**SASKATCHEWAN JOINT BOARD, RETAIL, WHOSESALE AND DEPARTMENT STORE UNION, Applicant v. SASKATOON CO-OPERATIVE ASSOCIATION LIMITED and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondents**

LRB File No. 081-14; March 6, 2017
Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: Laura Sommervill and Kent Kornelsen

| | |
|---|---|
| For the Applicant: | Larry Kowalchuk and Micah Kowalchuk |
| For the Respondent Employer: | Kevin C. Wilson, Q.C. and Brent M. Matkowski |
| For the Respondent Union: | Drew S. Plaxton, Q.C. |

**Practice and Procedure – Re-Hearing ordered by Saskatchewan Court of Appeal – A few weeks prior to commencement of re-hearing, Applicant applies for Leave to Appeal to Supreme Court of Canada – Board weighs a number of factors and concludes re-hearing should be postponed for a few months to await result in the application for leave – Board further concludes that re-hearing should proceed after postponement to minimize any further prejudice to the parties.**

**Practice and Procedure – Board reviews jurisprudence respecting the effect of an appellate court's order quashing a previous decision of the Board and directing a new hearing – Board concludes the re-hearing will proceed as a hearing *de novo*.**

**Practice and Procedure – Applicant seeks order for interim relief pending the re-hearing – Board reviews and reiterates requirements for commencing an application for interim relief – Board concludes that Applicant failed to comply with those requirements – Application for interim relief is dismissed.**

## REASONS FOR DECISION

### OVERVIEW

**[1] Graeme G. Mitchell, Q.C., Vice-Chairperson:** These Reasons for Decision address three (3) issues which arose at the outset of the rehearing in this matter ordered by the Saskatchewan Court of Appeal in *Saskatoon Co-operative Association Limited v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2016 SKCA 94 ["*Saskatoon Co-operative*"]. In that ruling, the Court of Appeal quashed this Board's earlier Decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Saskatoon Co-*

*operative Association Limited and United Food and Commercial Workers' Union, Local 1400*, LRB File No. 081-14, 2014 CanLII 63997 (SK LRB), and directed that a new hearing had to take place in that matter.

**[2]** That re-hearing was originally scheduled to proceed on November 1, 2016. Instead, the Board heard counsels' submissions respecting the issues addressed in these Reasons for Decision.

**[3]** On October 18, 2016, a brief few weeks before this re-hearing was to commence, counsel for the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ["RWDSU"], the losing party in the Court of Appeal, filed an Application for Leave to Appeal to the Supreme Court of Canada ["Leave Application"]. See: SCC File No. 37257.

**[4]** As a result of the Leave Application being filed so shortly before the re-hearing was to take place, the Board requested counsel to address whether that hearing should be postponed while the Supreme Court's decision respecting RWDSU's Leave Application is pending.

**[5]** A second issue, this time raised by counsel themselves, also had to be addressed before a hearing on the substantive merits of the application could proceed. There was a dispute among the parties as to how the re-hearing should proceed. Should it proceed as a hearing *de novo* or should it be limited principally to the transcript of evidence from the earlier hearing with additional *viva voce* testimony being received at the hearing itself, if necessary?

**[6]** These two (2) issues were addressed by counsel at the commencement of the hearing on November 1, 2016. In the course of that proceeding, a third issue emerged, namely whether the Board should issue an interim application in favour of RWDSU, in the absence of a formal application for such relief. Counsel for RWDSU sought an interim order maintaining the *status quo ante* pending the Board's final determination of is application.

**[7]** These three (3) issues are analyzed and adjudicated below. However, before commencing this analysis it is helpful to provide a brief factual overview of this matter to provide context for the discussion that follows.

**FACTUAL BACKGROUND**

**[8]** The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ["RWDSU"] is certified as the bargaining agent for all employees at the Canadian Safeway Limited store located at 3310 – 8th Street East, Saskatoon, Saskatchewan ["Circle Drive Store"] by an Order of this Board dated November 25, 1991.[1]

**[9]** On or about May 13, 2013, Canada Safeway Limited and Sobeys Inc. concluded a transaction in which all, or substantially all, of the assets of Canada Safeway Ltd., which included approximately 213 retail grocery stores across Canada, were sold to Sobeys Inc. The Competition Bureau of Canada ["Competition Bureau"] reviewed this sale under the *Competition Act*, RSC 1985, cC-34. The Competition Bureau directed that Sobeys Inc. must divest 23 or those stores, one of which was the Circle Drive Store.

**[10]** Following further approval by the Competition Bureau, Federated Co-operatives Ltd. purchased a number of those stores, including the Circle Drive Store. On or about May 13, 2014, the Saskatoon Co-operative Association Limited ["Saskatoon Co-operative"] acquired the assets of the Circle Drive Store.

**[11]** On April 24, 2014, RWDSU commenced an application pursuant to section 37(1) of *The Trade Union Act*, RSS 1978, cT-17. It asserted that as Saskatoon Co-operative was the successor employer to Canada Safeway Ltd., RWDSU remained the bargaining agent for all the employees at the Circle Drive Store by virtue of the certification orders in LRB File Nos. 180-90 & 181-90.

**[12]** The United Food and Commercial Workers Union, Local 1400 ["UFCW"] intervened in this application. It asserted that because it was certified by an Order of this Board dated November 7, 2002[2] to represent employees of the Co-op at all its business throughout the province, it, and not RWDSU, should be recognized as the bargaining agent for the employees at the Circle Drive Store.

**[13]** This application was heard by the Board over two (2) days in July and August 2014. At the conclusion of the hearing on August 1, 2014, Chairperson Love on behalf the Board announced its decision that Saskatoon Co-operative was the successor employer to

[1] LRB File Nos. 180-90 & 181-90.

Canada Safeway Ltd pursuant to sections 6-11 and 6-18 of *The Saskatchewan Employment Act*, SS 2013, cS-15.1 ["*SEA*"]. As a consequence, RWDSU remained the bargaining agent for the employees at the Circle Drive Store. This was not a unanimous decision, however. Member Maurice Werezak dissented.

**[14]** On August 5, 2014, the Board issued a certification Order reflecting its decision.

**[15]** Subsequently, the Board released its written decision on September 10, 2014.

**[16]** Shortly thereafter, both UFCW and Saskatoon Co-operative sought judicial review of the Board's decision. It cited a number of grounds alleging breaches of procedural fairness and natural justice. The central objection concerned the Board consulting the RWDSU's website while preparing its Reasons for Decision without notifying the parties that it had done so or seeking submissions from them on what information the Board had gleaned from the website.

**[17]** The Court of Queen's Bench dismissed these applications. See: *United Food and Commercial Workers, Local 1400 v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2015 SKQB 84. In addressing the alleged breach of natural justice argument, Mills J. concluded at paragraphs 6 and 12 as follows:

> *I agree that it is preferable for the Board to restrict itself to evidentiary matters led by the parties. But not every failure to follow this approach results in a setting aside of a decision by this court on a judicial review. Generally speaking, if no unfairness was visited on the parties as a result of the Board's examination of those two extraneous documents, then its decision should stand.*
>
> *[T]he Board determined that union raiding was no longer a problem between these two trade unions. The Board's ultimate factual conclusion based on its investigation was that the evidence disclosed that there would not be a problem with industrial stability. Interestingly, if they had not looked at the union website, they would have been left with the situation from the hearings that there was no evidence of industrial instability. They would have been left in the same place. Clearly, the review of the RWDSU website did not result in any change to its approach. They were faced with two alternatives: (1) the website evidence disclosed there was no industrial instability between the unions; and (2) there was no evidence of industrial instability called at the hearing. <u>The result is the same. The Board's investigation, while technically a breach of the principle of audi alteram partem, had no practical effect on the decision and as such, no prejudice occurred to any of the parties</u>. [Emphasis added.]*

---

[2] LRB No. 197-02

**[18]** An appeal from Mills J.'s Order was taken by Saskatoon Co-operative. Subsequently, the Saskatchewan Court of Appeal disagreed with the Queen's Bench Judge. In an unattributed decision dated July 28, 2016, the Court concluded that the Board's decision to consult *ex parte* the Union's website resulted in a fundamental breach of the principle of *audi alteram partem*. As a consequence, the Court quashed the Board's decision and directed that a new hearing be held. After reviewing many judicial authorities, the Court concluded at paragraphs 40 and 41:

> *[40] We agree with and rely on [Cardinal v Director of Kent Institution, [1985] 2 SCR 643]; [Hecla Mining company of Canada v Cominco Ltd., (1988) 116 NR 44] and [Kane v Bd of Governors of UBC, [1980] 1 SCR 1105]. If RWDSU had submitted evidence from its website, the parties may have been able to counter it. Further, counsel for Co-op makes the valid point that the authenticity of the information on the website, indeed its very reliability, remains untested.*
> . . . . .
> *[41] The appeal is allowed with costs in the usual way. The Board's decision is quashed. There will have to be a new hearing. [Emphasis added.]*

**[19]** As already stated, RWDSU filed its Leave Application on October 18, 2016.

**[20]** Subsequently, on January 16, 2017, the Leave Application was submitted to a panel of the three (3) Supreme Court justices – Abella, Karakatsanis and Brown, JJ. – to determine whether RWDSU should be granted leave to appeal the Saskatchewan Court of Appeal's decision in *Saskatoon Co-operative*, *supra*. See: Supreme Court of Canada Bulletin of Proceedings dated January 20, 2017, at p. 75. To date, the Supreme Court has not released its decision respecting the Leave Application.

**ISSUES**

**[21]** Three (3) issues will be addressed in these Reasons for Decision:

- Should the Board proceed with a rehearing of this matter while the Leave Application is pending before the Supreme Court of Canada?
- Should the rehearing proceed as a hearing *de novo*?
- Should the Board issue an interim order in this matter pending a final resolution of the application?

## RELEVANT STATUTORY PROVISIONS

**[22]** The provisions of the *SEA* most relevant to this matter read as follows:

> ***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.*
>
> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
>
> *(a) conduct any investigation, inquiry or hearing that the board considers appropriate;*
>
> *. . . .*
>
> *(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain 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:*
>
> *. . . . . .*
>
> *(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[.]*

## ANALYSIS AND DECISION

### A. Should the Board Proceed With A Re-Hearing While the Leave Application is Pending?

### 1. Issue

**[23]** This issue placed the Board in a dilemma. Should we proceed to hear two (2) days of evidence as scheduled, only to discover a few months later that the Supreme Court has decided to hear RWDSU's appeal, the final decision in which could render the re-hearing redundant. Alternatively, we could proceed with this re-hearing but hold our decision in abeyance pending the ruling of the Supreme Court on either the Leave Application or RWDSU's appeal, should leave be granted.

**[24]** As this issue raised the question of how best to utilize the Board's resources and time, we asked counsel to provide us with their views. These submissions were received at the opening of the hearing on November 1, 2016.

## 2. Position of the Parties

**[25]** RWDSU appeared to favour holding off re-hearing this matter pending the disposition of its Leave Application. Citing in particular *Baier v Alberta*, 2006 SCC 38, [2006] 2 SCR 311 ["*Baier*"], and *Lakeridge Health Corporation v Ontario Nurses' Association*, 2013 CanLII 8022 (ON LA), RWDSU argued that it would not be efficient or expedient to conduct a full hearing of the application while the Leave Application remained outstanding. RWDSU submitted that a "stay" of this matter together with an interim Order maintaining RWDSU as the collective bargaining agent of the employees at the Circle Drive Store was the more appropriate way to deal with this issue at this time.

**[26]** Saskatoon Co-operative strongly disagreed with this position. It asserted that in its view, at least, the Leave Application was not a compelling one, and statistically speaking the chances of leave to appeal being granted to RWDSU are remote. There has been no formal stay of the Saskatchewan Court of Appeal's ruling and, for all intents and purposes, it remains in full force and effect. As a result, the Board should proceed to hear this application in accordance with the Court of Appeal's direction.

**[27]** More significantly, Saskatoon Co-operative points to the need of settling this matter which has been on-going since 2014. Labour relations stability in the workplace requires a timely resolution of this application, particularly in light of its lengthy and protracted history.

**[28]** UFCW shares Saskatoon Co-operative's concerns about any further delay in this matter. In particular, it submits that a stay would be an inappropriate remedy because in this case the very nature of the Order of the Court of Appeal leaves nothing to execute, and, therefore, nothing to be stayed. See *e.g.*: *Kennibar Resources Ltd. v. Saskatchewan (Minister of Energy and Mines)*, 1990 CanLII 7650, 90 Sask. R. 127 (SK CA), and *Saskatchewan Union of Nurses v Sherbrooke Community Centre*, 1996 CanLII 4949, 141 Sask. R. 161 (SK CA).

## 3. Analysis and Decision

**[29]** At the hearing on November 1, 2016, it was agreed among counsel that four (4) days commencing on April 10, 2017 would be set aside for the formal re-hearing in this matter. The Board acknowledges that this rescheduling effectively meant that it was prepared to postpone the re-hearing in the hope that the Supreme Court would release its decision

respecting the Leave Application prior to that time. As already observed, to date this has not happened.

**[30]** It is important, therefore, to explain why the Board did what it did. We set out below the various considerations that factored into our decision to postpone the rehearing in this matter.

