Union's main application, being that neither LRB No. 079-14 nor LRB File No. 097-14 were "*pending*" before the Board at the time the City took its disputed actions. The City argued that a "*formally constituted*" panel of the Board had not yet begun hearing either of these applications. To the contrary, the City noted that these applications were only presented to an *in camera* panel of the Board and that panel was merely deciding whether or not the Union's application could be dismissed without a formal hearing. The City argued that an application does not become "pending" within the meaning of the *Act* until the Board begins hearing the merits of that application. The City took the position that the Legislature only intended to impose a freeze on industrial actions by the parties after the Board had begun hearing the merits of application and that it was unreasonable to assume that the Legislature intended to invoke the statutory freeze prior to a formal hearing in the presence of the parties. In other words, the City argued that none of the Board's pre-hearing processes used by the Board prior to a formal hearing, including procedures to set dates for hearing (i.e. motions day), applications for particulars, applications for production of documents, or applications for summary dismissal, were the kind of applications intended by the Legislature to invoke the statutory freeze.

[35] For example, the City argued that LRB No. 097-14 was not an "application pending" because it was not the type of application that was intended to trigger the statutory freeze. The City argued that this application was merely the means by which the City invoked a pre-hearing process. The City argues that including interlocutory proceedings within the definition of "*any application*" would result in an unacceptable and irrational expansion of the statutory freeze and that doing so would frustrate, not advance, the objectives of the *Act*. The City argued that including interlocutory applications, such as LRB 097-14, within the definition of an "*application pending*" would result in an overly expansive interpretation of the statutory freeze and would permit the legislation to be used for improper purpose, including the filling of frivolous applications by a party merely seeking to prevent an otherwise lawful strike or lockout by the other party.

[36] With respect to the balance of convenience argument, the City took the position that no labour relations harm would be created by allowing its lockout to continue pending a hearing of either LRB 210-14 or LRB 079-14. The City argued that, at that time, its lockout was the *status quo*. Furthermore, the City argued that any harm that might be suffered by the Union would be fully compensable through an award of damages. On the other hand, the City took the position that it will suffer harm and inconvenience if an injunction was granted by the Board. The City argued that lifting its lockout before a determination has been made on the merits of the Union's application would signal that the Board has pre-determined the legality of the City's lockout; would injure the City's reputation, and would give credence to the unproven allegations of the Union. Furthermore, the City argued that granting the relief sought would have the practical effect of granting all the relief the Union could reasonably expect to receive in its main application. Finally, the City argued that the evidence in these proceedings did not demonstrate that the requisite urgency existed for this Board to intervene prior to a full hearing. In this regard, the City noted that the Union did not raise any concern with the City about LRB File No. 079-14 on September 18, 2014, when the City served its lockout notice on the Union; or on September 20, 2014, when the Union's members were locked; or on September 22, 2014, when Union officials spoke at the special meeting of City Council. The City argued that, if the application of the statutory freeze was sufficient urgency (i.e.: to warrant interim injunctive relief), the Union would have mentioned its concerns to the City much earlier than it did.

[37] For the foregoing reasons, the City asked that the Union's application for interim relief be dismissed and that no injunction relief be granted until such time as a hearing could be

conducted into the Union's allegations. Counsel on behalf of the City filed a detailed written brief of law, which we found to be helpful.

Analysis:

[38] This Board's authority to grant interim remedial relief is now found in s. 6-103(2)(d) of *The Saskatchewan Employment Act*. This provision is essentially the same as s. 5.3 of the previous *Trade Union Act* (now repealed). Section 5.3 was added to *The Trade Union Act* in 1994 to clarify that this Board has the authority to grant interim remedial relief prior to a full hearing in a matter before the Board. The legislative purpose and the policy restrictions associated with this new authority were outlined in several decisions of this Board, including *United Food and Commercial Workers, Local 1400 v. Tropical Inn*, [1998] Sask. L.R.B.R. 218, LRB File Nos. 374-97, 375-97 & 376-97; and *Canadian Union of Public Employees v. Del Enterprises (St. Anne's Christian Centre)*, [2004] Sask. L.R.B.R. 391, 2004 CanLII 65596 (SK LRB), LRB File Nos. 087-04 to 092-04. A more recent articulation may be found in this Board's decision in *Saskatchewan Government and General Employees' Union v. The Government of Saskatchewan*, 2010 CanLII (SK LRB) 81339, LRB File No. 150-10, wherein the Board made the following observations with respect to the application of s. 5.3 of the *Act*:

