SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Applicant v. QUINT DEVELOPMENT CORPORATION, Respondent

LRB File No. 019-18; July 4, 2018

Chairperson, Susan C. Amrud, Q.C., Members: Maurice Werezak and Don Ewart

For Saskatchewan Government and General Employees' Union: Samuel I. Schonhoffer

For the Respondent, Quint Development Corp.: Gordon D. Hamilton and Karyn Kowalski

Application for Reconsideration – Union applied for reconsideration of an Order granted on a summary dismissal application, without a hearing, dismissing a second application for bargaining rights within 12 months, filed without any evidence or argument why the presumptive time bar in subsection 6-12(3) of *The Saskatchewan Employment Act* should not apply.

Application for Reconsideration – Board dismissed application as no grounds proven to apply – Not an appeal or an opportunity to reargue a case or correct parties' mistakes.

REASONS FOR DECISION

Background:

[1] Quint Development Corporation ("Employer") is a non-profit organization that seeks to create opportunities for stable housing, jobs and economic development in Saskatoon's west side core neighborhoods. It operates two homes: Pleasant Hill Place and Quint House.

[2] The history of the application currently before the Board started on July 20, 2017, when the Saskatchewan Government and General Employees' Union ("Union") filed an Application for Bargaining Rights for all of the Employer's employees[1]. A vote was ordered, that resulted in a 9-9 tie. The Union withdrew its Application for Bargaining Rights on August 28, 2017, the same day that it was notified of this result.

[1] LRB File No. 148-17

[3] On October 26, 2017, the Union filed an Unfair Labour Practice Application[2] on behalf of four employees, alleging that the Employer was taking various sanctions against them "as a ways and means of intimidating these employees to keep the union out".

[4] On December 15, 2017, the Union filed another Application for Bargaining Rights[3], but only for the employees who work at Pleasant Hill Place. On January 5, 2018, the Employer filed a Reply and an Application for Summary Dismissal and Objecting to Second Representation Vote within Twelve Months[4]. On January 9, 2018, the Board, in an *in camera* hearing, granted the following Order:

> ***THE LABOUR RELATIONS BOARD**, pursuant to Section 6-12(3) of The Saskatchewan Employment Act, declines to order a vote in LRB File No. 262-17 and, accordingly, the application of the Saskatchewan Government and General Employees Union in LRB File No. 262-17 is **DISMISSED**[5].*

[5] On January 29, 2018, the Union filed an Application for Reconsideration of the Order issued by the Board on January 9, 2018. This is the application that the Board is addressing in these Reasons for Decision.

Argument on Behalf of the Parties:

[6] The Union first addressed the test to be applied in considering an application for summary dismissal. It referred the Board to *Re KBR Wabi Ltd. et al.*, 2013 CanLII 73114 (SK LRB) ("*KBR Wabi*"), and two subsequent cases that relied on that decision (*Construction Workers Union, Local 151 v. Nicole Wilson and Westwood Electric Ltd., Tercon Industrial Works Ltd., Pyramid Construction, Willbros Construction Services (Canada) L.P. and Canonbie Contracting Ltd.*, 2013 CanLII 29675 (SK LRB) and *Saskatoon Co-operative Association Limited v. United Food and Commercial Workers, Local 1400*, 2018 CanLII 1733 (SK LRB)). In *KBR Wabi*, the Board established the test for summary dismissal applications:

> *[79] Taking all of this into consideration, we adopt the following as the test to be applied by the Board on the exercise of its authority under s. 18(p) of the Act.*
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> > *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this*

[2] LRB File No. 216-17
[3] LRB File No. 262-17
[4] LRB File No. 005-18
[5] LRB File No. 019-18

> *ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
>
> *2. In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*

[7] At paragraph 86 of *KBR Wabi*, the Board noted:

> *Given the procedure outlined above, it is clear that the Soles process is intended to be an in camera process, with the first hurdle being a determination that the matter is one that the Board thinks can conveniently be dealt with in camera. If the Board determines that the matter is not one that can conveniently be dealt with in camera, then the application for summary dismissal would require a viva voce hearing before a panel of the Board and the application under s. 18(q) would be dismissed.*

[8] And at paragraphs 105 and 106 of *KBR Wabi*, the Board clarified the test:

> *[105] In Odhavji Estate v. Woodhouse,[66] the Supreme Court relied upon the test set out by Wilson J. in Hunt v. Carey Canada Inc.[67] as follows:*
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> > *. . . assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect . . . should the relevant portions of a plaintiff's statement of claim be struck out . . . .*
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> *[106] The Court then went on to say at paragraph 15:*
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> > *The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also Attorney General of Canada v. Inuit Tapirisat of Canada, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735.*

[9] The Union argues that these quotes lead to the conclusion that, to dismiss an application *in camera*, the Board would have to have been satisfied that it could conveniently deal with the application in that manner, and be satisfied beyond doubt that it was plain and obvious that the Application for Bargaining Rights had no reasonable chance of success.