**[31]** First, the Board acknowledges that it controls its own processes and procedures. This flows from a number of the provisions of the *SEA*, most notably subsection 6-103(2)(a) which states that the Board has the power "to conduct any investigation, inquiry or hearing" that it considers appropriate. Although this power appears very broad and authorizes the Board to conduct a hearing or not as it sees fit, it is, of course, constrained by other legal limitations such as the application of the principles of natural justice and procedural fairness, as this matter plainly demonstrates.

**[32]** Second, it is true, as submitted by Saskatoon Co-operative, that technically speaking the Order of the Court of Appeal in this matter is not stayed. It is clear that the simple fact of applying for leave to appeal to the Supreme Court does not result in a stay of the Order from which leave is being sought. For this to happen, an applicant must commence a separate motion for a stay or other relief against the judgment below. See especially: Rule 62, *Rules of the Supreme Court of Canada*, SOR/2002-156 as amended, and *Baier*, *supra*. That was not done in this case.

**[33]** The Board acknowledges as well that the failure by a party to seek such a stay may in some circumstances mean the matter may proceed while an application for leave to appeal to the Supreme Court of Canada is pending. See especially: *United Food and Commerical Workers, Local 1400 v Wal-Mart Canada Corporation*, LRB File Nos. 069-04, 122-04 & 130-04, 2005 CanLII 63085 (SK LRB).

**[34]** Third, generally speaking the Board attempts to make the best use of its resources and time in order to achieve a timely resolution of labour relations disputes. This goal seeks to ensure that labour strife in a particular workplace that requires this Board's intervention, is resolved in a fair and expeditious manner. The Board recognizes that the longer it takes to resolve such disputes, the greater the hardship for, and, in some cases, prejudice to, one or more of the parties involved in the particular dispute.

**[35]** Fourth, an application for leave to appeal to the Supreme Court of Canada is not an insignificant procedural matter. It seeks review from Canada's apex court of a judgment made by a lower appellate body which has affected the rights of the applicant. It also signals to lower courts or administrative tribunals that they should proceed with caution when asked to adjudicate issues which are the subject of that application and, ultimately, may be reviewed by the Supreme Court.

**[36]** Taking all of these factors into account and balancing them with the need to resolve this matter in an expeditious way, the Board decided to postpone the re-hearing for a number of months to await the Supreme Court's decision on the Leave Application. The Board believed that the approximately five (5) month postponement should allow enough time for the Supreme Court's decision, a likely eventuality in view of the fact that the Leave Application was submitted to a panel of judges on January 16, 2017, almost three (3) months before the rescheduled dates for the re-hearing.

**[37]** In any event, had the Board proceeded with the re-hearing on November 1, 2016, as a matter of prudence we would have postponed issuing our decision until the Supreme Court's disposition of the Leave Application was released.

**[38]** At the same time, the Board understands the need, and the desire, for a timely resolution of this matter and for minimizing as much as possible any further prejudice which might flow to the parties because of a less than expeditious resolution of the matter. We accept these are considerations that become more acute the longer the re-hearing is postponed.

**[39]** As a result, while the Board believed it was prudent to postpone the rehearing in November 2016 to wait for the Supreme Court's ruling respecting the Leave Application, the rehearing should proceed on April 10, 2017 regardless of whether a final disposition of the Leave Application has been handed down. This will minimize any further prejudice to the parties and in the unlikely event the Supreme Court's disposition of Leave Application is still unknown, it will be decided shortly after the rehearing is concluded.

**[40]** If the Supreme Court decides to allow RWDSU to appeal the Court of Appeal's judgment in this matter, however, the issue of how to proceed in the face of such an appeal will have to be addressed by the parties at that time.

## B. Should the Re-hearing Proceed as A Hearing *de novo*?

**[41]** Prior to the opening of the proceedings on November 1, 2016, counsel raised the issue of how this re-hearing should be conducted. This issue had to be resolved prior to the commencement of the re-hearing.

### 1. Position of RWDSU

**[42]** RWDSU'S principal argument respecting this issue is that a hearing *de novo* would be unfair because it would effectively permit the parties to re-litigate issues which had already been determined by the Board and by the Courts. Instead, the Board should proceed with the re-hearing on the basis of the record of the previous hearing, augmented, if necessary, by *viva voce* testimony from witnesses.

**[43]** RWDSU submits further that based on the Board's prior jurisprudence, the Board should approach this particular issue applying the following analytical process:

- What, if any, errors were identified by the reviewing court?
- Were those errors of fact or of law?
- Is the error of the type and character that the entire decision is flawed, or can the error be addressed by considering only the question that it concerned?
- Is it necessary for the parties to adduce additional evidence on the error?

**[44]** Applying this analytical framework, RWDSU maintains that the flaw in the previous hearing identified by the courts is a narrow error of law, namely the Board's *ex parte* consultation of its website. On this point, RWDSU appears to rely on the Queen's Bench Judge's conclusion that this error did not compromise the Board's essential findings of facts. For this reason, RWDSU submits that the transcript of the evidence given at the original hearing in August 2014 is sufficient for the Board to determine the central issues it raises in the application, while a repetition of the evidence given over three (3) days in August 2014 would be inefficient and duplicative.

**[45]** To support these arguments, RWDSU relied upon a number of the Board's previous decisions including the following authorities: *Saskatchewan Joint Board, Retail,*

*Wholesale and Department Store Union, Local 568 v K-Bro Linen Systems Inc.*, LRB File No. 350-13, 2016 CanLII 31171 (SK LRB) ["*K-Bro Linen*"]; *Metz v Saskatchewan Government and General Employees' Union*, LRB File Nos. 199-05 to 211-15, 2008 CanLII 58436 (SK LRB) ["*Metz*"]; *CLAC, Local 151 v Westwood Electric Ltd.*, LRB File No. 005-13, 2013 CanLII 47053 (SK LRB) ["*Westwood Electric*"] and *Amalgamated Transit Union, Local 615 v City of Saskatoon*, LRB File No. 269-14, 2016 CanLII 30540 (SK LRB) ["*Amalgamated Transit Union*"].

## 2. Position of Saskatoon Co-operative

**[46]** The Respondent, Saskatoon Co-operative submits that in light of the direction from the Court of Appeal, the re-hearing in this matter must proceed by way of a hearing *de novo*, with oral testimony being received from witnesses and documentary evidence introduced in accordance with established rules of evidence.

**[47]** Saskatoon Co-operative starts from the position that the Court of Appeal ordered that a new hearing had to take place in this matter. The Court quashed the Board's decision in its entirety. It submits that in fulfilling this Court of Appeal's direction for a new hearing, the Board is expected to exercise its role as a fact-finder which cannot be achieved by relying on a transcript of evidence that is almost three (3) years out-of-date. Indeed, were this Board to limit the hearing to the evidence heard in August 2014 as RWDSU encourages it to do, it would run counter to the clear and firm direction of the Court of Appeal.

**[48]** Next, Saskatoon Co-operative argues that the issues to be addressed in the re-hearing are complex as they raise matters of certification, successorship, other orders and intermingling. These questions, this Respondent asserts, cannot be satisfactorily addressed primarily on the basis of the transcript of evidence that is almost three (3) years out-of-date. It is important this Board understands the current situation at the Circle Drive Store and the day-to-day operations at the workplace. This information can only be received by way of *viva voce* testimony from witnesses.

**[49]** Finally, relying on *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, Saskatoon Co-operative argues that were the Board to confine the re-hearing to a review of the transcript, this would violate the duty of procedural fairness and leave the Board vulnerable to yet another attack on judicial review. It would be ironic, Saskatoon Co-

operative asserts, were a re-hearing needed because of a breach of the principles of natural justice, defeated a second time because of a breach of the duty of procedural fairness.

### 3. Position of UFCW

**[50]** On this issue, UFCW takes a position very similar to that advanced by Saskatoon Co-operative. It too argues that the Court of Appeal clearly directed that a new hearing must be held and as a newly constituted panel of the Board has been constituted, that re-hearing must proceed by way of a hearing *de novo*.

**[51]** In particular, UFCW cited the following decisions to bolster its argument: *Floris v Nova Scotia (Director of Livestock Services)*, [1986] NSJ No 399, 79 NSR (2d) 230 ["*Floris*"]; *Posluns v Toronto Stock Exchange*, [1968] SCR 330; *I.A.M., Lodge 2309 v Canada (Labour Relations Board)*, [1988] FCJ No 830 (CA) ["*I.A.M., Lodge 2309*"] and *Rodriguez v Canada (Minister of Citizenship and Immigration)*, [2012] FCJ No 1434 ["*Rodriguez*"].

### 4. Analysis and Decision

**[52]** To analyze this issue properly, it is prudent first to consider carefully the reasoning and direction of the Court of Appeal in *Saskatoon Co-operative*, *supra*. As already noted, this decision arose out of an appeal taken from the decision of Mills J. dismissing an earlier application seeking judicial review of the Board's original decision in this matter.