> ***[30]*** *Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Board utilizes a two-part test to guide in its analysis: (1) whether the main application raises an arguable case of a potential violation under the Act; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Property Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn), [1999] Sask. L.R.B.R. 190, LRB File No. 131-99. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668, LRB File No. 083-10. As with any discretionary authority under the Act, the exercise of the Board's authority to grant interim or injunctive relief must be based on a sound labour relations footing in light of both the broad objectives of the Act and the specific objectives of the section allegedly offended.*
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> ***[31]*** *In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strength or*

> *weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case". See: Re: Regina Inn, supra. See also: Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre, 2010 CanLII 42668, LRB File No. 083-10. The Board has also used terms like whether or not the applicant is able to demonstrate that a "fair and reasonable" question exists (which should be determined after a full hearing on the merits) to describe this portion of the two-part test. See: Re: Macdonalds Consolidated, supra. Simply put, an applicant seeking interim relief need not demonstrate a probably violation or contravention of the Act as long as the main application reasonably demonstrates more than a remote or tenuous possibility.*
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> ***[32]*** *The second part of the test – balance of convenience - is an adaptation of the civil irreparable harm criteria to the labour relations arena. See: Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suite Hotel (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00. In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy. See: Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership, [2000] Sask. L.R.B.R. 223, LRB File No. 079-00. The Board will also balance the relative labour relations harm that is anticipated to occur prior to the hearing of the main application without intervention by the Board compared to the harm that could result should a remedy be granted. See: Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Regina Exhibition Association Limited, et. al., [1997] Sask. L.R.B.R. 667, LRB File No. 266-97; United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Con-Force Structures Limited, [1999] Sask. L.R.B.R. 599, LRB File No. 248-99; and International Association of Fire Fighters, Local 1318 v. South Saskatchewan 911, [2001] Sask. L.R.B.R. 97, LRB File No. 037-01. In assessing the relative labour relations harm, the Board is particularly sensitive to the potential for irreparable or non-compensable harm. See: Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc., [2000] Sask. L.R.B.R. 219, LRB File No. 076-00.*
>
> ***[33]*** *In addition, the Board had enunciated certain policy restrictions on when interim relief should be granted (or rather should not be granted). For example, the Board has stated that the relief sought may not be granted were doing so would have the practical effect of granting what the applicant might hope to obtain on the main application. See: Tai Wan Pork Inc., supra.*
>
> ***[34]*** *While the Board uses a two-part test to aid in its consideration (and for ease of reference), each application for interim relief involves a matrix of considerations involving the factual circumstances of the application, the general goals of the Act, the policy objectives of the particular provision alleged to have been violated, and the nature of the relief being sought.*

[39] In our opinion, the legislative purpose and the policy restrictions associated with the exercise of the discretion set forth in s. 6-103(2)(d) are the same as that which was articulated by this Board in the *Government of Saskatchewan* case, *supra*. Simply put, the Board's authority to grant interim relief, the factors we take into consideration on interim applications, and the test employed in exercising our discretion have remained essentially

unchanged following the repeal of *The Trade Union* Act and the proclamation of *The Saskatchewan Employment Act*.

[40] We begin our analysis by examining the legislative objective of the provision that is alleged to have been violated; in this case, s. 6-62(1)(l)(i) of *The Saskatchewan Employment Act*. This provision prevents employers from engaging in certain industrial actions (including declaring a lockout or making unilateral changes in the terms and working conditions for employees) while an application is pending before this Board. Concomitant prohibitions restrain the actions of trade unions when an employer is pursuing its rights before the Board. These restrictions are commonly referred to as the "application pending" statutory freeze. There are many restrictions on the rights of parties in an organized workplace to engage in strikes or lockouts. In the case of the "application pending" statutory freeze, these restrictions are about protecting the integrity of the Board's processes after we have begun considering an application.

[41] As we have noted, this Board has already rendered its decision in the Union's main application, being LRB File No. 210-14. In light of our determinations with respect to that application, the first part of our analysis is redundant. We need not state anything further than we were satisfied when we heard the Union's interim application that the Union's material demonstrated an arguable case that a violation of the *Act* had occurred and/or was occurring. As we have noted, in considering interim applications, we do not place too fine a distinction on the relative strength or weakness of the main application provided the applicant's material demonstrates at least an arguable case. In LRB File No. 210-14, the Union asserted that the City's recent industrial actions were in contravention of the "application pending" statutory freeze. The City denied that any applications were "pending" at any relevant time or that, if an application was pending, it was not the kind of application necessary to trigger the statutory freeze. However, the City was unable to point to any jurisprudence of this Board wherein this specific fact situation had previously arisen and these questions were previously answered by the Board. Nor could the City point to a fatal flaw in the Union's application.