[10] The Union stated that the role of the Board was to determine whether the proposed bargaining unit was an appropriate unit, not whether it was the most appropriate unit[6]. It argued that there was not sufficient evidence before the Board for it to determine that the bargaining unit proposed in the second Application for Bargaining Rights was not appropriate. It stated that, based on the evidence before the Board, it could not have been plain and obvious that the proposed bargaining unit was not appropriate.

[11] The Union then turned to the issue of the Board's approach to applications for reconsideration. The Board's approach to reconsideration applications is well established. The process for review is a two stage process. First, an applicant needs to satisfy the Board that its decision should be reconsidered because one or more of the applicable grounds have been established. If the applicant makes out a case for reconsideration, then the Board undertakes a review of the decision on those grounds. The six grounds were first articulated by the Board in *Remai Investment Corporation (o/a Imperial 400 Motel) v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union & Sharon Ruff*, [1993] 3rd Quarter Sask. Labour Rep. 103 ("*Remai Investment Corporation*"), 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.*
> 2. *If a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons.*
> 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.*
> 4. *If the original decision turned on a conclusion of law of (sic) general policy under the code which law or policy was not properly interpreted by the original panel.*
> 5. *If the original decision is tainted by a breach of natural justice.*
> 6. *If the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[12] The Union argued that the first ground applies, because there was not a hearing and, in their opinion, additional evidence is necessary. With respect to the fourth ground, it argued at

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[6] *Workers United Canada Council v. Amenity Health Care LP and/or 7169320 Manitoba Ltd., operating as Tim Hortons*, 2018 CanLII 8572 (SK LRB); *UFCW, Local 1400 v. Plainsview Credit Union*, 2011 CarswellSask 467 (SK LRB).

length its view that the Board made the wrong decision. The Union argued that the fifth ground also applies, because it was not given an opportunity to respond with evidence and submissions after the Employer raised subsection 6-12(3) of the Act in its Reply and Application for Summary Dismissal. It argued that it did not have a chance to make its case through its original pleadings. With respect to the sixth ground, the Union considers this decision precedential and opined that it would have been helpful for the Board to have provided detailed reasons for its decision.

[13] The Employer submitted that the issue before the Board was whether the Union had established any of the grounds for reconsideration. Only if one or more grounds were established would the Board go on to the second step of reconsidering the merits of the Application for Bargaining Rights.

[14] The Employer also directed the Board to the *Remai Investment Corporation* grounds noted above. With respect to the first ground, it pointed out clause 6-111(1)(q) of the Act, which permits the Board to decide any matter before it without holding an oral hearing. If the failure to hold a hearing automatically entitled a party to reconsideration, this provision would be redundant. The Employer argued that there are no facts relevant to the issue before the Board that are in controversy. With respect to the third ground, the Employer argued that given the specific language in subsection 6-12(3), the outcome was not unanticipated. The Employer argued that the Union has not proven that the fourth ground applies. It suggested that, since no reasons were issued in January, 2018 the Union was unable to rely on this ground. It also stated that a petition for the Board to provide exhaustive reasons does not constitute a ground for reconsideration. With respect to the fifth ground, the Board clearly decided that it had enough information before it. The Employer stated that, if the procedure in the Application for Summary Dismissal amounted to a denial of natural justice then the decision to allow the Union to withdraw the first Application for Bargaining Rights without first giving the Employer an opportunity to comment or object would also amount to a denial of natural justice. As to the sixth ground, the Employer stated that the January 9, 2018 Order is not precedential; it is consistent with previous Board decisions. The Board's exercise of its discretion was carried out precisely in the manner for which such discretion is always exercised in a labour relations context, namely to provide a cooling-off period.

[15] The Employer then compared the language of the Act and *The Trade Union Act* in two places. First it compared clauses 18(m) and (n) of *The Trade Union Act* to clauses 6-111(1)(m) and (n) of the Act:

The Trade Union Act:
18 The board has, for any matter before it, the power:
(m) to bar from making a similar application for any period not exceeding one year from the date an unsuccessful application is dismissed:
(i) an unsuccessful applicant;
(ii) any of the employees affected by an unsuccessful application;
(iii) any person or trade union representing the employees affected by an unsuccessful application; or
(iv) any person or organization representing the employer affected by an unsuccessful application;
(n) to refuse to entertain a similar application for any period not exceeding one year from the date an unsuccessful application is dismissed from anyone mentioned in subclauses (m)(i) to (iv);

The Saskatchewan Employment Act:
6‑111(1) With respect to any matter before it, the board has the power:
(m) to bar from making a similar application, for any period not exceeding 12 months after the date an unsuccessful application is dismissed:
(i) an unsuccessful applicant;
(ii) any of the employees affected by an unsuccessful application;
(iii) any person or union representing the employees affected by an unsuccessful application; or
(iv) any person or organization representing the employer affected by an unsuccessful application;
(n) to refuse to entertain a similar application, for any period not exceeding 12 months after the date an unsuccessful application is dismissed, that is submitted by anyone mentioned in subclauses (m)(i) to (iv);

[16] These provisions are almost identical. As the Employer pointed out, it was unable to make an application under either of these clauses because the Union withdrew the first Application for Bargaining Rights before the Board had an opportunity to dismiss it.

[17] Next, the Employer compared the language of clause 5(b) of *The Trade Union Act* to subsections 6-12(1) and (3) of the Act:

The Trade Union Act:
5 The board may make orders:
(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in

The Saskatchewan Employment Act:
6‑12(1) Before issuing a certification order on an application made in accordance with section 6‑9 or amending an existing certification order on an application made in accordance with section 6‑10, the board shall direct a vote of all employees eligible to vote to determine whether the union should

respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;

be certified as the bargaining agent for the proposed bargaining unit.

(3) Notwithstanding subsection (1), the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same union.

[18] While these provisions are not identical, the Employer argued that they should be interpreted in the same manner, with the only change being that the presumptive time bar was increased from six months to 12 months. To interpret subsection 6-12(3) to mean the same as clauses 6-111(1)(m) and (n) would mean that subsection 6-12(3) has no meaning. This interpretation would be contrary to modern rules of statutory interpretation, which provide that every word in a statute is presumed to have meaning. The Employer referred the Board to the Supreme Court of Canada decision in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 SCR 715, 2006 SCC 20 (CanLII), which stated as follows:

> *[45] Under the presumption against tautology, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose": see R. Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994), at p. 159. To the extent that it is possible to do so, courts should avoid adopting interpretations that render any portion of a statute meaningless or redundant: Hill v. William Hill (Park Lane) Ld., [1949] A.C. 530 (H.L.), at p. 546, per Viscount Simon.*
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> *[46] Although the presumption is rebuttable where it can be shown that the words do serve a function, or that the words were added for greater certainty, I do not think that either of those arguments can succeed in the present case.*

[19] The Employer also addressed the Union's argument that to deny a vote on the second Application for Bargaining Rights would mean that the employees' wishes were not being respected. As they pointed out, a vote was conducted on the first application, and the employees' wishes were expressed – the vote did not support the application. By allowing for a cooling-off period, the employees' wishes are being respected.

Relevant Statutory Provisions:

[20] The Board was referred to the following statutory provisions as being relevant to this matter:

> *Representation vote*
> *6‑12(1) Before issuing a certification order on an application made in accordance with section 6‑9 or amending an existing certification order on an application made in accordance with section 6‑10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.*
> *. . .*
>
> *(3) Notwithstanding subsection (1), the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same union.*
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> *Powers re hearings and proceedings*
> *6‑111(1) With respect to any matter before it, the board has the power:*
> *(a) to require any party to provide particulars before or during a hearing or proceeding;*
>
> *. . .*
>
> *(m) to bar from making a similar application, for any period not exceeding 12 months after the date an unsuccessful application is dismissed:*
> *(i) an unsuccessful applicant;*
> *(ii) any of the employees affected by an unsuccessful application;*
> *(iii) any person or union representing the employees affected by an unsuccessful application; or*
> *(iv) any person or organization representing the employer affected by an unsuccessful application;*
> *(n) to refuse to entertain a similar application, for any period not exceeding 12 months after the date an unsuccessful application is dismissed, that is submitted by anyone mentioned in subclauses (m)(i) to (iv);*
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> *. . .*
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*
> *(q) to decide any matter before it without holding an oral hearing;*
>
> *No appeals from board orders or decisions*
> *6‑115(1) Every board order or decision made pursuant to this Part is final and there is no appeal from that board order or decision.*
> *(2) The board may determine any question of fact necessary to its jurisdiction.*
> *(3) Notwithstanding subsections (1) and (2), the board may:*
> *(a) reconsider any matter that it has dealt with; and*
> *(b) rescind or amend any decision or order it has made.*

Analysis:

[21] At the commencement of the hearing, the Employer requested an adjournment on the basis that the Board required viva voce evidence about certain matters that had occurred or come to light since the January 9, 2018 Order was granted. The Board denied that request as, on the first stage of a reconsideration application, that evidence is irrelevant. If the Board had decided that the Union had established grounds for reconsideration, a decision would have been made at that point what, if any, further evidence it required to deal with the second step.

[22] Both parties provided the Board with submissions that the Board reviewed and found helpful. Both parties also filed affidavits respecting activities that occurred after the January 9, 2018 Order. That information is not relevant to this stage of the application and has not been considered by the Board in making this decision.

[23] The application currently before the Board is an Application for Reconsideration. The ability for the Board to reconsider any matter that it has dealt with does not provide a general right of appeal. Section 6-115 of the Act specifically states that there is no appeal from a Board order or decision. There is value in Board decisions being final in all but exceptional circumstances. The Board has emphasized this principle in many decisions, for example, in *Canadian Union of Public Employees, Local 600-3 v. Government of Saskatchewan (Community Living Division, Department of Community Resources)*, 2009 CanLII 49649 (SK LRB), a case relied on by the Union, the Board stated:

> *[21] The Board has consistently applied the same stringent test in determining whether or not a reconsideration application should be allowed. As set out by the Board in Grain Services Union v. Saskatchewan Wheat Pool et al.*
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> > *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 evidence to be presented that was not previously available, or errors to be corrected.*

[24] It was agreed by the parties that an application for reconsideration involves a two-step process. The first question for the Board is whether any of the grounds cited in *Remai Investment Corporation* have been met. If the Board decides that one or more of the grounds apply, additional evidence may be relevant to the issue of whether a vote should be ordered on the second Application for Bargaining Rights.

[25] The Board considered each of the *Remai Investment Corporation* criteria, and reached the following conclusions.

[26] 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: There was no hearing in this matter. However, there is no finding of fact that is in controversy. The Board directed a vote of all employees of the Employer on July 27, 2017. The Union made a second Application for Bargaining Rights, of the Pleasant Hill Place employees, on December 15, 2017, less than five months later.

[27] If a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons: Both parties agree that the second ground does not apply because no hearing took place.

[28] 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: The Order has not operated in an unanticipated way. The Order implemented the cooling-off period contemplated by subsection 6-12(3) of the Act.

[29] If the original decision turned on a conclusion of law of (sic) general policy under the code which law or policy was not properly interpreted by the original panel: *KBR Wabi* provides that, in making a determination on a summary dismissal application, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim. In making its second Application for Bargaining Rights the Union chose only to provide the application. It did not provide the Board with any information addressing subsection 6-12(3). Faced with only the application, it was clear and obvious that the Union had not made out a case why the presumptive time bar in subsection 6-12(3) should not apply in this case. The Union chose not to provide the Board with any information on the issue.

[30] If the original decision is tainted by a breach of natural justice: The Union argued that it was a breach of natural justice for the Board not to provide it with an opportunity to reply to the Employer's Reply. The Union did not address the subsection 6-12(3) issue in its second Application for Bargaining Rights. It is not a breach of natural justice for the Board to refuse to

assist the Union in correcting this oversight. The following passage from *Kennedy v Canadian Union of Public Employees, Local 3967*, 2015 CanLII 60883 (SK LRB) is applicable here:

> *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*.

[31] The Union chose to provide no evidence in its second Application for Bargaining Rights with respect to why it was of the view that the presumptive time bar would not apply. It is not a breach of natural justice for the Board to decline to provide them a second opportunity to make their case before dismissing their application. This is not a situation where the evidence they now wish to present was not available to them in December 2017. They chose not to present it and are now asking the Board to allow them to choose an alternative strategy in their approach to the second Application for Bargaining Rights. As the Board stated at page 9 of *Remai Investment Corporation*:

> *The possibility of reconsideration is not offered to make it possible for the parties to mend their mistakes or experiment with a different strategy at a second hearing – an opportunity which advocates everywhere would no doubt welcome. The jurisdiction to reconsider a decision is intended instead to redress an injustice which would be perpetrated by failing to take into account evidence which, for reasons beyond the control of the party making the application, was not presented at the first hearing.*

[32] <u>If the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change</u>: The decision made by the Board on January 9, 2018 was not precedential. It is consistent with the past approach of

the Board, to apply a cooling-off period before a subsequent Application for Bargaining Rights will be allowed.

