INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 119, Applicant v. CORNERSTONE CONTRACTORS LTD., WESTCOR SERVICES LIMITED, STEEPLEJACK INDUSTRIAL INSULATION LTD. and BROCK CANADA INC., Respondents, and CONSTRUCTION WORKERS UNION (CLAC), LOCAL 151, Intervenor

LRB File No. 126-15; January 12, 2016
Chairperson, Kenneth G. Love, Q.C.; Members: Greg Trew and Maurice Werezak

For the Applicant Union:	Mr. Greg Fingas
For the Respondents:	Mr. Larry Seiferling, Q.C. and Mr. Chris Lane
For the Intervenor:	Mr. Richard Steele and Mr. David DeGroot

Reconsideration of Board Decision – Union applies to Board to reconsider a decision wherein the Board declined to make a discretionary order declaring a common employer relationship between two (2) employers – Board considers arguments regarding reconsideration and determines that there is no reason to reconsider prior decision.

Reconsideration of Board Decision – Union applies under the historic criteria Nos. 4 and 6 adopted by the Board with respect to reconsideration of its decisions – Board reviews its prior jurisprudence that notes the two criteria relied upon are not often utilized in smaller jurisdictions as they are usually utilized to ensure consistency between decisions of different panels of a Board.

Reconsideration of Board Decision – Board reviews its previous jurisprudence – Board confirms that the Board will strictly review the arguments for reconsideration and that reconsideration is not an appeal from a decision of the Board, not a means to re-argue a case previously determined by the Board.

REASONS FOR DECISION

Background:

[1] Kenneth G. Love, Q.C., Chairperson: The International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 (the "Union") applies for reconsideration of

the Board's decision dated June 5, 2015[1] in which the Board determined not to issue a common employer declaration as requested by the Union. As a result of that decision, the Intervenor, the Construction Workers Union (CLAC), Local 151 (the "Intervenor") was certified[2] as a result of a vote by the employees of Cornerstone Contractors Ltd. ("Cornerstone") in support of being represented by the Intervenor.

[2] The application for reconsideration was submitted by the Union in reliance upon (2) two of the criteria established by this Board on which a decision may be reconsidered. Those factors were:

> *4. if the original decision turned on a conclusion of law or general policy under the code which law or policy was not properly interpreted by the original panel; or*
>
> *. . .*
>
> *6. if the original decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon, or otherwise change.*

Facts:

[3] There are no new facts alleged in this case. The underlying facts are as set out by the Board in its Reasons for Decision dated June 5, 2015[3].

Relevant statutory provision:

[4] Relevant statutory provisions are as follows:

> ***General powers and duties of board***
>
> ***6-103****(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*
>
> . . .
>
> ***6-104****(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*

[1] LRB File No. 309-13
[2] LRB File No. 272-13
[3] *Supra* Note 1

. . .

> *(f) rescinding or amending an order or decision of the board made pursuant to clause (b), (c), (d) or (e) or subsection (3), or amending a certification order or collective bargaining order in the circumstances set out in clause (g) or (h), notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of the order or decision is pending in any court;*
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> *(g) amending a board order if:*
>
> *(i) the employer and the union agree to the amendment; or*
>
> *(ii) in the opinion of the board, the amendment is necessary;*

Summary of the Union's arguments:

[5] The Union argued that the Board misapplied or misinterpreted its previous jurisprudence with respect to a common employer declaration. The Union argued that the focus the Board should have had was on the relationship between employers, which should not be impacted by other extraneous considerations.

[6] The Union argued that the common employer provisions of *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the "*Act*") were intended to protect bargaining rights against "double breasting", but acknowledged that the Board retained discretion as to whether or not to make such a declaration. The Union argued that the Board should not have exercised its discretion to not issue the declaration in this case.

[7] The Union also argued that the decision was precedential in nature and represented a drastic leap in precedent. It argued that the decision provided a radical new application of the Board's existing jurisprudence and sets an unexpected precedent on the question of whether one's assertion of bargaining rights through a common employer application is subordinate to rights claimed by another union.

[8] The Union argued that the Board declined to consider all of the factors relevant to the exercise of its jurisdiction and, in so doing, made that decision subject to the inchoate application by the Intervenor.

[9] The Union argued that the decision undercut the purpose and effect of the common employer provisions of the *SEA* which should not become a precedent without a focused exploration of its implications.

Summary of the Respondent Employers' arguments:

[10] The Respondent, Cornerstone, argued that the use of criteria 4 by the Applicant Union were of no assistance to it. It argued that the Board had, in its decision in *Remai Investments Corporation,*[4] limited the use of these criteria.

[11] The Respondent Employers argued that the Board had properly considered the necessary factors with respect to the issuance of a common employer declaration and that it properly exercised its discretion in not making the requested order. The Respondent Employers argued that there was nothing novel or unique in the approach taken by the Board.

[12] The Respondent Employers also argued that the Board's determination that wishes of the employees in the choice of their bargaining agent was in accordance with the basic underlying principles of the *SEA*. They argued that the Board would have erred if it failed to consider the employees wishes in the choice of their bargaining agent.

[13] The Respondent Employers argued that there was no factor, as alleged by the Union which "trumped" other considerations by the Board in the exercise of its discretion.

Summary of the Intervenor's arguments:

[14] The Intervenor argued that the Board cited proper authorities and properly interpreted those authorities. The Intervenor argued that the Board did not, as alleged by the Union, insert additional matters into its consideration of the common control issue. Nor, it argued further, did the Board fail to consider each of the factors that are required to be addressed when assessing the labour relations purpose issue.