[42] As stated, exigency is a necessary component of an interim application. Simply put, interim applications are reserved for circumstances where action is **required** by the Board for sound labour relations reasons. Typically, we look for the potential that serious or irreparable harm may occur if action is not taken prior to a full hearing of a pending application. In doing so, it is recognized that the Board makes a concerted effort to hear its applications on a timely basis

and that there are not usually long delays in having an application heard by the Board. In addition, the Board has the option, as we did in this case, of ordering an expedited hearing.

[43] Having considered the evidence and the argument of the parties, we were satisfied that a non-trivial (if not reasonable) potential existed for irreparable harm to occur if the City were to implement changes to the Pension Plan for members of the Union. As is typically the case in interim applications, the relevant facts were in dispute and we were not in a position to weigh conflicting evidence. Nonetheless, we were satisfied that the changes to the City's Pension Plan that were approved by City Council on September 22, 2014 were made without the consent of the Union. We were also satisfied based on the evidence before us that the implementation of these changes, or any other changes to that Pension Plan that might be approved by City Council prior to a hearing in the Union's application, could result in irreparable harm to members of the Union. Because of our view as to the potential for irreparable harm associated with changes to the City's Pension Plan, we granted the Order we did.

[44] On the other hand, we were not satisfied that it was necessary or appropriate for this Board to enjoin the City's lockout at that time. The primary reason for this conclusion was our view that the majority of harm that would be suffered by the Union and its members pending a hearing would be compensable by an award of damages if the City's lockout was subsequently determined to be unlawful. We were aware that some members of the Union might experience non-compensable harm, including disparity in seniority between employees deemed to be essential and those subject to the lockout. However, we were not satisfied that these non-compensable consequences, if they occurred, represented the kind of exigency that is necessary to justify our intervention prior to a hearing. Because of our view that the majority of harm that could potentially be suffered by the Union and its members would be compensable, in our opinion, the requisite exigency did not exist to justify an interim injunction of the City's lockout at that time.

[45] It was our view that the facts in these proceedings were distinguishable from the facts before the Board in *Mosaic Potash Colonsay ULC v. United Steelworkers Union, Local 7656, supra*. In the case of a "wildcat" strike, the harm suffered by an employer in terms of opportunity cost and lost productivity is typically non-compensable. Unlike the damages suffered by employees who are locked out by their employer, it is very difficult to quantify the injury suffered by an employer in the case of a "wildcat" strike, let alone for this Board to order

damages in compensation for those losses. Secondly, the Board in the *Mosaic Potash* case was dealing with a strike during the term of a collective agreement. In the present application, the collective agreement between the parties had expired. The difference being; that strikes and lockouts are prohibited during the term of a collective agreement; however, upon the expiration of a collective agreement, strikes and lockouts become lawful, albeit regulated by statute. Because of this distinction, we were not satisfied that the City's actions, even if those actions were subsequently found to be contrary to the *Act*, were analogous to a "wildcat" strike. For these reasons, we found the *Mosaic Potash* case to be distinguishable on its facts.

[46] Finally, we were also not satisfied that the general disruption in the city caused by the lockout or the frustration experienced by transit users or the injury that may result in the public's perception of the transit system were factors relevant to our determination. While these may well have been important considerations for the parties, for the public, and for transit users, we were not satisfied that they ought to have a significant bearing on our determination. In our opinion, this Board's determinations must be based on the labour relations in the workplace and, in particular, on our view as to whether or not serious or irreparable harm might be experienced by either party in the period before we are able to make a final determination into the Union's allegations.

[47] Having considered the evidence available to us at that time, together with the fulsome argument presented on behalf of the parties, we were not persuaded that it was necessary or appropriate for this Board to enjoin the City's lockout prior to our hearing into the Union's allegations in LRB File No. 210-14.

[48] Board members Don Ewart and Dennis Perrin concur with these Reasons for Decision.

DATED at Regina, Saskatchewan, this 29th day of October, 2014.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson