Saskatchewan
Labour Relations Board

**UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND THE PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA LOCAL 179, Applicant v. MODERN NIAGARA WESTERN INC., Respondent**

LRB File No. 089-15; January 13, 2016
Chairperson, Kenneth G. Love, Q.C.; Members: Jim Holmes and Allan Parenteau

For the Applicant Union Crystal L. Norbeck
For the Respondent Employer: Kevin C. Wilson, Q.C.

**Acquisition of Bargaining Rights** – Union applies to the Board to be certified to represent employees – Employer objects to application for certification based upon a Memorandum of Understanding between the Employer and the Union in which the Union agrees not to apply for bargaining rights during the term of the Agreement and for a (6) six month period thereafter.

**Acquisition of Bargaining Rights** – Employer objects to application for certification based upon a Memorandum of Agreement wherein the Union agrees not to apply for certification, but to supply union members to perform work. Employer argues that the Union should be estopped from making the application and that it constitutes an abuse of the Board's processes.

**Acquisition of Bargaining Rights** – Union applies for certification in the face of an agreement not to seek representational rights during the term of a Memorandum of Agreement between Union and Employer. The Union argues that the Board has no jurisdiction with respect to the dispute.

**Jurisdiction** – Board reviews its jurisdiction with respect to the dispute – Board finds that the essential character of the dispute is with respect to an application for certification – which is within its jurisdiction.

**Acquisition of Bargaining Rights** – Board reviews jurisprudence from B.C. Labour Relations Board related to estoppel and abuse of Board process – finds that application for certification in face of agreement not to make application must be dismissed.

## REASONS FOR DECISION

**Background:**

**[1]** **Kenneth G. Love, Q.C., Chairperson:** The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 179 (the "Union") applied to be certified to represent employees of Modern Niagara Western Inc. (the "Employer"). In its Reply, the Employer challenged the application on the grounds that the Union had entered into a Memorandum of Agreement ("MOA") with it on June 17, 2014, wherein the Union agreed that *inter alia*, it would not seek to apply for certification to represent the employees of the Employer during the currency of the MOA and for a period of six (6) months following its expiry. That MOA was still in effect at the time of the application by the Union.

**[2]** The Employer asked the Board to consider a preliminary question with respect to the MOA and its impact on the application for certification. The Employer argued that the MOA precluded a certification being granted to the Union. The Union denied that the MOA had any such effect and argued that the Board had no jurisdiction with respect to the MOA and that the rights of employees to organize should be respected by the Board.

**[3]** These reasons are in respect of the Employer's application to have the application for certification dismissed by the Board.

**Facts:**

**[4]** The Board heard evidence only from a representative of the Employer, Mr. Robert Silberstein, who is an officer and director of the Employer. The Union chose not to lead any evidence with respect to this preliminary question.

**[5]** Mr. Silberstein testified that the Employer was contacted in 2012 & 2013 by a national vice-president of the Union to see if the Employer was interested in working together with respect to the conduct of business in Saskatchewan by the Employer with Union workers. At that time the discussions were not fruitful, although Employer representatives did meet with the Union to discuss how a relationship might work.

**[6]** In March of 2014, Mr. Larry Cann from the Union approached Mr. Silberstein directly and, through a series of telephone and email discussions, the parties agreed that they might be able to work together in some way and began serious discussions. On March 31, 2014, the Union provided a draft MOA to the Employer by email from Mr. Troy Knipple, the Business Manager for the Union.

**[7]** On May 19, 2014 Mr. Silberstein responded to Mr. Brad McAninch of the Union regarding the draft MOA and suggesting some modifications to that agreement. A revised draft agreement was forwarded to Mr. Silberstein by Mr. Knipple on June 17, 2014 with the message, "I appreciate the opportunity and assure you Modern Niagara will have UA Local 179's full support, and that we are going to succeed working together in Saskatchewan". That draft was acceptable to the Employer and was executed by the parties on June 17, 2014. Mr. Knipple signed on behalf of the Union and Mr. Silberstein signed on behalf of the Employer. A copy of the executed MOA is attached for reference as Schedule "A" to these Reasons.

**[8]** The Employer became involved in two (2) commercial construction projects in Saskatchewan, being the construction of the new football stadium in Regina and an office tower project (known as AG Place or Hill Tower IV). Later, the company requested permission, in accordance with the MOA, to add an industrial project at the Jansen Potash Mine site, to the projects covered by the Agreement.

**[9]** Mr. Silberstein testified that while the Union was able to supply workers for the projects, often those workers would not have commercial experience. Those employees were normally industrial plumbers or pipefitters whose skill sets were different from those employed by commercial plumbers and pipefitters. He noted as well that there were workmanship and productivity issues in respect of the AG Place project. Mr. Silberstein indicated that the foreman supplied for that project had to be replaced.