**[53]** In paragraph 2 of its judgment, the Court of Appeal *per* Jackson, Ottenbreit and Ryan-Froslie JJ.A. summarized the various issues raised on the appeal as follows:

> *[2] UFCW and Co-op challenged the Saskatchewan Labour Relations Board's decision in the Court of Queen's Bench and in this Court on the basis of breaches of procedural fairness. The allegations of breaches of procedural fairness fall into two categories. The first is whether the Saskatchewan Labour Relations Board [Board] conducted ex parte research following its oral decision. The second is whether the Board properly heard the parties as one member was not physically present when the Board adjourned to deliberate and was without the materials that had been filed during oral argument. UFCW and Co-op had other grounds of appeal directed to the reasonableness of the Board's decision.*

**[54]** In the very next paragraph, the Court concludes that only the first issue needed to be decided as it would resolve the appeal in the Appellants' favour. As a consequence and because "there must be a new hearing", the Court refrained for considering and deciding the other arguments advanced by the Appellants.

**[55]** Later in its judgment, the Court explained why it came to the conclusion it did as follows:

> *[24] The Board's resort to the historical information provided on RWDSU's website was a breach of procedural fairness. It is made particularly so because the relationship between the two unions and the impact the bad blood between them might have on future industrial stability, was addressed by the parties as a matter of evidence and oral argument. The testimony of UFCW's representative could be taken as showing the difficulty the two unions were having in reaching consensus on a series of issues. RWDSU led evidence that the two unions could not get along and, at the Board hearing, did not seek to put in the very evidence from its own website that the Board relied upon; indeed, their officer's evidence directly contradicted what the Board said it found on the website. Nonetheless, the Board's research allowed the majority of the Board to arrive at a result in favour of RWDSU. The parties had no notice that the Board would look to RWDSU's website and could not anticipate the Board would do so.*
>
> . . . . . .
>
> *[31] Thus, the relationship between the unions was a live issue that had to be resolved on the basis of the evidence and argument. Counsel for RWDSU believed the unions could get along, but he acknowledged the history, and it was his client who spoke about the new wounds opened by the present situation. For the Board, this was the "biggest" issue (at para. 39).*
>
> *[32] The Board's consultation of RWDSU's website is best framed as a breach of procedural fairness that impinges on the parties' participatory rights or, more simply can be classified as a breach of audi alteram partem…..*
>
> *[33] In the appeal before us, the Chambers judge likewise found the Board's actions constituted a breach of audi alteram partem but did not act on this finding…He did not err by finding a breach of the principle of audi alteram partem but he did err by failing to quash the decision on the footing that the Board's error could have had no effect on the result. [Citations omitted.]*

**[56]** A close reading of the Court's opinion reveals that not only did it order a new hearing but it declined to address the other issues raised on appeal presumably because it expected that at least some of those issues likely would be addressed again on the re-hearing. It is true that the Court did not explicitly state this, however, it is the only reasonable inference to draw from its reasoning. In our view, this is what distinguishes the matter currently before us from *K-Bro Linen*, *supra*, for example, where the reviewing court referred only a narrow issue back to the Board for its reconsideration.

**[57]** This conclusion is buttressed by a few of the authorities cited by the Respondent, UFCW. For example, in *I.A.M. Lodge 2309*, *supra*, the Federal Court of Appeal concluded that the Canada Labour Relations Board had breached the principle of *audi alteram partem*. It concluded that the only remedy available was to refer the matter back to the Board for a re-

hearing which, in the circumstances of that case, would require proceeding by way of a hearing *de novo*.

**[58]** Similarly, in *Munoz v Canada (Citizenship and Immigration)*, 2006 FC 1273 (CanLII), a decision referred to *Rodriguez*, *supra*, the Federal Court offered this explanation of what is meant by a reviewing court's direction that a tribunal must hold a new hearing:

> *[41] …The Court would like to emphasize that a judicial review is not an appeal and that even in cases where a decision is returned for review by a differently constituted panel, the [Refugee Protection Division] is an independent tribunal that is responsible for reviewing and deciding on the credibility of the evidence adduced, in accordance with its own legislation, rules, guidelines and institutional memory.*
>
> *[42] In this case, the Federal Court ordered that the matter be "referred to a differently constituted panel of the Immigration and Refugee Board for reconsideration". The latter was given no instructions other than the fact that the matter was to be heard by a differently constituted panel. All that was required of the new panel was to reconsider the matter de novo. [Emphasis added.]*

**[59]** The effect of a judgment quashing an administrative tribunal's decision is "to extinguish the decision being set aside for all purposes": *Burton v Canada (Minister of Citizenship and Immigration)*, 2014 FC 910 (CanLII) at para. 30. From this it follows that the doctrines of *stare decisis*, *res judicata* and issue estoppel do not operate at any new hearing. Nor are the first tribunal's findings of fact or respecting credibility binding on any subsequent panel constituted to rehear the matter. See especially: *Rodriguez*, *supra*, at para. 4, and *Lee v Canada (Minster of Citizenship and Immigration)*, 2003 FCT 743 (CanLII), at para. 11.

**[60]** Furthermore, in some cases, it may even amount to a breach of the rules of natural justice were a rehearing not to proceed by way of a *de novo* hearing which would allow the parties to lead fresh evidence before a differently constituted panel. See, *e.g.*: *Floris*, *supra*, at p. 9 (NSJ).

**[61]** As a result, guided by the Court of Appeal's clear and firm direction that the Board's original decision in this matter must be quashed and a new hearing convened, as well as the general understanding about the effect of such an order reflected in jurisprudence from other courts, this Board is satisfied that the re-hearing is this matter must proceed as a hearing *de novo*. This means that all the evidence will be received by way of *viva voce* testimony. What utility, if any, the transcript of the previous hearing may have in the new hearing will be decided at that hearing.

## C. Should the Board Issue An Interim Order Pending the Re-hearing?

### 1. Issue and Position of the Parties

**[62]** In the course of the hearing on November 1, 2016 when it became apparent that the substantive hearing would not procced that day, counsel for RWDSU requested the Board to issue an interim Order designating it as the collective bargaining agent for all employees at the Circle Drive Store in Saskatoon, pending the final disposition of the application. In effect, RWDSU seeks an order maintaining the *status quo ante*. He asserted that the Board plainly had jurisdiction to make such an order pursuant to subsection 6-103(d) of the *SEA*, and, in the circumstances, we should issue an interim Order even though, strictly speaking, RWDSU had not complied with the procedural pre-requisites governing applications for interim relief.

**[63]** Counsel for both Saskatoon Co-operative and UFCW took strong exception to RWDSU's request. They referred specifically to section 15 of *The Saskatchewan Employment (Labour Relations Board) Regulations* ["*Regulations*"] and recent jurisprudence of the Board, in particular, *UNIFOR, Local 609 v Health Sciences Association of Saskatchewan*, LRB File No. 189-16, 2016 CanLII 74279 (SK LRB) ["*UNIFOR, Local 609*"]. They were in agreement that by failing to comply with the procedural pre-requisites RWDSU was foreclosed from seeking interim relief at this particular time.

### 2. Analysis and Decision

**[64]** In *UNIFOR, Local 609*, *supra*, the Board reviewed the procedural requirements respecting applications for interim relief brought pursuant to section 6-103(2)(d) as follows at paragraphs 6 - 7, 12 - 16:

> *[6] It is well-known that there are two (2) pre-requisites which have to be satisfied before the Board will take up an application for interim relief brought pursuant to subsection 6- 103(2)(d) of the SEA. The first is that there must be an underlying application before the Board. See for example: CUPE, Local 4836 v LutherCare Communities et al. [LRB File No. 043-09, 2009 CanLII 22876], and CUPE, Local 4802 v Outlook Division Support Staff Association [LRB File Nos. 112-05 & 061-07]. . .*
>
> *[7] The second pre-requisite is that the party seeking interim relief – in this case, the Union – must serve and file a formal application for interim relief as well as affidavits in support. . .*

. . . . . .

*[12] Since LutherCare Communities and the advent of the SEA, the Board has promulgated The Saskatchewan Employment (Labour Relations Board) Regulations [the "Regulations"]. The Regulations are intended to provide greater clarity respecting the processes before this Board. They do not purport to supersede Practice Note No. 1 but rather elaborate on procedural pre-requisites for applications initiated under the SEA.*

*[13] Section 15 of the Regulations relates specifically to applications for interim relief. This provision sets out the requirements that govern the Union's objections to Mr. Job's affidavit and for this reason the relevant subsections are reproduced below:*

> *15 (1) An employer, other person or union that intends to obtain an interim order pursuant to clause 6-103(2)(d) of the Act shall file:*
> *(a) an application in Form 12 (Application for Interim Relief) with the registrar;*
> *(b) an affidavit of the application or other witness in which the applicant or witness identifies with reasonable particularity:*
> > *(i) the facts on which the alleged contraventions of the Act are based, including referring to the provision or provisions of the Act, if any, that are alleged to have been contravened;*
> > *(ii) the party against whom the relief is requested; and*
> > *(iii) any exigent circumstances associated with the application or the granting of the interim relief;*
> *(c) a draft of the order sought by the applicant; and*
> *(d) any other materials that the applicant consider necessary for the purposes of the application.*
>
> *(2) Subject to subsection (3), every affidavit filed pursuant to clause (1)(b) must be confined to those facts that the applicant or witness is able of the applicant's or the witness's own knowledge to prove.*
>
> *(3) If the board is satisfied that it is appropriate to do so because of special circumstances, the bard may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.*
>
> *(4) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subsection (3), the source of the information must be disclosed in the affidavit.*

*[14] Section 15 incorporates much of what is set out in Practice Directive No. 1 and it also elaborates on other aspects of these applications, most notably the Board's ability in "special circumstances" to admit affidavits or portions of affidavits based on information and belief and not personal knowledge. See: subsection 15(3).*

*[15] This Board has already ruled that case-law interpreting section 5(3) of The Trade Union Act [RSS 1978, c T-17 [the "TUA"]] remains relevant when deciding applications for interim relief under subsection 6- 103(e)(d) of the SEA. See especially: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Aaron's Furniture [LRB Files No. 265-15 & 268-15, 2016 CanLII 1307 (SK LRB)], and Amalgamated Transit Union, Local 615 v Saskatoon (City) [LRB File No. 211-14, 2014 CanLII 63994 (SK LRB). The Board explained in Amalgamated Transit Union, Local 651 as follows:*

> *In our opinion, the legislative purpose and the policy restrictions associated with the exercise of the discretion set forth in s. 6-103(2)(d) are the same as that which was articulated by this Board in*

> *[Saskatchewan Government and General Employees' Union v The Government of Saskatchewan, 2010 CanLII 81339]. Simply put, the Board's authority to grant interim relief, the factors we take into consideration on interim applications, and the text employed in exercising our discretion have remained essentially unchanged following the repeal of The Trade Union Act and the proclamation of The Saskatchewan Employment Act.*
>
> *[16] Simply stated, prior authorities respecting all aspects of applications for interim relief decided under the TUA remain good law unless they have been overtaken by more recent legislative changes or new developments in the Board's jurisprudence interpreting and applying the SEA.*

**[65]** The Board most recently endorsed this approach to interim relief applications in *Canadian Union of Public Employees v City of Warman*, LRB File Nos. 283-16 & 013-17.

**[66]** It is clear that these procedural requirements do more than simply encourage best practices; they are pre-requisites that must be satisfied before the Board will take up an application for interim relief. The pre-condition that an underlying application has first been commenced ensures that there will be a factual context outlining the general nature of the principal dispute which will inform the Board about the case it ultimately must adjudicate. The pre-condition that affidavit evidence be submitted to support a formal interim relief application fulfills the important objective of procedural fairness. It ensures the Board has sufficient factual background to assess whether its' early intervention in the dispute is warranted. More significantly, perhaps, a requirement that affidavit evidence be submitted on an interim relief application enables other parties to know more fully the case they must meet.

**[67]** Here while there is an underlying main application filed in this matter, RWDSU supplied no affidavit evidence to support its request that the Board intervene at this time. Absent compliance with this pre-condition, it is not possible to issue an interim relief order in this matter. That said, it is open to RWDSU to commence a formal application invoking subsection 6-103(2)(d) of the *SEA* and comply with the procedural pre-requisites, should it decide to do so.

**[68]** Accordingly, for these reasons the Board declines to issue an interim relief order in this matter at this time.

**CONCLUSION**

**[69]** The Board hereby orders as follows:

- THAT the rehearing will proceed on April 10, 2017 regardless of whether or not the Supreme Court of Canada has released its decision respecting RWDSU's Leave Application;
- THAT the rehearing will proceed as a hearing *de novo* with *viva voce* testimony from witnesses, and
- THAT RWDSU's application for an interim Order is dismissed.

**[70]** The Board expresses its appreciation to all counsel for their oral submissions and written legal memoranda. They were of great assistance to us.

**[71]** This is an unanimous decision of the Board.

**DATED** at Regina, Saskatchewan, this **6th** day of **March, 2017**.

**LABOUR RELATIONS BOARD**

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