[15] The Intervenor also argued that the Board followed its existing precedents and properly exercised its discretion in not making a common employer declaration.

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[4] [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93.

Analysis:

[16] The Board utilizes a (2) two part process in consideration of applications for reconsideration of its decisions. The first step on the road to reconsideration of a Board decision is for an applicant to demonstrate to the Board that its decision should be reconsidered based upon the factors utilized by the Board, which were adopted in its decision in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et a*l.[5]

[17] That decision outlined (6) six criteria upon which the Board would potentially reconsider its decision in a particular case. For an application to succeed, an applicant must convince the Board that the application satisfies on or more of these criteria. Those criteria are as follows:

> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
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> 2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
>
> 3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
>
> 4. *if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
>
> 5. *if the original decision is tainted by a breach of natural justice; or,*
>
> 6. *if the original decision is precedential and amounts to a significant policy adjudication which the Counsel may wish to refine, expand upon, or otherwise change.*

[18] The Board applies a stringent test in determining whether or not a reconsideration application should be allowed. In its decision in *Grain Services Union v. Saskatchewan Wheat Pool et al.*[6], the Board said at page 456:

> *A request for reconsideration is not an appeal or a hearing de novo, nor is it an opportunity to reargue a case, raise new arguments or present new evidence, but rather, it generally allows important policy issues to be addressed, such as*

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[5] *Supra* Note 4
[6] [2003] Sask. L.R.B.R. 454, LRB File No. 003-02

> *evidence to be presented that was not previously available, or errors to be corrected.*

[19] The reason why such a stringent test is applied by the Board is to accord a serious measure of finality to the decisions of the Board while affording a fulsome degree or flexibility to respond to exigencies of fact and circumstances which may mitigate against the continued governance of determinations earlier made.

[20] A reconsideration is not an appeal of a decision of the Board, nor is it an opportunity to re-argue the case from a revised perspective. In *Kennedy v. C.U.P.E., Local 3967,*[7] the Board made the following comments at paragraph [9]:

> *[9] The Board's authority and willingness to reconsider its prior decisions is often confused with a right of appeal. However, as Chairperson Bilson noted in the Remai Investment Corporation decision, and as this Board has confirmed in numerous decisions since then, the power to re-open a previous decision must be used sparingly and in a way that will not undermine the coherence and stability of the relationships the Board seeks to foster. In other words, while the Board has authority to reconsider its own decisions, doing so is neither a right of appeal nor an opportunity for an unsuccessful applicant to re-argue and/or re-litigate a failed application before the Board. See: Grain Services Union (ILWU – Canada) v. Saskatchewan Wheat Pool, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC Communications Inc., [2003] Sask. L.R.B.R. 454, LRB File No. 003-02; and Saskatchewan Government and General Employees' Union v. Government of Saskatchewan, [2011] CanLII 100993 (SK LRB), LRB File No. 005-11. This Board's willingness to reconsider its prior decision is founded in the periodic need for the Board to address important policy issues arising out of our jurisprudence and/or to avoid injustices. However, the Board must balance the need for policy refinement and error correction with the overarching need for finality and certainty in our decision-making process. As a result, both our approach to reconsideration applications and the criteria upon which we rely establish a high threshold for any applicant seeking to persuade this Board to review a previous decision.*

[21] Criteria 4 & 6 from *Remai* factors were discussed by the Board in that decision. In its discussion of each of the criterion, the Board said:

> *The fourth and sixth of these criteria reflect the concern of Council* [sic] *with an issue which is of less significance in smaller jurisdictions such as ours, the issue of consistency and coherent development with respect to the articulation of public policy. Where there are numerous panels struck to determine similar cases, the concern for maintaining a uniform approach on matters of principle understandably becomes acute.*

[7] [2015] CanLII 60883 (SKLRB)

[22] The Board made the following comment with respect to criterion 4 in its decision in *Wilson v. Construction Workers Union (CLAC), Local 151* at paragraph [19][8]:

> ***[19]*** *The Act requires that panels of the Board must consist of three members, at least one of whom must be the Chairperson or a Vice-Chairperson. Therefore, in Saskatchewan, the only conflict can be between decisions made by panels composed of those chaired by the Chairperson versus those composed of members chaired by a Vice-Chairperson. This limits considerably any conflicts that may arise.*

[23] This rationale is applicable in this case as well. While the Applicant argued that the Board had misapplied its previous jurisprudence, that is not the underlying rationale for this criteria. Rather, it is intended to ensure consistency between decisions issued by various panels of the Board, something that may occur in larger jurisdictions where there a numerous panels dealing with similar matters and in respect of which, the Board wishes to ensure consistency.

[24] We can see no reason to reconsider the decision on this criteria. There is no conflict between decisions made by panels of the Board that the Board needs to address to achieve consistency.

[25] Likewise, there is no reason to review the decision on the basis of criterion 6. We do not agree with the Applicant that the decision reflects a policy shift in the magnitude argued by the Applicant. In our opinion, the decision does not require any further refinement, expansion or change.

[26] For these reasons, in our opinion, the application fails to satisfy either of the criteria for reconsideration and must therefore be dismissed. An appropriate Order will accompany these reasons.

[8] [2013] CanLII 81262 (SKLRB)

[27] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **12th** day of **January, 2015.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson