The Labour Relations Board
Saskatchewan

UNITED STEELWORKERS, LOCAL 7656, Applicant v MOSAIC POTASH COLONSAY ULC, Respondent

LRB File Nos. 132-16 & 146-16; November 16, 2016
Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: Duane Siemens and Laura Sommervill

For the Applicant Union: Gary L. Bainbridge
For the Respondent Employer: Robert Frost-Hinz

Unfair Labour Practice – Timeliness – Union filed Unfair Labour Practice application alleging the Employer failed to bargain in good faith by unilaterally creating the position of Safety & Environment Technician (Safety) and moving it out-of-scope – Employer challenges jurisdiction of Board to consider application because it was filed outside time limit set out in *The Saskatchewan Employment Act*.

Unfair Labour Practice – Timeliness – Board determines that Union filed its application approximately ten (10) months late – Board reviews legal principles governing the exercise of its discretion under subsection 6-111(3) of *The Saskatchewan Employment Act* – Board concludes Union did not provide sufficient reasons for the delay and, as a result, Employer suffered significant labour relations prejudice.

Unfair Labour Practice – Timeliness – Remedy – Board declined to exercise its discretion under subsection 6-111(3) to allow Unfair Labour Practice to proceed to a hearing – Board granted Employer's Preliminary Objection and dismissed Union's Unfair Labour Practice application.

REASONS FOR DECISION

OVERVIEW:

[1] United SteelWorkers, Local 7656 [the "Union"] is certified as the bargaining agent for all employees of Mosaic Potash Colonsay ULC [the "Employer"] by an Order of the Board dated February 10, 2003.[1]

[2] On June 16, 2016, the Union commenced an unfair labour practice application against the Employer invoking sections 6-43 and 62(1)(d) of *The Saskatchewan Employment*

Act, SS 2013, c S-15.1 [the "*SEA*"]. The Union particularized its allegations against the Employer in its formal application as follows:

> . . .
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> *c) On or about May 6, 2015, the employer created a new position of Security Guard in the workplace, and simultaneously eliminated the position of Clerk II (Security Guard) in the workplace.*
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> *d) The Clerk II (Security Guard) position was a position in scope of the Union and had been in scope of the Union, and subject to the terms and conditions of the collective agreements negotiated over the years between the parties, since the position was first organized by the Union in the mid-1970s.*
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> *e) As a result of this new position creation, four (4) Clerk II (Security Guard) incumbents were provided with displacement options under the collective agreement and were removed from their prior positions.*
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> *f) At the time the new position was created, the employer advised the Union that the new Security Guard position fell outside of the bargaining unit.*
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> *g) On June 3, 2015, the Union advised the employer in writing that it objected to the new position being placed out of scope. The duties of the new position were substantially similar to the previous in-scope duties, and were not of the type referenced in sections 61(1)(h)(i)(A) or (B) of [the SEA].*
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> *h) Notwithstanding that the employer had not reached agreement with the Union, and despite the absence of an order of this Board declaring the Security Guard positions as out of scope positions, filled the positions with approximately 6 incumbents, and unilaterally declared all of those positions out of scope and not subject to the terms and conditions of the collective agreement.*
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> *i) The employer then advised the Union that it was willing to join in a joint application to this Board to obtain a preliminary determination of whether positions were in or out of scope.*
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> *j) In September 2015, the Union advised the employer that it was the employer that would be required to initiate an application to the Board, as opposed to the application being a joint one made by the [sic] both parties.*
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> *k) Following this communication, the employer, by communication from its legal counsel to the Union's legal counsel, took the position that for the first time that the newly created Security Guard position was in fact <u>already</u> excluded from the bargaining unit by the terms of the certification order, which excludes (inter alia) a "Safety and Environmental Technician" position. The Union disputes that the legacy exclusion for a "Safety and Environmental Technician" has anything whatsoever to do with the new Security Guard position. [Emphasis in original.]*

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[1] LRB File No. 019-03.

> *l) To afford the employer one final chance to comply with [the SEA], the Union on December 1, 2015 directed a letter to the respondent, calling for payment of Union dues, as required by both [the SEA] and the Union's security clause in the collective agreement, for the new positions.*
>
> *m) The Union awaited a response, but has not to the date of this application received any response to that request.*

[3] On June 24, 2016, the Employer filed its Reply to the Union's application. It expressly denied the allegations set out above. In addition, it challenged the Board's jurisdiction to adjudicate the Union's application because the application fell outside the timeline set out in subsection 6-111(3) of the *SEA*.

[4] The Employer also commenced a summary dismissal application pursuant to section 32 of *The Saskatchewan Employment (Labour Relations Board) Regulations* seeking to have the Union's application summarily dismissed on the basis of delay.[2] On August 17, 2016, the Board dismissed the Employer's application for summary dismissal of the Union's unfair labour practice application.

[5] On October 24, 2016, the hearing of the Union's application commenced. The parties agreed that this hearing would proceed in two (2) parts. The Board would first decide the Employer's preliminary objection respecting the Union's failure to comply with subsection 6-111(3) of the *SEA*. Should the Board allow the Union's application to proceed, the substantive application would be heard on November 29, 2016.

[6] These Reasons for Decision explain why the Board unanimously concludes that the Union's delay in commencing its unfair labour application in this matter is excessive and does not merit the Board exercising its discretion under subsection 6-111(4) to permit it to proceed to a formal hearing. Accordingly, the Employer's preliminary objection is well-founded and the Union's unfair labour practice application is dismissed in its entirety.

[2] LRB File No. 146-16

PRELIMINARY OBJECTION – THE TIMELINESS ISSUE

A. Relevant Statutory Provisions

[7] The Employer's Preliminary Objection to the Union's unfair labour practice application engages subsections 6-111(3) and 6-111(4) of the *SEA*. These provisions read as follows:

> ***6-111(3)*** *Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.*
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> ***6-111(4)*** *The board shall hear any allegation of an unfair labour practice that is made after the deadline mentioned in subsection (3) if the respondent has consented in writing to waive or extend the deadline.*

B. Relevant Factual Background

[8] Two (2) witnesses testified at the hearing. Mr. Ken Leclaire, the Employer's human resources manager testified on behalf of the Employer. Mr. Barry Moore, a long-time employee at the Mosaic Potash Colonsay ULC mine, testified on behalf of the Union. At all times material to this dispute, Mr. Moore served as Union President. As well, a number of documents were admitted into evidence during the course of the hearing.

[9] There was no disagreement between the parties about the chronology of events culminating in the Union's Unfair Labour Practice Application. The following chart summarizes the dates and events that the Board finds to be most relevant to the Employer's Preliminary Objection.

April 15, 2015	The Employer issued a letter to the Union advising it will be restructuring Security Guard job duties at the mine site and these newly restructured positions would be out-of-scope. The Employer also issued a job description for the new position designated as "Safety & Environment Technician (Security)". The Employer also sent individual letters to the affected employees advising them of the reduction in the workforce. Some of those letters offered severance packages to employees who were directly affected by these changes. Those offers varied depending on an individual's years of service as well as job duties.
May 6, 2015	The Employer re-issued the previous letter which was largely unamended. The letter was presented to Mr. Moore by Mr. Leclaire at a meeting with Union representatives. It reiterated the Employer's position that the newly restructured position was out-of-scope.
June 3, 2015	The Union provided written notice to the Employer that it objected to having those positions moved out of the bargaining unit. It stated unequivocally that the Union's position is that "the jobs in question, ARE and will stay IN SCOPE[.]" Mr. Moore testified that he personally delivered this letter to Mr. Leclaire that same day.
June 22, 2015	The Union filed grievances on behalf of two (2) of the affected workers objecting

	to the contracting out of those positions and removing them from the bargaining unit.
August 15, 2015	The Employer began to hire independent contractors to fill these new positions. Ultimately, the Employer hired six (6) individuals.
August 26, 2015	In response to an e-mail from Union counsel, Mr. Steven Seiferling, on behalf of the Employer, e-mailed Union's counsel advising that the Employer was willing to make a joint application to the Board to determine whether the new position fell within, or outside, of the scope of the Union.
September 23, 2015	Union counsel e-mailed Ms. Jana Linner who had been retained by the Employer, respecting the Employer's willingness to bring an application to the Board. He indicated that such an application could not be a joint one but rather must be brought by the Employer. Union counsel concluded his email as follows: "Please let us know as soon as possible which of these routes the employer plans to go, for the creation of an out of scope position without the consent of the Union (or prior order of the Board) is an Unfair, and we'd rather not go that way if we can avoid it." [Emphasis added.]
October 28, 2015	Ms. Linner e-mailed Union counsel to advise that the Employer now took the position that the Safety and Environment Technician (Safety) had always been out of scope by virtue of Article 1.01 of the Collective Agreement.
December 1, 2015	Mr. Moore, on behalf of the Union, issued formal notification to the Employer requesting that all check off union dues owing for the disputed security guards be remitted to the Union. Mr. Leclaire testified that shortly after receiving this notification he had a brief conversation with Mr. Moore and advised him that the Employer would not remit any dues to the Union for those positions. On cross-examination, Mr. Moore stated he did not recollect such a conversation taking place but admitted it was "possible". In any event the Employer never sent to the Union a formal written response rejecting its' demand.
December 31, 2015	This is the date that Union counsel asserts the dues requested ought to have been paid.
June 16, 2016	The Union filed its Unfair Labour Practice Application with the Board.

C. Relevant Jurisprudence and Governing Legal Principles

[10] Recently, in *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, LRB File No. 229-15, 2016 CanLII 58881, 2016 CarswellSask 502 (SK LRB), the Board reviewed the operative legal principles under subsections 6-111(3) and (4) of the *SEA*. The Board stated:

> *[14] For all intents and purposes, subsections 6-111(3) and (4) of the SEA are identical to section 12.1 of The Trade Union Act, RSS 1978, c T-17 (the "TUA"). The Saskatchewan Legislature enacted section 12.1 only in 2008. In light of the provision's recent vintage, there is little case law from this Board considering it. To date, the leading cases are: [Dishaw v Canadian Office & Professional Employees Union Local 397, [LRB File No. 164-08, 2009 CanLII 507(SK LRB)] ["Dishaw"], and Peterson v Canadian Union of Public Employees, Local 1975-01 and University of Regina,[LRB File No. 156-08, 2009 CanLII 13052 (SK LRB)] ["Peterson"]. Neither Dishaw nor Peterson dealt directly with the application of section 12.1 of the TUA as those cases involved duty of fair representation claims and not unfair labour practice applications. Nevertheless, in those Decisions the Board made statements of general principle regarding undue delay in commencing labour relations applications which were quoted with approval in SGEU, the only decision of the Board to interpret section 12.1.*

[15] More significantly, SGEU adopted the analytical framework identified by the Alberta Board in Neville Toppin v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 488, [2006] Alta. L.R.B.R. 31, 123 C.L.R.B.R. 253 ["Toppin"] as appropriate for adjudicating claims under section 12.1 of the SEA. In 2000, Alberta's Labour Relations Code [RSA 2000, c L-1] was amended to include a section which provided:

> ***16(2)*** *The Board may refuse to accept any complaint that is made more than 90 days after the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.*

[16] This section is substantially the same as section 12.1 of the TUA save that it is not limited to unfair labour practice applications. Over the years inconsistencies in its application emerged, and in Toppin, the Alberta Board established an analytical framework "that best reflects [the Alberta] Board's actual practice": [Toppin, supra, at 265, para. 30]. This framework is comprised of five (5) considerations or guidelines. These guidelines, which Chairperson Love for the Board, endorsed in SGEU [supra, at para. 27] are:

1. *The 90-day time limit is a legislative recognition of the need for expedition in labour relations matters.*

2. *"Labour relations prejudice" is presumed to exist for all complaints filed later than the 90-day limit.*

3. *Late complaints should be dismissed unless countervailing considerations exist.*

4. *The longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed. There is no separate category of "extreme" delay.*

5. *Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:*

    (a) *Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?*

    (b) *Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?*

    (c) *Has the delay caused actual litigation prejudice or labour relations prejudice to another party?*

    (d) *And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complaint? [Toppin, supra, at 265-66, para. 30].*

[17] This case presents the Board with its first opportunity to interpret and to apply subsections 6-111(3) and (4) of the SEA. To begin, the text of these provisions deviates only slightly and inconsequentially from the text of section 12.1 of the TUA. As there is no discernible substantive difference between these

> *various provisions, we conclude that the principles announced in these cases are equally relevant under the SEA.*
>
> *[18] From these cases, and the relevant statutory provisions, the following salient principles emerge:*
>
> *• Applications alleging an unfair labour practice must be filed within 90 days after the applicant knew or ought to have known about the misconduct giving rise to the allegation (ss. 6-111(3)).*
> *• The 90 day limitation period reflects the fact that time is of the essence in addressing labour relations disputes and timely resolution of such disputes is essential to ensuring amicable labour relations in Saskatchewan (Dishaw, at para. 36; Peterson, at para. 29; SGEU, at paras. 13-14).*
> *• It is important to identify with precision when the 90 day limitation commences. Typically, the alleged misconduct will be founded upon a particular fact situation and the clock starts running from that date (SGEU, at para. 29).*
> *• A complaint may be based on a "continuing policy or practice rather than a discrete set of events". This fact makes it more difficult to ascertain the commencement of the 90 day limitation period and may make it easier to justify a delay (Toppin, at para. 29; SGEU, at para. 30).*
> *• The Board will adjudicate applications filed outside the 90 day limitation period provided the other party consents or otherwise waives the application of the limitation period (ss. 6-111(4))).*
> *• Where no such consent or waiver is given, the Board possesses discretion to adjudicate the application (ss. 6-111(3); SGEU, at para. 24).*
> *• When exercising this discretion, the Board should apply the non-exhaustive list of counter-vailing factors identified in Toppin (SGEU, at paras.26-27;Toppin, at para. 30)*
> *• Prejudice is presumed in all late filings; however, if actual prejudice could result from hearing the application it will be dismissed.*

[11] The parties agree that these are the principles which should govern the Board's adjudication of the Employer's Preliminary Objection in this matter.

D. Analysis and Decision

1. Onus

[12] The question of onus was not disputed. The Employer accepted that it bore the onus to demonstrate its application should be granted. While the evidentiary burden will shift between the Employer and the Union in respect of certain elements of the legal analysis under subsections 6-111 (3) and (4), the Board agrees that the burden of proof rests on the Employer to prove its case on a balance of probabilities. See *e.g.*: *F.H. v McDougall*, [2008] 3 SCR 41, 2008 SCC 53, at para. 49.

2. Application of Governing Legal Principles

(a) Length of Delay

[13] The first issue to be determined is the length of the delay at issue here. It is important to settle this question at the outset as it functions as the yardstick, so to speak, against which the other *Toppin/SGEU* criteria are to be measured and evaluated. The *SEA* expressly requires a party to commence an unfair practice application within 90 days from when it "knew or, in the opinion of the Board, ought to have known, of the action or circumstances" underlying the application. Admittedly, this is a relatively short time-line. Yet "[the] overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied", to quote the Ontario Court of Appeal in *Journal Publishing Co. of Ottawa v Ottawa Newspaper Guild, Local 205*, [1977] O.J. No. 8.

[14] It should be noted that unlike section 16(2) of Alberta's *Labour Relations Code* which imposes a 90 day deadline for the commencement of all applications brought pursuant to that statute, and on which subsections 6-111(3) and (4) of the *SEA* appear to be modelled, those subsections are confined only to unfair labour practice applications. Indeed, the *SEA* did not lay down stringent timelines for commencing any other applications under Part VI. From this, it is apparent the Legislature determined that as unfair labour practice applications typically emerge when serious industrial relations strife exists in a particular workplace, such applications should be commenced with reasonable dispatch. Plainly in the Legislature's view, unfair labour practice applications are a discrete class of applications and need to be initiated and prosecuted without undue or unwarranted delay.

[15] The Union admits that it failed to comply with the 90 day time-limit set out in subsection 6-111(3). However, there is disagreement between the parties respecting the relevant date for determining the length of the delay in question here.

[16] The Employer argues that April 15, 2015 – the day it notified the Union and its affected employees of its intention to create the out-of-scope position of a Safety & Environment Technician (Security) officer – is the relevant date. At paragraph 25 of its Preliminary Brief of Law, the Employer asserts that should the Board agree with this argument, the Union's unfair labour practice application was filed "428 days after the initial notice provided by Mosaic".

[17] The Employer argues in the alternative that as it reiterated its position to the Union on May 26, 2015; June 22, 2015; and through legal counsel on October 28, 2015, it may be possible to identify any one of those dates as the relevant date for assessing the length of delay at issue here. Finally, the Employer suggests that should the Board be prepared to give the Union "a generous benefit of the doubt" and decide the period should begin to run "from the Unions 'final chance' provided on December 1, 2015", this would mean the Union took 198 days to file the unfair labour practice application in this matter.

[18] The Union submits that the relevant date for assessing the delay at issue in this matter should be December 31, 2015 as this was the date the Union dues requested on December 1 became due and owing. Alternatively, he submitted that December 1 should be the operative date.

[19] After a careful review of the evidence, the Board has concluded that **August 15, 2015** – the date when the Employer began to hire independent contractors to fill the new out-of-scope security guard positions – is the relevant date for assessing the delay at issue here. We have come to this conclusion for the following three (3) reasons.

[20] First, we do not accept the Employer's argument that either April 15 or May 6, 2015 is the operative date. It is acknowledged the evidence demonstrates that the Employer gave notice to the Union as well as affected employees of its intention to change the job description for these positions on April 15. Nevertheless, it revised its letter and effectively served notice upon the Union a second time on May 6. As Mr. Leclaire acknowledged in cross-examination neither of these letters indicated that the Employer's intention was to move these positions out-of-scope. The Board is satisfied that these letters signaled to the Union its intentions; however, it was not entirely clear to the Union at that time the Employer intended to go through with this plan.

[21] Second, we do not accept the Union's argument that either December 1, 2015 or December 31, 2015 is the relative date. In the course of his testimony, Mr. Moore stated that the Union served notice upon the Employer that dues were owed on December 1 because it thought the Employer might still change its mind. This notice was characterized as providing the Employer with a "last opportunity" to reverse the position it had consistently maintained throughout.

[22] The Board finds this to be wishful thinking, at best, on the Union's part. It is clear to us the evidence discloses that from the outset the Employer never resiled from its intention to move the new positions out-of-scope. Indeed, the Union appears to have recognized this as well when on June 3, 2015 it served formal written notice on the Employer of its objection to its plan.

[23] Third, the text of subsection 6-111(3) of the *SEA* stipulates the statutory timeline should commence on the date that in the Board's opinion the Union ought to have known the Employer's impugned actions potentially amounted to an unfair labour practice. In our view, that date is August 15, 2015. It was on this date that the Employer began to hire independent contractors to fill the positions. The Rubicon had been crossed! There was no turning back, a reality underscored by the e-mail exchange between Mr. Bainbridge and Ms. Linner in September and October 2015, culminating in Ms. Linner's e-mail to Mr. Bainbridge on October 28, 2015 advising him that the Employer believed these new positions always were out-of-scope as described in the original Certification Order.

[24] Accordingly, the Union delayed filing its Unfair Labour Practice application for approximately ten (10) months after it should have been in order to comply with the statutory timeline set out in subsection 6-111(3). While this delay might not qualify as "extreme" relatively speaking, the Board considers it to be undue requiring the Union to provide compelling reasons for it.

(b) Sophisticated or Unsophisticated Applicant

[25] This *Toppin/SGEU* criterion asks the Board to assess whether a complainant who has failed to satisfy the statutory pre-condition to commencing an unfair labour practice application can be characterized as a sophisticated or unsophisticated applicant?

[26] Counsel for the Union conceded that it was, indeed, a sophisticated applicant. The Board agrees with this concession. The Union is well established and has a mature collective bargaining relationship with the Employer. It is also represented by experienced and highly respected legal counsel. As stated in *SaskPolytechnic*, *supra*, at paragraph 26, a finding that an applicant is sophisticated in labour relations matters "militates against allowing this application to proceed to a hearing."

(c) Reasons for the Delay

[27] This *Toppin/SGEU* criterion seeks a satisfactory explanation for the failure to comply with subsection 6-111(3). On this aspect of the inquiry, the evidentiary burden shifts to the Union.

[28] The Union offered a few reasons for the delay at issue here. First, it pointed to the fact that it explored alternative ways to resolving this dispute without immediately filing an unfair labour practice application. It emphasizes that it agreed to a proposal initiated by a lawyer for the Employer that together they present a joint application to this Board in order to determine whether the new position was properly outside the bargaining unit. The Union suggests that this conciliatory approach should forgive a considerable portion of the delay and invokes this Board's decision in *International Association of Firefighters, Local 1318 and Local 1755 v Swift Current (City)*, LRB File Nos. 008-14, 009-14; [2014] S.L.R.B.D. No. 4, 241 C.L.R.B. (2d) 180, ["*Re Swift Current (City)*"] to support its contention.

[29] In addition, the Union submits that a "good portion" of the post-December 2015 delay was occasioned by the Employer's refusal to respond formally to its demand to remit dues to the Union for those positions. The Union contends that the Employer never responded.

[30] The Board will deal with each of these submissions in turn.

[31] In our opinion the circumstances of *Re Swift Current (City)*, *supra*, are clearly distinguishable from the circumstances of the matter before us.

[32] In that case, all parties agreed to submit to the Queen's Bench legal questions respecting the application of certain provisions of *The Fire Departments Platoon Act*, RSS 1978 c. F-14, now repealed by section 10-5 of the *SEA*. The parties had been involved in collective bargaining over a period of time. The Union involved concluded that an impasse had been reached in those negotiations and wanted to refer all matters in dispute to interest arbitration as permitted under subsection 9(4) of *The Fire Departments Platoon Act*. The administrations of the two Cities involved in those negotiations – Swift Current and North Battleford – disagreed and opposed the Union's proposal. A joint application was submitted to the Queen's Bench on September 13, 2013 seeking to resolve the question of whether the dispute could be referred to interest arbitration at that time.

[33] On December 2, 2013, McMurtry J. issued a brief fiat concluding that the Queen's Bench lacked jurisdiction to adjudicate the question. Rather, it was this Board which should resolve the question.

[34] Shortly thereafter, on January 14, 2015, the Cities filed their unfair labour practice applications. The Union objected to the Board hearing the application on the basis of delay. The Board *per* Chairperson Love considered the complicating factor of the court application and accepted it as explaining away most of the delay that had occurred. He stated at paragraphs 30 to 34 as follows:

> *[30] The Respondents rely heavily on the fact that they filed their application in the Court of Queen's Bench within the ninety (90) day time period. They also argue that they forthwith filed their application with this Board upon the decision of Madam Justice McMurtry being given on December 2, 2013. They also argue that there was no prejudice to the Applicant's [sic] arising out of the delay. The Applicants, argue the contrary. The Respondents also argue that the unfair labour practice alleged (failure to bargain in good faith) is an ongoing failure and was, therefore, in the nature of a continuing offence.*
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> *[31] If the Board accepts that the triggering event was the Applicant's letters of May 23, 2013 (North Battleford) and May 25, 2013 (Swift Current), the ninety (90) day time period would have expired about August 21, 2013. If measured from the later date that the Cities responded to these letters, June 18, 2013 (Swift Current) and June 6, 2013 (North Battleford), only the Swift Current judicial review application was filed within ninety (90) days (September 6, 2013).*
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> *[32] No objection was taken to the judicial review process invoked by the Cities. It appears from the decision of Madam Justice McMurtry that the Applicant did not challenge her jurisdiction to determine the issues in dispute. The Respondents in this application relied upon that fact to show that both parties assumed that they had made the correct choice of forum for their dispute.*
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> *[33] However, Madam Justice McMurtry declined to make the requested determinations and referred the matter to this Board. The hearing of the matter was on October 31, 2013 and the Court's decision made on December 2, 2013. This process, the Respondents say, was the reason for the delay in making the application to this board.*
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> *[34] It appears that both parties were of the view that the Court of Queen's Bench had the appropriate jurisdiction in this case. The question put to this Board is whether that reliance, which ultimately turned out to be unfounded, should result in a finding that the time limits in Section 12.1 have expired, and that we should or should not, in these circumstances, exercise our discretion to allow the applications to proceed.*
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> *[35] Looking at the matter through the lens of the facts above, the delay cannot be considered to be extreme. Nor, we think, can the Applicants be considered to have been prejudiced insofar as they were willing participants in the process of going to the Court of Queen's Bench. There has not, in our opinion,*

> *been any actual litigation prejudice or labour relations prejudice. The issue between the parties is not so factually driven that we need be concerned over the loss of witness memories due to effluxion of time due to delay. The issue is, based upon a relatively straight forward fact situation, whether or not the arbitration provisions of The Fire Departments Platoon Act can be invoked in this fact situation, or whether that fact situation gives rise to a finding that the Applicants refused to engage in good faith bargaining. On the other hand, the Respondents in this case are not unsophisticated and were represented by experienced counsel throughout. [Emphasis added.]*

[35] A close reading of *Re Swift Current (City)* reveals that all parties to that dispute believed albeit mistakenly that the Queen's Bench had original jurisdiction to resolve the questions in issue. When the Cities' application for judicial review was dismissed, however, they acted quickly to file their unfair labour practice applications with the Board. It was on this basis that the Board concluded the delay was neither extreme nor prejudicial to the Union.

[36] The circumstances of this case are quite different. It is true that on August 22, 2015 there was an e-mail exchange between counsel for both the Union and the Employer about making a joint application to the Board. It is also true that nothing came of this proposal principally because the Employer now took the view that the positions in dispute had always been out-of-scope by virtue of the Certification Order.

[37] Furthermore, upon receipt of Ms. Linner's e-mail dated October 28, 2015, it was obvious to the Union that no such application would be commenced. Nevertheless, the Union delayed a further eight (8) months before it commenced a formal application with the Board.

[38] For these reasons, the Board concludes that *Re Swift Current (City)*, *supra*, does not assist the Union.

[39] In *SaskPolytechnic*, *supra*, the Board acknowledged that it is better to attempt to resolve industrial relations disputes through collaborative, rather than adversarial, measures. However, at paragraph 28 the Board stated as follows:

> *[28] SPFA's counsel submitted further that were the Board to dismiss SPFA's application as being out-of-time, it would discourage conciliatory attempts to resolve industrial relations disputes rather than immediately initiating adversarial processes such as grievance arbitrations or applications to the Board. The Board accepts counsel's submission to a point. At the same time statutorily imposed time lines are there for a reason, namely to ensure the expeditious resolution of such disputes. In SGEU, for example, the Board repeated the oft-quoted maxim that "labour relations delayed are labour relations defeated and denied". Even the*

> *best of intentions cannot displace the operation of a stringent statutory requirement like that found in subsection 6-111(3) of the SEA. [Emphasis added, citation omitted.]*

[40] Nor does the Board find the Union's explanation for the post-December 2015 delay persuasive. As stated earlier at paragraph 22 of these Reasons for Decision, the Union's fervent hope that the Employer would in time reverse itself, even after it had hired workers to fill those newly created positions was "wishful thinking at best". There is some evidence to indicate the Employer's rejection of the Unions' December 1 request was informally communicated to the Union's President. However, for the Union to continue to hold out such hope after December 31, 2015 appears to us to be unreasonable.

[41] Finally on this point, the Union cited the Alberta Board decision in *Health Sciences Association v Misericordia Hospital*, [1995] Alta. L.R.B.R. 533 ["*Misericordia Hospital*"] for the proposition that applications challenging the creation of any new position should not be commenced until after six (6) months have elapsed from the time the position became operational.

[42] The Board finds that this case is of no assistance here. It is significant that *Misericordia Hospital* predates by five (5) years the coming into force of section 16(2) of Alberta's *Labour Relations Code*. It is apparent from the Alberta Board's extensive reasons in *Toppin* that in future it would stringently enforce the 90 day statutory timeline for filing any application under that legislation. The Union was unable to furnish us with any post-*Toppin* decision in which the Alberta Board reaffirmed the approach it had earlier endorsed in *Misericordia Hospital*.