[33] It must also be noted that the Board has consistently held that criteria 4 and 6 are of less significance in Saskatchewan, as they are not to be interpreted as broadly as the Union suggests. For example, in *Wilson v Construction Workers Union (CLAC), Local 151*, 2013 CanLII 81262 (SK LRB), while considering criterion four on a reconsideration application, the Board stated:

> ***[17] . . . .*** *The Applicant alleges that the Board has misconstrued or misapplied questions of law related to the application. The Union and Westwood argue that this criterion is of less significance in Saskatchewan due to the fact that the structure of the Board is composed of only the Chairperson and one Vice-Chairperson, such that disharmony in decisions is less likely to apply and require the Board to reconsider and confirm certain policy adjudications over others, or to ensure a consistent application of the law in all cases.*
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> ***[18]*** *We agree with the Union and Westwood in this regard. As noted by the Board in Remai Investment Corporation, supra:*
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> > *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.*
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> ***[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.*
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> ***[20]*** *The Applicant brought forward no conflicting decision of law or policy which it argued the Board should clarify by reconsideration.*

[34] A proper, narrow interpretation of grounds four and six confirms that they have not been satisfied in this case either. The Union brought forward no conflicting decisions that the Board needs to address to achieve consistency[7].

[35] The Order that the Union is asking the Board to reconsider is an Order for Summary Dismissal of an Application for Bargaining Rights. The Board relied on subsection 6-12(3) of the

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[7] See also *International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v Cornerstone Contractors Ltd., Westcor Services Limited*, 2016 CanLII 1306 (SK LRB).

Act in making its decision. Subsection 6-12(3) of the Act replaced clause 5(b) of *The Trade Union Act*. The Union argued that the change in wording from clause 5(b) of *The Trade Union Act* to subsection 6-12(3) of the Act means that there is no longer a presumptive bar to a second vote. It based this argument in part on *United Food and Commercial Workers, Local 1400 v. Affinity Credit Union*, 2010 CanLII 44855 (SK LRB). However, that case is clearly distinguishable. In that case, the presumptive time bar in clause 5(b) of *The Trade Union Act* had expired, and the employer had made an application under clause 18(n) of that Act to extend even further the time before an application for bargaining rights could be made. That is not the situation here. The Union has also made the error of assuming that subsection 6-12(3) is the replacement to clause 18(n), but as has been set out above, clause 18(n) was replaced by clause 6-111(1)(n).

[36] The Employer argued that the only change made by the redrafting of clause 5(b) of *The Trade Union Act* was to extend the presumptive bar from six months to 12 months. In making its Order on January 9, 2018, the Board clearly adopted this interpretation.

[37] The purpose of subsection 6-12(3), like its predecessor, clause 5(b) of *The Trade Union Act*, is to prevent unnecessary or prolix applications for certification. If it was intended to have the same meaning as clauses 6-111(1)(m) and (n), there would have been no reason to include it. The only reasonable interpretation of subsection 6-12(3) is that, when the drafting was updated in the new Act, the only substantive change was to extend the six month cooling off period to 12 months.

[38] In adopting this interpretation the Board has considered at length the application of section 2(d) of the *Canadian Charter of Rights and Freedoms* and section 6-4 of the Act. The Board is satisfied that this interpretation is consistent with both of these provisions. In paragraph 77 of *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 ("*SFL*"), the Supreme Court of Canada stated:

> *[77] This brings us to the test for an infringement of s. 2(d). The right to strike is protected by virtue of its unique role in the collective bargaining process. In Health Services, this Court established that s. 2(d) prevents the state from substantially interfering with the ability of workers, acting collectively through their union, to exert meaningful influence over their working conditions through a process of collective bargaining (para. 90). And in Mounted Police, McLachlin C.J. and LeBel J. confirmed that*

> *[t]he balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. . . . Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining . . .*

[39] The question for the Board, then is whether a presumptive time bar to a subsequent Application for Bargaining Rights, that provides a cooling-off period for employees, is an acceptable limitation on those rights. The Board is satisfied that it is. The Union has other remedies in the Act that it can use to protect the employees' rights. For example, the time bar is presumptive, not mandatory, meaning that the Union can ask the Board to waive it in appropriate circumstances. The Union (as it has done in this case) may make an application alleging unfair labour practices by the Employer if it is of the view that the initial application was unsuccessful because of Employer interference.

[40] Further, at paragraphs 99 and 100 of *SFL*, the Supreme Court stated:

> *[99] As for The Trade Union Amendment Act, 2008, this Court has long recognized that the freedom of association protects the "right to join associations that are of [employees'] choosing and independent of management, to advance their interests": Mounted Police, at para. 112; see Dunmore v. Ontario (Attorney General), 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016, at para. 30. In Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), 1990 CanLII 72 (SCC), [1990] 2 S.C.R. 367, this Court stated that "s. 2(d) protects the freedom to establish, belong to and maintain an association" (p. 402), and in Health Services it was reaffirmed that s. 2(d) guarantees employees "the right to unite" (para. 89).*
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> *[100] But I agree with the trial judge, whose conclusion was upheld by the Court of Appeal, that in introducing amendments to the process by which unions may obtain (or lose) the status of a bargaining representative, The Trade Union Amendment Act, 2008 does not substantially interfere with the freedom to freely create or join associations. This conclusion is reinforced by the trial judge's findings that when compared to other Canadian labour relations statutory schemes, these requirements are not an excessively difficult threshold such that the workers' right to associate is substantially interfered with.*

[41] The Union suggested that the interpretation of subsection 6-12(3) adopted by the Board would be contrary to section 2(d), as it would deny the employees the right to vote on whether to be represented. This argument ignores the fact that the employees did vote on this issue, and

chose not to be represented. While this was not the outcome that the Union hoped for, it cannot be ignored by the Board. The Union states that the employees have "the right to be represented" [para 55 of the Union's Brief of Law]; in fact what they have is "the right to join associations that are of [their] choosing", and in this case joining the Union was not their choice. The Union's unwillingness to respect the employees' decision is described quite tellingly in the following statement at paragraph 102 of the Union's Brief of Law: "SGEU is still waiting for its chance to represent these employees".

[42] Both parties referred the Board to *KBR Wabi* where, as noted in paragraph [6] above, the Board set out the test for summary dismissal. The test established in that case has been consistently followed by the Board. The jurisprudence is clear that to dismiss an application without the benefit of evidence or argument is a step that should only be taken in plain and obvious cases, where the case is beyond doubt.

[43] *KBR Wabi* also confirmed, at paragraph 67, that the power to summarily dismiss can be used with or without an oral hearing being held:

> *It is clear from the analysis above that the power to dismiss an application summarily for "lack of evidence" or disclosing "no arguable case" and the power to dismiss an application without an oral hearing are discrete powers granted to the Board. That having been said, the Board's procedures have also acknowledged, the power to summarily dismiss can be utilized by the Board with, or without an oral hearing being held.*

[44] In *Roy v. Workers United Canada Council*, 2015 CanLII 885 (SK LRB), after citing the test set out in *KBR Wabi*, the Board went on to say:

> *[9] Generally speaking, summary dismissal is a vehicle for the disposition of applications that are patently defective. The defect(s) must be apparent without the need for weighing of evidence, assessment of credibility, or the evaluation of novel statutory interpretations. Simply put, in considering whether or not an impugned application ought to be summarily dismissed, the Board assumes that the facts alleged in the main application are true or, at least, provable. Having made this assumption, if the Board is not satisfied that the main application at least discloses an arguable case, and/or if there is a lack of evidence upon which an adverse finding could be made, then the main application is summarily dismissed in the interests of efficiency and the avoidance of wasted resource.*

[45] In this case the Union chose to provide no evidence on its second Application for Bargaining Rights respecting the presumptive time bar in subsection 6-12(3). Given this lack of evidence, the Board had no choice but to summarily dismiss the application as being patently defective and disclosing no arguable case. It is unnecessary for the Board to consider the issue of whether the bargaining unit in the second Application for Bargaining Rights was an appropriate unit.

[46] The Board orders that the Application for Reconsideration is dismissed.

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

DATED at Regina, Saskatchewan, this 4th day of July, 2018.

LABOUR RELATIONS BOARD

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Susan C. Amrud, Q.C.
Chairperson