**[10]** On May 12, 2015, Mr. Silberstein and other employer reps came to meet with the Union. He testified that he thought the purpose of the meeting was to discuss how the relationship was going. However, at the meeting, he was advised that the Union was getting pressure and that the Union did not wish to continue under the MOA.

**[11]** Mr. Silberstein later received a voicemail message from Mr. Bill Peters, the new Business Manager for the Union, to advise him that the Union would be filing an application for

certification. That application was filed with the Board on May 13, 2015 and had been sworn by Mr. Landon Mohl of the Union on May 7, 2015.

**Relevant statutory provision:**

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

> ***6-9****(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.*
>
> *(2) When applying pursuant to subsection (1), a union shall:*
>
> *(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and*
>
> *(b) file with the board evidence of each employee's support that meets the prescribed requirements.*
>
> . . .
>
> ***General powers and duties of board***
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> ***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.*
>
> . . .
>
> ***Power to rescind certification order obtained by fraud***
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> ***6-109****(1) If the board has made a certification order, any of the following who allege that the order was obtained by fraud may apply to the board at any time to rescind the order:*
>
> *(a) any employee in the bargaining unit;*
>
> *(b) the employer;*
>
> *(c) any union claiming to represent any employees in the bargaining unit.*
>
> *(2) On an application pursuant to subsection (1) and if it is satisfied that the order was obtained by fraud, the board shall rescind the order.*
>
> *(3) No person shall take part in, aid, abet, counsel or procure the obtaining by fraud of an order mentioned in subsection (1).*

**Employer's arguments:**

**[13]** The Employer provided a written Brief and case authorities which we have reviewed and found helpful. The Employer argued that the certification application by the Union should be barred since the Union is precluded from making such an application under the terms of the MOA. It argued that the Union was permitted to enter into agreements such as the MOA on behalf of its members. Furthermore, it argued that the Union can agree to delay a certification application. In support of its position, the Employer cited *Seymour, Building Systems Co. and UBJA, 26 Locals*[1]*, Speers Construction Ltd. v. International Brotherhood of Electrical Workers, Local 993*[2] and *R. Coutts Construction Ltd. and UBJA 27 Locals*[3].

**[14]** The Employer also argued that the MOA provided employees with better terms and conditions of employment than *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the "*Act*") and was therefore of full force and effect. The MOA, the Employer argued, incorporated by reference, the Provincial Utility Core Agreement which was the Collective Bargaining Agreement under which the Union operated throughout the Province. In support, the Employer cited *Regina (City) v. Saskatchewan (Minister of Labour)*[4] and *Canadian Co-operative Implements Ltd. v. USWA Local 3960*[5].

**[15]** The Employer also argued that the equitable principles of estoppel and abuse of process should be invoked to prevent the Union from applying for certification. It argued that the Employer had entered into the MOA with the intention of creating a legal relationship with the Union, that the Employer had relied upon the MOA and obtained its labour though the Union rather than hiring non-union employees to complete the work. It argued that this reliance satisfied the tests for estoppel to be applied.

**[16]** In respect of abuse of process, the Employer cited the decision of Richards J.A. (as he was then) in *Saskatchewan Beach (Resort Village) v. Collins*[6], *University Health Network and ONA (CM-34)*[7] and *Toronto (City) v. C.U.P.E., Local 79*[8].

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[1] [1989] Carswell BC 2793
[2] BCLRB Ref 229/84 decision dated September 20, 1984 per Wayne Moore, Vice-chair
[3] [1982 Carswell BC 3521
[4] [1994] SJ No. 140 , [1993] CanLII6720 SKQB
[5] [1984] Carswell Man 234, 29 Man. R. (2d) 198, 84 C.L.L.C. 14064
[6] [2013] SKCA 12 at paragraph 30 (CanLII)
[7] [2015] 254 LAC 4th 161 (ONT Arb)
[8] [2003] 3 S.C.R. 77, 2003 SCC 63 (CanLII)

**[17]** The Employer argued that the doctrine of clean hands should apply in this case providing that the Union does not come to the certification application with clean hands as a result of its breach of the MOA. In support, the Employer cited numerous authorities from this Board and from other Boards in Canada where the clean hands principle had been invoked.

**[18]** The Employer also argued that the Board had jurisdiction to provide the remedy that it sought under the Board's ancilliary or incidental authority given to it pursuant to Section 6-103 of the *SEA.*

**Union's arguments:**

**[19]** The Union made oral argument and provided the Board with case authorities which we have reviewed. The Union argued that the Board had no jurisdiction to make the order requested by the Employer and that any remedy regarding a breach of the MOA should be resolved by the Courts of Saskatchewan. In support, it cited *Construction General Labourers, Rock and Tunnel Workers, Local 1208 v. Provincial Paving Ltd.*[9] and *International Brotherhood of Electrical Workers, Local 2038 v. JLB Electric Ltd*.[10]

**[20]** The Union also argued that to grant the remedy sought by the Employer would amount to a denial of the freedom of employees to be represented by a union of their choice as enshrined in the *SEA* and *The Canadian Charter of Rights and Freedoms*. The Union argued that a private dispute should not override the rights granted to employees to organize and form trade unions. In support the Union cited the Ontario Labour Relations Board decision in *Bakery and Confectionery Workers' International Union of America, Local 426 v. Christie, Brown & Company Limited et al.*[11]

**[21]**

**Analysis:**

**Does the Board have jurisdiction to deal with the Question raised by the Employer?**

**[22]** This Board does not enjoy the original jurisdiction enjoyed by the superior Courts of this Province. The Board's jurisdiction is limited by the boundries of its founding legislation,

[9] [1994] N.J. No. 221, 122 Nfld & P.E.I.R. 51
[10] LRB file Nos. 154-15, 159-15, 160-15, 161-15 & 218-15, decision dated December 11, 2015.
[11] [1975] Carswell Ont 695

which is now Part VI of the *SEA*. Similarly, Section 6-103 does not cloak the Board with any extraordinary powers or jurisdiction similar to that enjoyed by the superior Courts.

**[23]** The limits on the ancilliary and incidental authority granted to the Board was described by Mr. Justice Cameron in *Burkart et al. v. Dairy Producers Co-operative Ltd.*[12] when the Court was considering the predecessor section to Section 6-103 which was Section 42 of *The Trade Union Act*[13]. At paragraphs [63] to [71] the Court says:

> *[63] Section 42, including the provision in emphasis, is virtually identical to s. 121 of the Canada Labour Code, R.S.C. 1970, c. L-1. Section 121 was considered by the Supreme Court of Canada in Canadian Broadcasting Corporation v. Le Syndicat des Employes de Production du Québec et L'Acadie C.L.R.B., 1984 CanLII 26 (SCC), [1984] 2 S.C.R. 412; 55 N.R. 321.*
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> *[64] There, the Canada Labour Relations Board, having found that a concerted refusal by production employees of the C.B.C. to work overtime constituted an unlawful strike within the meaning of the Code, went on to order that the Union and the C.B.C. submit the underlying matter in dispute -- the payment of overtime -- to arbitration. While the Board was not expressly empowered by the Code to so order, s. 121 was said, on review, to allow for orders of the sort on the ground they were conducive to re-establishing good relations between the parties, that being among the general objects of the Act, according to its preamble, which the Board was to attain. The argument was rejected in both the Federal Court of Appeal and the Supreme Court as taking the provision too far.*
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> *[65] In delivering the judgment of the Supreme Court, Beetz, J. (at p. 432), said this:*
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> > *"Interpretation of s. 121 of the Code is not facilitated by its loose wording. Nonetheless, however liberal a construction it should be given, it cannot be read, as Pratte, J., properly observed, so as to render unnecessary the other provisions of the Code including ss. 183 and 183.1(1)(a), which set forth the Board's powers. This would be the result of the argument made by counsel for the Board. By rendering unnecessary the other provisions setting forth the Board's powers, that proposition not only infringes the rules of interpretation but at the same time eliminates the limitations inherent in those provisions and is contrary to the intent of the legislator who enacted them. The interpretation proposed by counsel for the Board has even more extreme consequences, which counsel for the Syndicat correctly described as follows:*
> >
> > > *[Translation] '… adopting the argument made by counsel for the Board in their submission as to the powers conferred on the Board by s. 121 of the Canada Labour Code in conjunction with the preamble to Part V of the said Code would amount to a recognition that the Board has complete power and authority in*

[12] [1990] CanLII 7774 (SKCA)
[13] R.S.S. 1978 c. T-17

> *the field of labour relations in Canada (except for powers specifically conferred on other bodies or jurisdictions), even powers which the legislator has not conferred on it, and make the said preamble a source of power and authority.'*
>
> *The legislator intended that the Board's powers should be extensive; he did not intend that they should be practically unlimited.*
>
> *It is quite possible that s. 121 covers only the powers necessary to perform the tasks expressly conferred on the Board by the Code, as Pratte, J., indicated. Nevertheless, I consider that even if it covers autonomous or principal powers, like that of ordering a reference to arbitration, and not merely incidental or collateral powers, it cannot cover autonomous powers designed to remedy situations which the Code has dealt with elsewhere, and for which it has prescribed specific powers, as is the case with unlawful strikes. Here, the legislator has not only specified the principal powers of the Board in s. 182, but its collateral powers as well in s. 183.1. These two sections contain an exhaustive description of the Board's authority over unlawful strikes and cover it completely.*

*[66] Taking the scope of s. 42 to be thus limited, it will be seen that even then -- in the context and to the extent we are here concerned with it -- the provision could be taken as conferring the power at issue without exceeding the scope of the section. It is not as though the section, should one construe it to endow the Board with such power, would render any of the Board's s. 5 powers unnecessary; or would confer "practically unlimited" power on the Board to do anything consistent with achieving the objects of the Act, however general; or would bestow upon the Board an autonomous or principal power as distinct from a merely incidental or collateral power. That is unclear without elaboration. Instead, the section so construed would merely supplement the Board's s. 5(e) remedial power enabling it to more effectively perform its duties and attain the specific and obvious objects of s. 11(1)(m) and (j). It will be recalled that these subsections respectively render it un unfair labour practice for an employer to unilaterally alter rates of pay, hours of work, or other conditions of employment where no collective bargaining agreement is in force, and to do so, or to "threaten" to do so, while any application is pending before the Board.*

*[67] Nor can we think of any good reason to suppose s. 5 is exhaustive to the point of excluding a draw upon s. 42 for such supplementary power. Indeed, having regard for those considerations which have already been mentioned, and some which have not, there is every reason for supposing otherwise.*

*[68] In addition to what has already been said, it might be noted that construing the provisions to embrace the power at issue would comport with the general direction in this field of law -- which is increasingly to leave matters governed by labour relations legislated to the tribunals created for such purposes. See, for example, St. Anne Nackawic; and most recently Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057 et al. (1990), 1990 CanLII 110 (SCC), 109 N.R. 321; 66 Man. R.(2d) 81.*

*[69] Finally, it is perhaps worth noting that so far as s. 42 endows the Board with such powers "as may be incidental" to achieving the objects of the Act, the section is reminiscent of s. 15 of the Court of Appeal Act, R.S.S. 1978, c. C-42, pursuant to which power the judges of this Court frequently issue orders preserving or even altering the status quo pending the final determination of matters before it.*

> *[70] Viewed in the light of these many considerations, it appears to us, as a matter of law, that the Board could have commenced hearing the applications, made a tentative assessment of their legal and evidentiary merits, and issued an order, if convinced it was just and convenient to do so, requiring the company to refrain from acting on its decision pending a final determination of the matter*
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> *[71] Returning, then, to the principal issue, it is our view, given the scheme of the Act, the nature of the relationship between the parties, the character of the subject matter at issue, and the adjudicative and remedial powers of the Labour Relations Board, that the legislature intended to vest the Board with exclusive jurisdiction in relation to the substantive component of the cause of action, leaving the Court with no role in the exercise of its ordinary jurisdiction, (as distinct from its supervisory powers) except for that provided for by s. 14, namely the enforcement of Board orders. It follows that the Court did not have jurisdiction to entertain the unions' cause of action and that there was no foundation for the grant of injunctive relief.*

**[24]** In the *Dairy Producers* case, the Court of Appeal was dealing with an appeal from a decision of the Court of Queen's Bench wherein that Court granted an injunction enjoining a party to a collective bargaining relationship from engaging in conduct alleged to be an unfair labour practice contrary to *The Trade Union Act,* until such time as the Board was able to consider the matter. On the reasoning set out above, the Court of Appeal reversed that decision in determining that the Court had no role in the exercise of the functions reserved by the legislature, to the Board.

**[25]** Mr. Justice Wakeling went on at paragraph [103] to deal with a then recent case from the Supreme Court of Canada which he cited in support of his conclusion that the Court had no role to play. He says:

> *[103] Since this case was argued we have the added benefit of the judgment of Madam Justice L'Heureux-Dubé given for the Court in Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057 1990 CanLII 110 (SCC), 109 N.R. 321; 66 Man. R. 81 (S.C.C.), in which the following comment found at p. 354 appears to be supportive of my previously stated position.*
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> > *… There is no original jurisdiction in the ordinary courts to decide the matter, only the ability to review Board decisions in the very limited parameters contemplated by the privative clause.*
> >
> > *"For these reasons I would conclude that the Manitoba Court of Queen's Bench, in entertaining the respondent's claim, improperly assumed jurisdiction in this case.*

**[26]** *Gendron* dealt with a question of whether or not the superior Courts had any jurisdiction with respect to an allegation of a breach of the duty of fair representation which the Supreme Court had established in its decision in *Canadian Merchant Service Guild v. Gagnon*[14]. In that decision, Madam Justice L'Heureux-Dube, delivering the decision of the Court, said with respect to the codified provision in the *Canada Labour Code* dealing with the duty of fair representation:

> *While the legislation does not expressly provide that the Board has exclusive jurisdiction, it indicates that Parliament envisioned a fairly autonomous and specialized Board whose decisions and orders were to be accorded deference by the ordinary courts, subject only to review within the confines of the privative clause. As noted earlier, Parliament has provided the duty, the procedure for adjudicating an alleged breach, a wide array of remedies and a privative clause protecting the Board. It can be therefore assumed to have intended that the ordinary courts would have but a small role if any to play in the determination of disputes covered by the statute. An analysis of the legislative scheme would not seem to permit any alternative as any other interpretation would endanger the special role of the Labour Board and the policy underlying the Code. An examination of this particular legislation and its policy objectives would not seem to permit an action in the ordinary courts for a breach of the statutory duty. That, of course, may not be the case for other legislation differently drafted.*
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> *In his text, Canadian Labour Law, Adams examines the rationale underlying the deference accorded the decisions and jurisdiction of labour boards and states at p. 154:*
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> > *Such privative clauses [contained in most legislation which establishes labour relations boards] reflect the rationale for administrative agencies and the importance of finality and speed in labour relations dispute resolution. While courts of superior jurisdiction have historically assumed the duty of supervising tribunals of inferior jurisdiction with the purpose of maintaining the integrity of legal rules, the distinctive characteristics of labour relations warrant a high degree of judicial restraint and self-control.*
> >
> > *. . . Labour relations boards represent greater specialization and expertise. And because of their relative familiarity with the problems before them, labour boards are better able to fashion and monitor workable new policies. Activity before them is also more informal, less costly and expeditious.*

**[27]** Madam Justice L'Heureux-Dube also quoted her dissenting decision in *TWU v. British Columbia Telephone Co.*[15], wherein she stated the rationale for deference to specialized tribunals such as labour relations boards "…has to do with the Court's deference to the "expertise" of statutorily established and administered tribunals. In the field of labour law, the

[14] [1984] CanLII 18 (SCC), [1984] 1 S.C.R. 509
[15] [1988] CanLII 14 (SCC), [1988] 2 S.C.R. 564

concentration of decision making power among labour tribunals is designed for efficiency, and is tailored to the development of a coherent labour policy".

**[28]** Madam Justice L'Heureux-Dube was careful to point out any deference to be shown to statutory tribunals would not prevail in the face of a jurisdictional error by that tribunal. However, in conclusion, she says:

> *It is clear then that this Court has enunciated a principle of deference, not only to decision-making structures under the collective agreement but as well to structures set up by labour legislation and in general, to specialized tribunals operating within their fields of expertise. When the relevant statute requires collective agreements to provide for the final and binding settlement of disputes, it becomes difficult if not impossible to distinguish St. Anne, supra, and similarly reasoned cases on the basis that the issue in those cases concerned the relationship between contractual dispute resolution and the jurisdiction of the ordinary courts, not the relationship between statutory dispute resolution and the courts. The concern that recourse to the ordinary courts may jeopardize the comprehensive dispute resolution process contained in labour relations legislation is one that arises in this latter situation as well. Allowing parties to disputes which, by their very nature, are those contemplated and regulated by labour legislation, to have recourse to the ordinary courts would fly in the face of the demonstrated intention of Parliament to provide an exclusive and comprehensive mechanism for labour dispute resolution, particularly in the context of the present case.*
>
> *I concluded earlier that the common law duty of fair representation was by necessary implication ousted in situations where the statute applies. As the statute is applicable in the present case, the respondent in this case cannot base his claim on the common law but must instead have recourse to the statute. For the above reasons, I would also conclude that the statutory duty owed the respondent was one that must first proceed to the decision-making structure assigned this task under the legislation, the Canada Labour Relations Board. There is no original jurisdiction in the ordinary courts to decide the matter, only the ability to review Board decisions in the very limited parameters contemplated by the privative clause.*
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> *For these reasons I would conclude that the Manitoba Court of Queen's Bench, in entertaining the respondent's claim, improperly assumed jurisdiction in this case.*

**[29]** Subsequent to these decisions, the Supreme Court brought down its decision in *Dunsmuir v. New Brunswick*[16], which decision it applied in *Canada (Citizenship and Immigration) v. Khosa*[17]. The Supreme Court, in *Khosa* restored the decision made by the Immigration Appeal Baord made the following statement at the outset of its Reasons, at paragraph [17]:

> *[17] This appeal provides a good illustration of why the adjustment made by Dunsmuir was timely. By switching the standard of review from patent unreasonableness to reasonableness simpliciter, the Federal Court of Appeal*

[16] [2008] SCC 9 (CanLII), [2008] S.C.R. 190
[17] [2009] SCC 12 (CanLII), [2009] 1 SCR 339

> *majority felt empowered to retry the case in important respects, even though the issues to be resolved had to do with immigration policy, not law. Clearly, the majority felt that the IAD disposition was unjust to Khosa. However, Parliament saw fit to confide that particular decision to the IAD, not to the judges.*

**[30]** The cases above show that the Courts are according administrative tribunals such as Labour Relations Boards deference with respect to decisions falling within their legislative mandate, and reviewing those decisions on a reasonableness standard. Nevertheless, in circumstances like the present fact situation, the lines remain fuzzy insofar as to whether this Board or the Courts have jurisdiction in respect of the matter. That determination is normally made on the basis of a determination of the essential character of the dispute. That test was set out by the Saskatchewan Court of Appeal in *Rodney McNairn v. U.A. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*[18].

**[31]** The question in *McNairn* was whether or not the Courts had jurisdiction to deal with an action in damages brought by Mr. McNairn against his union, which included allegations of breach of contract by the union for breaching the union hall rules governing the allocation of jobs among unemployed union workers. In that case, Mr. Justice Cameron, speaking for the Court says at paragraphs [23] to [27]:

> *[23] Since the question posits a choice between the jurisdiction of the Court of Queen's Bench and that of the Labour Relations Board, it invites comment on the relationship between the two. How is it that the Court rather than the Board, or the Board rather than the Court, might have jurisdiction to entertain Mr. McNairn's claim? And upon what basis does this fall to be resolved?*
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> *[24] The Queen's Bench Act, 1998 endows the Court of Queen's Bench, as the superior court of record in Saskatchewan, with all-embracing original jurisdiction in civil matters. Section 9 states: "The court has original jurisdiction throughout Saskatchewan, with full power and authority to consider, hear, try and determine actions and matters", including by definition all civil proceedings commenced by statement of claim. In addition to this express jurisdiction, the Court is possessed of inherent jurisdiction to entertain a civil cause of action. This emanates from the principle that if a right exists, the presumption is that there is a Court which can enforce it, and if no other mode of enforcing it is prescribed, that alone is sufficient to afford jurisdiction to the Court of Queen's Bench: Board v. Board, [1919] 2 W.W.R. 940; [1919] A.C. 956 (P.C.), affirming [1918] 2 W.W.R. 633 (Alta. C.A.).*
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> *[25] Although all-embracing, this jurisdiction of the Court is nevertheless subject to limit by other legislation within the constitutional competence of the Legislature and by common law principle restraining the exercise by the Court of its jurisdiction in some instances and in relation to some matters. These forms of limit*

[18] [2004] CanLII 57, (SKCA)

> *extend to most labour relations disputes, the resolution of which the Legislature, in enacting The Trade Union Act, committed to the Labour Relations Board to the implied exclusion of the Court of Queen's Bench: Noranda Mines Ltd. v. The Queen and The Saskatchewan Labour Relations Board, 1969 CanLII 104 (SCC), [1969] S.C.R. 898; St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219, 1986 CanLII 71 (SCC), [1986] 1 S.C.R. 704; Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057, 1990 CanLII 110 (SCC), [1990] 1 S.C.R. 1298; and Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929. In general, then, the Court lacks jurisdiction, or is restrained from exercising it, in relation to disputes arising out of collective bargaining agreements or the provisions of The Trade Union Act.*
>
> *[26] Even on this account of the relationship between the jurisdiction of the Court and the Board, it is sometimes difficult to tell where jurisdiction lies. A claim may be framed in tort so as to appear to lie within the jurisdiction of the Court, for example, yet be grounded in a provision of The Trade Union Act so as to lie within the jurisdiction of the Board, leaving behind uncertainty about where the claim is to be heard and determined. This was the case in Moldowan v. Saskatchewan Government Employee's Union et al. (1995), 1995 CanLII 3995 (SK CA), 126 D.L.R. (4th) 289 (Sask. C.A.) and Floyd v. University Faculty Association et al. (1996),1996 CanLII 5074 (SK CA), 148 Sask R. 315 (Sask. C.A.).*
>
> *[27] As these cases demonstrate, uncertainties of this nature fall to be resolved by examining the "essential character" of the dispute, having regard for its substance rather than its form. Thus in Floyd v. University Faculty Association et al., Bayda C.J. said this on behalf of the Court:*
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> > *[2] Our task then is to determine the "essential character" of the dispute between [the parties]. In going about our task we are not to concern ourselves with labels or with the manner in which the legal issues have been framed—in short with the packaging of the dispute. We must proceed on the basis of the facts surrounding the dispute. Given that this is an application to strike out the statement of claim, we must take our facts from the statement of claim and for the purposes of this application must accept as true the facts there pleaded.*

**[32]** In *McNairn*, the Court approached the issue by an analysis of whether the essential character of the dispute placed the matter within the jurisdiction of the Courts, or if it had been reserved to the jurisdiction of the Labour Relations Board by its governing legislation. In the *McNairn* case, the Court examined the Board's jurisdiction under then Sections 25.1 and 36.1 of *The Trade Union Act* and found that those provisions were not broad enough to encompass the dispute that Mr. McNairn had with his union.

**[33]** Mr. Justice Cameron also took notice of how the dispute had been framed by the parties. He noted that the dispute was framed in the context of contract and breach of contract. That framing is similar to what is presented in this case. The Employer says, in part, that the Union has breached its agreement wherein it agreed not to seek certification on behalf of the

employees. Where the issue as simple as that, there would, in our opinion, be no real issue in this case and jurisdiction would fall to Her Majesty's Courts.

**[34]** This Board thinks that the matter falls within the jurisdiction of the Board in that it is raised in an application for certification by the Union on behalf of its members. There is little doubt that the process of certifying unions to be the bargaining representative for employees of employers is a jurisdiction granted exclusively to the Board under its governing legislation.

**[35]** In this application by the Employer, the Board is not being asked to determine if the Union has breached its agreement with the Employer nor are we asked to determine what damages, if any, the Employer may or has suffered as a result of any breach. Rather, we are being asked by the Employer to apply long standing principles of equity in preventing the Union breaching its agreement by making the application for certification.

**[36]** The Board is bound to consider equity in its determination of matters before it. Since *Canadian Merchant Service Guild v. Gagnon*[19] and *Burkart et al. v. Dairy Producers Co-operative Ltd.*[20], it has been recognized that the Board is empowered to utilize equitable principles and remedies in the exercise of its jurisdiction.

**[37]** The dispute which is before this Board, in its essential character, does not deal with whether or not there has been a breach of the agreement between the parties and if and what, if any, damages would flow therefrom, but rather, it is a question of whether or not the Board should defer the application for certification, on equitable principles of estoppel, based on the terms of the agreement, or on other equitable principles related to the application for certification which is before the Board.

**[38]** The Board has full control over its practice and procedure with respect to applications which are brought before it. The Employer argued that and cited *Seymour, Building Systems Co. and UBJA, 26 Locals*[21]*, Speers Construction Ltd. v. International Brotherhood of Electrical Workers, Local 993*[22] and *R. Coutts Construction Ltd. and UBJA 27 Locals*[23].

**[39]** *Seymour* was cited in support of the Employer's position that the Union had the ability to enter into a binding contract to delay or prohibit certification. *Seymour* was a decision

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[19] [1984] CanLII 18 (SCC), [1984] 1 S.C.R. 509
[20] [1990] CanLII 7774 (SKCA)
[21] [1989] CarswellBC 2793
[22] BCLRB Ref 229/84 decision dated September 20, 1984 per Wayne Moore, Vice-chair

of the B.C. Industrial Relations Council. In that case, however, while acknowledging earlier decisions of the B.C. Industrial Relations Council on the point, the Counsel declined to grant the Employer's application based upon estoppel due to the failure of the Employer to establish both the agreement not to seek certification and that an estoppel by representation occurred.

**[40]** *Speers* was an earlier case from the Labour Relations Board of B.C. In that case, the Board found that an agreement had been made. The Board concluded, in its final paragraph of that decision, by saying:

> *…In the result, I am of the view that in the face of an agreement not to do so, the re-making of an application is an abuse of the process of the Board and accordingly the application should not be entertained. In light of my conclusion on this point, it is not necessary for me to decide the estoppel and Section 49 issues and I specifically refrain from doing so.*

**[41]** *Coutts* was decided by the B.C. Labour Relations Board prior to *Speers*. The facts in *Coutts* are somewhat similar to the facts in this case. In *Coutts*, the Union had agreed to provide union labour for a non-union project on a one-time basis. At paragraph 17, the Board says:

> *The panel is satisfied the, by his words and conduct, Beaulieu represented and led Coutts Construction to believe that, if it hired through the union hall for this particular job, the Carpenters would not rely on their strict legal rights under the Code and apply for certification. The panel is further satisfied that Coutts Construction hired carpenters through the hall in reliance on that representation and belief. In these circumstances, it would be inequitable for the Carpenters to renege on their agreement and obtain certification on the basis of members from the hiring hall employed by Coutts Construction on this project. The estoppel only relates to the application for certification arising out of union members employed on this particular project and does not operate to prevent the Carpenters from making an application for certification with respect to any future employment of carpenters by Coutts.*

**[42]** These comments are equally applicable to this case. Here, the Union by the MOA agreed that it would not seek to represent employees of the Employer during the term of the MOA and a six (6) month period thereafter. The Employer relied upon this representation and hired Union members to perform work on its behalf. As noted by the B.C. Board in *Coutts,* it would be both inequitable and an abuse of the Board's procedures to permit the certification application to proceed in these circumstances.

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[23] [1982] Carswell BC 3521

**[43]** The MOA in and of itself, as noted in *Coutts,* does not prevent an application for certification once the embargoed period has expired. Accordingly, the Board will not in these circumstances, make an order under Section 111(1)(m) or (n). However, any such application may not be made within the period during which the Union has agreed not to apply for certification in accordance with the MOA.

**[44]** *Coutts* also raised an issue with respect to consideration of an agreement between an employer and a trade union which adversely affected the efforts of a group of employees to obtain representation for collective bargaining. In *Coutts*, the Board was satisfied that the agreement did not have that effect.

**[45]** We have come to a similar conclusion with respect to the MOA. Members of the Union are not being denied representation as a result of the MOA. They are represented by and continue to be represented by the Union for collective bargaining. The terms of their employment are specified by the Provincial agreement covering the Plumber and Pipefitting trades which is incorporated by reference into the MOA. The Union members enjoy the same rights, benefits and privileges as other Union members working with certified contractors under that agreement. There is no advantage or disadvantage to Union members working for the Employer or for any other unionized employer under the Plumber and Pipefitting Provincial Agreement.

**[46]** For these reasons, we conclude that application is an abuse of the processes of the Board and that the Union is estopped from bringing the certification application in respect of the Employer. That application will, as a result of this decision, be dismissed. An appropriate order will accompany these reasons.

**[47]** This is a unanimous decision of the Board.

**DATED** at Regina, Saskatchewan, this **13th** day of **January, 2016**.

**LABOUR RELATIONS BOARD**

Kenneth G. Love, Q.C.
Chairperson

# Schedule A

Memorandum of Understanding

Between

United Association of Journeyman and Appreatices of the Plumbing and Pipefitting Industry of the United States and Canada Local 179,
(The Union)

and

Modern Niagara Western Inc.
(The Company)

This Memorandum of Understanding (MOU) sets forth the terms and understanding between the Union and the Company to work together on one or more projects to be designated by the Company under the *UA Local 179 Commercial Provincial Utility Core Agreement*.

**Background**
The United Association Local 179 is a multi-craft trade union that has been supplying journeyperson and apprentices in the piping trades industry in Saskatchewan to over 80 contractors since 1906. Modern Niagara is a unionized signatory contractor in other provinces in Canada but not in Saskatchewan.

**Purpose**
This MOU will enable the Union and the Company to work together on one or more trial projects with the intention of the Company becoming a certified union contractor with the Union in the Province of Saskatchewan.

The above goal will be accomplished by undertaking the following activities:

- The Union and the Company agree to taking no strike action or look out action for the duration of this MOU.
- The Union will supply skilled journeyperson and apprentice tradespeople to the Company to work on the project.
- The Company agrees to abide by the *UA Local 179 Commercial Provincial Utility Core Agreement* for the purposes of resolving disputes and grievances and to establish and maintain satisfactory work conditions, hours of work and salaries, for all Employees working under the provisions of this MOU.
- The Union agrees to uphold its *Standard for Excellence* and work with the Company to the best of its abilities to complete the job on time and on budget.
- The Company and the Union will strive to communicate at least weekly to ensure that there is an adequate supply of skilled labour and to resolve any issues or challenges that may arise.
- The Company and the Union will meet in person or by conference call monthly for the duration of the MOU to monitor productivity, budget, work schedule and other relevant issues relating to the successful completion of the project.
- Upon completion of the project the Company and the Union will meet in person to debrief the results of the project and the success of the Union to supply labour.

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**Reporting**
The Company and the Union will update each other in the monthly meetings on how the project is going in regards to budget, work schedule and the supplying of labour. The Company and the Union will conduct an evaluation meeting at the conclusion of this MOU to assess and measure the success of the project in regards to budget, work schedule and the supplying of labour. At the conclusion of the evaluation meeting a decision will be made by the Company as to whether Modern Niagara will become a signatory contractor with United Association Local 179 in the province of Saskatchewan.

**Funding**
This MOU is not a financial commitment between the Company and the Union and no financial compensation will be awarded directly to and from the Company or the Union as a result of this MOU.

**Duration**
This MOU is at-will and may be modified by mutual consent of authorized officials from United Association Local 179 and Modern Niagara. This MOU shall become effective upon signature by the authorized officials from the Union and the Company and will remain in effect for a period of 18 months from the date of signing unless modified or terminated by any one of the partners by mutual consent.

The Union agrees that it will not apply for certification of employees or take any other action, such as a common employer application, to have the Company designated as a Union Contractor either during the currency of the MOU or for 6 months after the expiry of the MOU.

The Parties agree that this MOU is intended to apply only to the projects designated by the Company and does not obligate the Company to be bound by any bargaining relationship with the Union or to be bound by any collective agreement negotiated by the Union in Saskatchewan.

**Contact Information:**

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Troy Knipple, Business Manager
United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 179
(The Union)

Date: 17-Dec-2014

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Robert Silberstein, President
Modern Niagara Western Inc.
(The Company)

Date: June 17, 2014

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