[43] For these reasons, the Board concludes that the Union has failed to offer any compelling reason or reasons for why it postponed so long before commencing this unfair labour practice application.

(d) Prejudice to the Employer

[44] This *Toppin/SGEU* criterion is an important one and asks whether the party seeking to have an unfair labour practice application dismissed for delay, has suffered either litigation prejudice or labour relations prejudice as a consequence of that delay. As recognized in *SaskPolytechnic*, *supra,* actual evidence of litigation prejudice can defeat such an application even if the applicant may have good reasons for the delay.

[45] The Union submits that the Employer is not prejudiced in any way by the delay at issue here. It asserts that the Employer knew of the Union's strong opposition to the change respecting these positions when the grievances were filed on June 22, 2016. As it is not a surprise to the Employer, no prejudice is demonstrated. The Union relies in particular on this Board's decision in *Saskatchewan Government and General Employee's Union v The Government of Saskatchewan*, LRB File No. 009-09, 2009 CanLII 30466 (SK LRB) ["*SGEU*"], to support its position that the filing of a grievance negates prejudice to the other party.

[46] The Employer on the other hand asserts it has suffered actual prejudice from the Union's delay for two reasons. First, it contends that the Union failed to raise these scope issues in the collective bargaining process which commenced in July 2015. Only when negotiations deteriorated and impasse reached did the Union file its unfair labour practice application. Second, because the Union is also seeking the retroactive collection of dues, this delay increases the quantum of those dues in a prejudicial way.

[47] To place this aspect of the inquiry in context, it is useful to recall the Alberta Board's discussion in *Toppin* respecting prejudice occasioned by delay in the commencement of an unfair labour practice application. The Alberta Board stated:

> *31. We start our task from the proposition that it is highly meaningful that the Legislature has set a time limitation, even a discretionary one, of 90 days upon the filing of complaints before this Board. Compared to the limitations for commencement of most civil actions in the courts, this is a short limitation period indeed. It is reminiscent of the 30 day limitation period for the filing of application s for judicial review of the Board's decision in section 19(2) of the Code. In our opinion both provisions address what the Board in [Post and U.A., Local 488, [2005] A.L.R.B.D. No. 35] at paragraph 19, called the "peculiarly prejudicial effect of delay in labour matters".*
>
> *32. Delay in labour relations litigation is peculiarly prejudicial and corrosive for at least these reasons that we can discern. First, instead of the ordinary two-sided employment relationship, labour relations statutes govern the much more complex three-sided relationship of employer, employees and trade union. They do this partly through the instrument of the collective agreement, which is itself a product of a complex process, not just of balancing employer interests against employee interests, but of balancing among competing employee interests. Seniority provisions are just one example of a collective agreement term that balances among competing employee interests. Second, labour relations statutes create systems of workplace governance with many time-sensitive features. Once the right of collective bargaining is established, one party can periodically compel the other to bargain. If bargaining is not successful, parties can as a last resort have recourse to the drastic economic pressure of a strike or lockout, subject to some complex rules about process and timing. Once a collective agreement is reached, it is an agreement for a term, not of indefinite duration; and that term determines the times at which another round of bargaining may begin, and when employees*

> *may abandon collective representation or replace their bargaining agent. And a collective agreement must feature a method of resolving differences arising out of the agreement, which is almost universally a grievance procedure with short time limits, culminating in grievance arbitration through which reinstatement of employment is a common remedy.*
>
> *33. These factors meant that labour relations disputes typically affect many persons, not just the immediate litigants. . . . .*
>
> *34. Because the impact of a typical labour relations dispute is so broad and diffuse, there is a compelling public policy need to air and resolve those disputes quickly. The entire structure of the Labour Relations Code, and the system of workplace governance that it sponsors, is aimed at airing, mediating, adjudicating and otherwise resolving those disputes with a minimum of delay. The prevalence of abbreviated grievance time limits in collective agreements, and the abbreviated 30-day time limit for judicial review of a Board or arbitrator's decision, are important features of this structure. The 90-day time limit for filing complaints in section 16(2) is entirely consistent with this statutory approach.*
>
> *. . . . . .*
>
> *39. We conclude that it is far too limited an approach for the Board to look only for the litigation prejudice – the damage to a party's ability to litigate the dispute – produced by the delay. The prejudice with which the Board should be concerned is broader. The Board must recognize the prejudice delay creates to the entire set of labour relations relationships in the workplace. It must keep in mind the corrosive effect of delay upon a labour relations system that is both statutorily and in practice extraordinarily sensitive to time. It must place some value on the maintenance of "industrial peace".*
>
> *40 We consider that this broader form of prejudice should be presumed to exist in all cases of delay beyond the 90-day time limit. It is not practical to expect the Board, or even the immediate parties to the dispute, to be able to identify with precision all the negative effects that delay in filing a complaint has had or may have on someone connected with the workplace in question. This means that a late complaint is presumptively bad and should be dismissed unless countervailing considerations exist in the case. [Emphasis added.]*

[48] The Board accepts that some actual prejudice flows to the Employer in the increased potential for liability to pay for retroactive union dues should the unfair labour practice application proceed and the Union prevails. However, this is not necessarily the kind of litigation prejudice contemplated in *Toppin* and other authorities. To be sure, it places the Employer in a somewhat disadvantageous situation. Yet, the Employer presented no evidence that the effluxion of time occasioned by the delay here, compromised its ability to mount a defence in any significant way, beyond the usual concerns that arise when there is a lengthy delay in bringing a matter to a hearing.

[49] However, this is hardly determinative of the issue of labour relations prejudice relevant under subsections 6-111(3) and (4) of the *SEA*. Here, there is a ten (10) month delay at

issue. This is more than three (3) times the delay allowed by the *SEA*. And as the fourth *Toppin/SGEU* principle acknowledges, the "longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed".

[50] In its defence, the Union points to *SGEU* where the Board references the pre-*Toppin* decision of the Alberta Board in *Chinook RHA Regional Health Authority and U.N.A., Local 23*, [2002] A.L.R.B.D. No. 77 ["*Chinook RHA*"]. From the summary provided in *Toppin*, *Chinook RHA* purports to stand for the proposition that although prejudice to a respondent may be inferred from delay "the inference may be negated by the fact that a timely grievance was filed about the same transaction". See: *Toppin*, *supra*, at paragraph 29. That, the Union asserts, is what happened here. It filed grievances in a timely way on June 22, 2015 and as a consequence all prejudice is removed.

[51] There is little background provided about *Chinook RHA*, however, the Board cautions against over-reading it. To begin, it is apparent from the structure of the *Toppin* decision that it is simply enumerated as an example of the Alberta Board's jurisprudence on the 90-day time limit prior to *Toppin*. In other words, it is cited in that decision as simply an illustration of the existing jurisprudence and not a wholehearted endorsement of its holding.

[52] In any event, the Board does not accept that because grievances respecting the same dispute were filed in this case, this fact wholly removes labour relations prejudice from the equation. Were the Board to endorse this argument, it would be tantamount to accepting that a filing of a grievance in accordance with the collective agreement displaces the operation of the 90-day time limit set out in the statute for the filing of an unfair labour practice application. This would not only ignore the clear legislative direction in subsection 6-111(3), but, it must be said, is also inconsistent with the fourth *Toppin/SGEU* principle set out above.

[53] On balance, serious labour relations prejudice exists in this case, a reality that militates against permitting the Union's unfair labour practice application to proceed to a hearing.

(e) <u>Importance of Issues at Stake</u>

[54] The final *Toppin/SGEU* criterion asks the Board to assess in "evenly balanced cases", the "importance of the rights asserted" and the "apparent strength" of the application.

[55] The Union argues strenuously that the issues at stake in this case are of fundamental importance as they lie at the heart of every collective bargaining relationship and "go to the root of the Union's existence". See: Union's Written Submissions, at paragraph 49. In light of the important issues in play here, the Union submits that its unfair labour practice application must proceed. It cites a number of authorities in support of this argument, most notably: *Hotel Dieu Hospital and O.P.S.E.U.*, [2000] O.L.R.D. No. 867; *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27; *Re Saskatchewan Gaming Corporation*, [2004] S.L.R.B.D. No. 21, 109 C.L.R.B.R. (2d) 106, and *Donovel v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2006 CanLII 62 (SK LRB).

[56] The Board is of the view that although this matter is not an "evenly balanced" case as contemplated in *Toppin*, it is nonetheless important to address the arguments advanced by the Union under this criterion.

[57] The Board recognizes that the principal issue presented on this unfair labour practice application is very important. The Union argues that its importance means the application should proceed in spite of the delay in its commencement and the lack of a satisfactory explanation for that delay.

[58] In our view, however, this argument cuts both ways. The fact that this issue is important to the Union should have motivated it to move far more quickly on it than it did. To be sure, grievances were filed in June 2015. Yet as Mr. Moore's testimony before the Board revealed, little, if any, progress has been made respecting those grievances since that time. Furthermore, after filing those grievances, the Union waited almost a full year before commencing its unfair labour practice application. This reality significantly undermines the Union's contention that the rights at stake here are so critical they must be adjudicated despite the lengthy delay in commencing this application.

3. Conclusion

[59] Accordingly, for all of these reasons the Employer's Preliminary Application is allowed and the Union's unfair labour practice application is dismissed.

[60] The Board is grateful to counsel for their oral submissions and well-written briefs of law. They were of great assistance to us in arriving at our decision.

DATED at Regina, Saskatchewan, this **16th** day of **November**, **2016**.

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson