AMALGAMATED TRANSIT UNION, LOCAL 615, Applicant v. CITY OF SASKATOON, Respondent

LRB File No. 263-17; November 23, 2018
Chairperson, Susan C. Amrud, Q.C.; Members: Gary Mearns and Maurice Werezak

For the Applicant Union: Mr. Gary L. Bainbridge, Q.C.
For the Respondent Employer: Ms. Christine Bogad

Application to dismiss for delay – Despite inordinate delay, Board allowed application to proceed. Union was pursuing claim throughout this time period – Board error contributed to delay.

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

Introduction:

[1] This application is another step in the long-running history of applications and appeals that were generated by the lockout of members of the Amalgamated Transit Union, Local 615 ["Union"] by the City of Saskatoon ["City"] commencing September 20, 2014. A summary of that history follows.

I. October 17, 2014 Order/ October 21, 2014 Reasons for Decision re LRB File No. 210-14 (Unfair Labour Practice Application filed by Union on September 22, 2014)[1]

[2] The Board made the following findings:

- LRB File No. 079-14 ["Mongovius Application"] was pending before the Board from June 3, 2014 to October 3, 2014, invoking the "pending application" statutory freeze on lockouts pursuant to clause 6-62(1)(l)(i) of *The Saskatchewan Employment Act* ["Act"].

[1] ATU, Local 615 v Saskatoon (City), 2014 CanLII 63995 (SK LRB).

- When the City gave notice of its intention to lock out members of the Union on September 18, 2014, the Mongovius Application was pending before the Board.
- When the City locked out members of the Union on September 20, 2014, the Mongovius Application was pending before the Board.
- When the City enacted Bylaw No. 9224 on September 22, 2014, the Mongovius Application was pending before the Board.

[3] The Board held that not only was the lockout unlawful, but the notice of lockout was also unlawful, such that the City was required to start over and issue a new notice if it intended to lock out its employees. The Union sought compensation for the monetary losses suffered by its members as a result of the City's unlawful conduct. The Board held:

> *[67] In its application, the Union seeks compensation for monetary losses suffered by its members as a result of the unlawful conduct of the City. In our opinion, such compensation is appropriate. An Order was issued directing the City to pay compensation to the members of the Union for monetary loss suffered in being locked [sic] in contravention of s. 6-62(1)(l)(i) of The Saskatchewan Employment Act. However, by agreement of the parties, this Board heard no evidence or argument as to the quantification of such losses other than as to the period of time during which this compensation would be payable.*
>
> *[68] In our opinion, compensation for monetary losses suffered by members of the Union must be limited to the period commencing with the City's actions in locking out members of the Union on September 20, 2014 until October 3, 2014, when this Board made its decision with respect to the appropriate disposition of LRB No. 079-14. We were not satisfied that compensation for monetary loss is appropriate or necessary for the period after the statutory freeze has been lifted. (emphasis added)*

[4] The Board also ordered the City to cease and desist the lockout. The Order included the following terms:

> *THEREFORE, THE LABOUR RELATIONS BOARD, pursuant to Sections 6-103 and 6-104 of The Saskatchewan Employment Act, HEREBY:*
>
> *6. ORDERS the Respondent Employer to cease and desist from its current lockout of members of the Applicant Union and to refrain from declaring another lockout until such time as it has complied with Section 6-34 of The Saskatchewan Employment Act;*
>
> *7. ORDERS the Respondent Employer to pay compensation to the members of the Applicant Union for monetary loss suffered as a result of the unlawful actions of the Employer in locking out said members while an application was pending before the Board for the period during which the said application was pending before the Board; (emphasis added)*

II. January 30, 2015 Order/March 3, 2015 Reasons for Decision re LRB File No. 210-14[2]
(Hearing January 30, 2015)

[5] These Reasons and Order dealt with the proper remedy for the City enacting Bylaw No. 9224 on September 22, 2014. The Board held that Bylaw No. 9224 was of no force and effect for members of the Union for the period June 3, 2014 to October 3, 2014. The Reasons several times referred to the period of time in question as ending on October 3, 2014, the day on which the statutory freeze ended (paragraphs [5], [17], [21], [22], [23], [25]). See for example, paragraph 23:

> *The temporal limits of the monetary compensation contained in our Order of October 17, 2014 mirrored the temporal limits of the statutory freeze. While we also issued a cease and desist Order, we did so because the statutory freeze invalidated the City's notice of lockout. The cease and desist Order flowed from the invalidation of the City's notice of lockout; not from the lockout itself. By the time we heard the Union's application in LRB File No. 210-14, the statutory freeze had expired. At that point in time, the City's lockout was not unlawful because of the statutory freeze; it was unlawful because the City was no longer in compliance with s. 6-34 of The Saskatchewan Employment Act. Thus, the City was directed to cease the lockout and was enjoined from commencing a new lockout until such time as it had complied with s. 6-34 of the Act. The remedy imposed for unlawfully locking out members of the Transit Union while an application was pending before the Board was monetary compensation but that compensation was limited to the period of the statutory freeze. (emphasis added)*

III. February 24, 2016 Order and Reasons for Decision re LRB File No. 269-14[3]
(Unfair Labour Practice Application filed by Union on December 12, 2014)

[6] The Union filed an application claiming that the City should compensate its members for the period between October 3 and 17, 2014. The Board agreed with the City that this issue had already been dealt with by the Board:

> *The Order was issued on October 17, 2014 and could have, if that panel of the Board had so wished, included the period between October 3 and October 17, 2014 as compensable. It did not. In our opinion, the Board's Order on October 17, 2014 clearly established that compensation would be due only for the period up to October 3, 2014 and not thereafter. (paragraph 29)*

[7] The Board dismissed the Union's application as a collateral attack on the earlier Order. It treated it as an application for reconsideration and dismissed the application.

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[2] ATU, Local 615 v Saskatoon (City), 2015 CanLII 19980 (SK LRB).
[3] ATU, Local 615 v. Saskatoon (City), 2016 CanLII 30540 (SK LRB).

IV. December 8, 2016 Judgment of the Court of Queen's Bench[4]
(Judicial Review Application to quash the February 24, 2016 decision of the Board)

[8] The Court held that the Union had not had an opportunity to fully make its case respecting compensation for the period after October 3, 2014. The Court also held that the Board breached the *audi alteram partem* rule by treating the December 12, 2014 application as an application for reconsideration without giving the Union an opportunity to provide submissions on that issue. It quashed the February 24, 2016 decision and remitted the matter back to the Board to consider what compensation, if any, the Union should receive for the period of the lockout after October 3, 2014.

V. November 6, 2017 Decision/November 28, 2017 Judgment of the Court of Appeal for Saskatchewan[5]

[9] The Court allowed the appeal. However, it held that the Board had denied the Union its right to be heard on the question of whether the October 17, 2014 Order should be reconsidered, because the Board raised that issue on its own initiative and resolved it against the Union without hearing from the Union. The Court included the following order in its Judgment:

> *The respondent [Union] may bring an application asking the Board to reconsider the Lockout Application decision [the October 17, 2014 decision] if the Union so chooses.*

VI. Current Application: LRB File No. 263-17

[10] Less than three weeks after the Court of Appeal Judgment was issued (December 15, 2017), the Union filed the current application. It styled its application as an Application to Amend a Board Order, pursuant to section 16 of *The Saskatchewan Employment (Labour Relations Board) Regulations* ["Regulations"], rather than an Application for Reconsideration pursuant to section 33 of the Regulations. Although framed as an Application to Amend the Board's Order of

[4] ATU, Local 615 v Saskatoon (City), 2016 SKQB 396 (CanLII).
[5] Saskatoon (City) v ATU, Local 615, 2017 SKCA 96 (CanLII).

October 17, 2014, the current application is in fact an application for reconsideration[6]. No explanation was provided in oral or written argument for this inconsistency.

[11] Both parties filed Written Submissions that the Board has read and for which we are thankful.

A) PRELIMINARY OBJECTION – TIMELINESS

Background:

[12] Section 33 of the Regulations requires an application for reconsideration to be filed and served within 20 days after the date of the decision or order with respect to which reconsideration is sought. According to the City's calculations, this application for reconsideration was filed 1155 days after the October 17, 2014 Order. The City urges the Board to reject the application on that basis.

[13] The Board would point out that this is not the only irregularity with this application. If this is actually an Application to Amend, as the document states, the Union failed to file a copy of the collective bargaining agreement in force between the parties, as required by section 16 of the Regulations. If it is actually an Application for Reconsideration (as the Union admits in its Written Submissions), the application does not set out a summary of the law on which the Union intends to rely, as required by section 33 of the Regulations. As the City did not object to these two irregularities, the Board is prepared to waive them pursuant to section 30 of the Regulations.

Argument on Behalf of the Parties:

[14] The City argues that the application should be dismissed for undue delay. It relied on *Dishaw v Canadian Office & Professional Employees Union, Local 397*, 2009 CanLII 507 (SK LRB) ["*Dishaw*"] for the principle that time is of the essence in labour relations matters. At paragraph 36 of *Dishaw*, the Board stated:

> *Finally, while the Board has indicated that it has declined to rule as to whether or not s. 12.1 has application in the present case, the Board notes that the addition of this new provision to the Act, together with s. 21.1 (which was added at the same time) signals an*

[6] Written Submissions on Behalf of the ATU, Local 615, para 1: "This is an application for reconsideration of a Saskatchewan Labour Relations Board decision".

> *intent by the authors of the legislation; that time is of the essence in dealing with disputes in a labour relations context; that the timely commencement and resolution of outstanding grievances is an important component in maintaining amicable labour relations in this Province; and that parties have the right to expect that claims, which are not asserted within a reasonable period of time, or which involve matters which appear to have been satisfactorily settled, will not later re-emerge.*

[15] The City also referred the Board to *Hartmier v Saskatchewan Joint Board Retail, Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060 (SK LRB) ["*Hartmier*"]. In that case, the Board conducted a review of its past decisions respecting delay generally before making the following findings:

> *[120] This survey of relevant Board Decisions reveals that while each decision turned on the particular facts of the case, nevertheless a number of factors figure prominently in the Board's analysis of undue delay applications in duty of fair representation claims. The more prominent factors include:*
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> - *Length of Delay: The length of delay is critical. An applicant will bear the burden to explain the reasons for any delay and the longer the delay, the more compelling must be the reasons for the delay in filing the application. Now that the Legislature has mandated a statutorily prescribed time limit for the filing of unfair labour practice applications, the Board's tolerance for exceptionally long delays has decreased significantly.*
>
> - *Prejudice: Labour relations prejudice is presumed in cases of delay; however, if the delay is extensive or inordinate this factor will weigh more heavily in the analysis. The longer the delay, the greater the prejudice to a respondent. Evidence of actual prejudice to a respondent likely will result in the main application being dismissed.*
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> - *Sophistication of Applicant: An applicant's knowledge of labour law and labour relations matters, generally is an important consideration when assessing the veracity of the reasons for the delay.*
>
> - *The Nature of the Claim: The issues at stake for an applicant will be weighed in the balance. If the consequences of dismissing an application for reasons of delay are significant to an applicant, this will weigh in favour of permitting the application to proceed despite a lengthy delay in its initiation.*
>
> - *The Applicable Standard: When adjudicating delay applications, the standard which has been applied consistently is: can justice be achieved in the matter despite a lengthy delay in commencing it?*

[16] In the City's view, the Union's application fails on all of these factors. The length of the delay is unacceptably long and the Union has provided no reason for the delay. Significant prejudice to the City should be presumed. The Union is a legally sophisticated organization with specialized, experienced counsel. The nature of the claim weighs against the Union – it is simply asking for more money. Justice cannot be achieved after this lengthy delay. This application

undermines the purpose of specialized labour relations tribunals such as the Board and, if granted, would frustrate the clear legislative purpose of expeditious and final determination of labour relations disputes as required by the Act.

[17] The Union argues that the time limitation in section 33 of the Regulations should not apply to this application.

[18] First, the Board has discretion to relieve against time limits in appropriate circumstances, and this is an appropriate circumstance to do so. The Union relied on *Treaty Three Police Service v Public Service Alliance of Canada*, 2013 CIRB 677 (CanLII) as support for its argument that the Board has broad discretion to waive the timeline for bringing an application for reconsideration in exceptional circumstances.

[19] It also referred the Board to *Re Refrigeration Installations (Honey Limited)*, [1995] S.L.R.B.D. No. 52, LRB File No. 057-94 ["*Refrigeration Installations"*], which, in considering the issue of delay, referred to a 1984 decision[7] of the Board that held that a delay of six and one-half years did not prevent the determination of monetary loss in that case.

[20] Second, the Union says, the Court of Appeal implicitly waived the time limitation. At paragraph 46 the Court stated:

> *the Board's error in relation to the reconsideration issue does mean that, should the Union now choose to apply for reconsideration of the Lockout Application decision, it may do so. The Board will be obliged to adjudicate any such application afresh and in light of whatever submissions might be made by the City and the Union.*[8]

[21] The timeline for bringing a reconsideration application had long since expired when the Court made this comment.

[22] Third, the Union submits that the attempt by the City to limit or prevent the Board from adjudicating on this application is a collateral attack on the Court of Appeal's decision. It characterized the City's position as an attempt to challenge the finality of the Order and contrary to the doctrines of *res judicata* and issue estoppel.

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[7] *RWDSU v. L&S Equipment (1981) Ltd.,* [1984] May Sask Labour Rep 31 ["*L & S Equipment*"].
[8] Supra, footnote 5.

Relevant Legislative Provisions:

[23] The following provisions of the Act are relevant to this application:

> ***General powers and duties of board***
> *6-103(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*
>
> ***Board powers***
> *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;*
> > *(g) amending a board order if:*
> >
> > > *(i) the employer and the union agree to the amendment; or*
> > > *(ii) in the opinion of the board, the amendment is necessary;*
> >
> > *(h) notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of a certification order or collective bargaining order is pending in any court, rescinding or amending the certification order or collective bargaining order;*
>
> ***No appeals from board orders or decisions***
> *6 -115(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.*

[24] Three sections of the Regulations also apply:

> ***Application to amend a board order***
> *16(1) An employer, other person or union that intends to obtain an order pursuant to clause 6-104(2)(f), (g) or (h) of the Act to amend an existing board order shall file:*
>
> > *(a) an application in Form 13 (Application to Amend); and*
> > *(b) if there is an existing collective bargaining agreement in force between the employer and the union named in the order, a copy of the collective bargaining agreement.*
>
> ***Non-compliance***
> *30 Non-compliance with these regulations does not render any proceeding void unless the board directs otherwise.*
>
> ***Application for reconsideration***
> *33(1) In this section, "application for reconsideration" means an application pursuant to subsection (2).*
> *(2) An employer, union or other person directly affected by a decision or order of the board may apply to the board to reconsider that decision or order.*
> *(3) An application for reconsideration must:*

> *(a) be in writing; and*
> *(b) be filed and served within 20 days after the date of the decision or order with respect to which reconsideration is sought.*
> *(4) An application for reconsideration must contain the following information:*
> *(a) the full name and address for service of the party making the application for reconsideration;*
> *(b) the file number assigned by the registrar for the decision or order of the board with respect to which reconsideration is sought;*
> *(c) the reasons the applicant believes the board ought to reconsider its decision or order;*
> *(d) a summary of the law on which the applicant intends to rely.*
> *(5) An application for reconsideration must be served by the applicant on any other parties named in the decision or order with respect to which reconsideration is sought.*

Analysis:

[25] The Board finds that the decision in *Treaty Three Police Service v Public Service Alliance of Canada*, 2013 CIRB 677 (CanLII) is of no assistance to the Union in this matter. When the Canada Industrial Relations Board stated that "such applications may be brought at any time", it was referring to a narrow category of cases, applications for review that are based on alleged changes to constitutional jurisdiction as a result of a decision of the Supreme Court of Canada:

> *[14] As the Board stated in Dilico, supra, the Board either has constitutional jurisdiction over the parties' labour relations or it does not. If it does not have such constitutional jurisdiction, then its decision is void ab initio. When a constitutional decision involving labour relations is issued by the Supreme Court of Canada, the jurisdictional status of certain parties, even if longstanding and previously uncontested, may be affected. Although the Board would prefer that parties seeking to argue that a newly issued Supreme Court of Canada decision affects their constitutional status would do so expeditiously, it cannot rely on a procedural time limit established by regulation to prevent a challenge to the Board's jurisdiction. As the Board noted in Oneida of the Thames EMS, supra, neither a Board regulation nor policy can clothe the Board with a constitutional jurisdiction that it does not have, or protect an order issued without jurisdiction from review.*
>
> *[15] Accordingly, the Board finds that the 30-day time limit set out in section 45(2) of the 2012 Regulations does not apply to applications for review that are based on alleged changes to constitutional jurisdiction as a result of a decision of the Supreme Court of Canada. Like applications for review of the scope of a bargaining unit, such applications may be brought at any time.*

[26] Neither is *Refrigeration Installations* of assistance to the Union, in that, even though the Board determined in that case that its original decision was based on an inaccurate interpretation of the Act, it dismissed the reconsideration application as the nine-month delay in challenging the decision was not justified. This was despite the fact that there was no statutory time limit for bringing an application for reconsideration in Saskatchewan at that time.

[27] The Board also reviewed the 1984 decision mentioned in *Refrigeration Installations*, *L&S Equipment*. Again, that case is not comparable to this case. In *L&S Equipment*, the Board ordered in 1977 that the employer pay an employee for monetary loss suffered for his wrongful dismissal but left it to the union and employer to agree on the amount, failing which they could return to the Board to set the amount. In its 1984 decision the Board was not being asked to decide whether the employee was entitled to damages, but to fix the monetary loss that it had previously decided was payable. This is not the situation here.

[28] The Board does not accept the Union's argument that the City's preliminary objection is an improper attempt to prevent the Board from adjudicating on the reconsideration application. Rather, the City is raising an issue that the Board can appropriately consider in deciding that application.

[29] The City referred to the dissenting decision in *North West Company v Tora Regina (Tower) Limited*, 2008 CanLII 47050 (SK LRB) which stated the opinion that if a party chooses an application for judicial review rather than an application for reconsideration, it should not be permitted to pursue reconsideration after it has been unsuccessful on its application for judicial review. The City suggested that the Court of Appeal decision that ultimately overturned the majority decision is entirely consistent with this statement. The Board does not agree that the Court's decision can be interpreted in that manner; the Court did not refer to that argument, and made its decision on other grounds.

[30] Further, the City pointed to the statement in the dissent that challenged the statement by the majority that the Employer made the reconsideration application "as a result of a suggestion made by the Court of Appeal". The dissent was of the view that the Court of Appeal did not "suggest" a reconsideration application. The statement by the Court of Appeal, the interpretation of which was in dispute in that case, reads as follows:

> *As a final point, the Employer contends the decision of the Chambers judge was the only one which could possibly have been made in the situation at hand and that, as a result, it made no difference whether its concerns were raised with the Board or taken directly to the Court of Queen's Bench. We do not agree with this submission. On one hand, if the changing circumstances of the Employer's workforce had been drawn to the Board's attention it might have chosen, nonetheless, to issue a certification order on the basis of the material filed as of the date of the application. Its reasons for doing so might or might not have been compelling. We do not know because we do not have the benefit of seeing them. On the other hand, the Board might have chosen other courses of action such as accepting evidence of post-application developments pursuant to s. 10 of the Act or*

> *ordering a representation vote pursuant to s. 6.* ***Further, it might have been open to the Employer, after the Board had released its decision, to seek a reconsideration of that ruling pursuant to ss. 5(i) and 13 of the Act.*** *In short, we cannot accept the Employer's contention that the Board would necessarily have been obliged to deny certification if the Employer had come forward with evidence of what were said to be material changes in the factual underpinnings of the certification application. (emphasis added)*[9]

[31] In this case, the Court of Appeal was much more direct:

> *However, the Board's error in relation to the reconsideration issue does mean that,* ***should the Union now choose to apply for reconsideration of the Lockout Application decision, it may do so. The Board will be obliged to adjudicate any such application afresh and in light of whatever submissions might be made by the City and the Union****.*
>
> *. . . .*
>
> *Nonetheless, the Board did deny the Union its right to be heard on the question of whether the Lockout Application decision should be reconsidered. This is so because the Board raised that issue on its own initiative and resolved it against the Union without hearing from the Union. Accordingly, and as just explained above, although the Board's decision to dismiss the Damages Application must stand,* ***the Union is nonetheless entitled to bring an application to have the Lockout Application decision reconsidered if it so wishes.***
>
> *The City's appeal is allowed with costs in the usual way.* ***The Union may bring an application asking the Board to reconsider the Lockout Application decision if the Union so chooses****.*[10]*.*

[32] Given the inordinate length of time this matter has been before the Board and the courts, the Board gave very serious consideration to whether to dismiss this application for delay. The Board agrees with the City that the discussion of delay in *Hartmier* applies generally to cases before the Board. However, the Board does not agree that all of the factors weigh against the Union. The Union has explained the reasons for the delay. While the length of the delay is inordinate, throughout this time period the Union was pursuing this claim. No evidence of actual prejudice was provided; the City has not spent the last three and a half years operating on the assumption that this matter was concluded. The Board agrees that time is of the essence in labour relations. However, given the clear statements by the Court of Appeal cited above, and the fact that the Board's error contributed to the delay, the Board is of the view that justice can best be achieved by considering the reconsideration application.

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[9] *UFCW Local 1400 v Tora Regina (Tower) Limited (Giant Tiger, Regina)* 2008 SKCA 38 (CanLII), para 23.
[10] *Supra*, footnote 5, paras 46, 48 and 49.

[33] The application to dismiss the reconsideration application, on the grounds of delay, is dismissed.

B) RECONSIDERATION

Argument on Behalf of the Parties:

[34] A reconsideration application is a two-step process: first, the Board must determine if the Union has made out a case for reconsideration on one of the factors set by the Board; second, if it has, the Board will review the decision on those grounds[11]. The factors that the Board has relied on since 1993[12] are as follows:

1. If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence.
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 or 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 Board may wish to refine, expand upon, or otherwise change.

[35] The Union relied on grounds 2, 3, 5 and 6.

[36] With respect to factor #2, the Union states that it could not ask for or provide evidence during the original hearing respecting damages that occurred after October 3, 2014. Since the Mongovius Application was still pending when it filed its application, its pleadings did not and

[11] *Re Westwood Electric Ltd.* (2013) CLRBR (2d) 1, [2013] SLRBD No 29; *Kennedy (Re)*, [2015] SLRBD No. 28 (LRB File No. 096-15).
[12] *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.

could not have claimed damages for a period of time after the Mongovius Application was no longer pending.

[37] Factor #3 considers whether the Board's decision operated in an unanticipated way or had an unintended effect. The Union argues that it must have; the Board could not have intended that the City would get a "free pass" for its actions from October 3 to 17, 2014.

[38] With respect to factor #5, the Union states that it did not apply for damages for the period after October 3, 2014 in its initial application, assuming that issue would be for what its counsel referred to as "another phase". It argued that the Board ruled on a question outside of the framework of the pleadings and decided a matter never raised or argued at the hearing.

[39] The Union states that the Board breached its duty of fairness to the Union because it heard no evidence with respect to losses or contraventions of the Act for the time period after October 3, 2014. The Union argues that its pleadings could not have alleged or claimed that the lockout was unlawful until the lockout notice was invalidated by the Board on October 17, 2014. At the time of filing the application on September 22, 2014 the pleadings could not have claimed damages for losses flowing from a period when the Mongovius Application was no longer pending before the Board. The Union states that it is "trite law" that an application is framed by its pleadings.

[40] The Union drew to the attention of the Board the decision in *Royal Oak Mines Inc v Canada (Labour Relations Board)*, [1996] 1 SCR 369, where the Court wrote:

> *[69] … In other words, the Board must be concerned about remedying a specific breach of the Code, and in so doing there must be a relationship between the unfair practice which has occurred, its consequences to the bargaining process, and the remedy imposed.*

[41] The Union also cited *Westfair Foods Ltd.v R.W.D.S.U., Local 454*, 1993 CanLII 9059 (SK QB) as authority for its argument that it would be a breach of natural justice for the Board to make a decision with respect to an issue that was not argued before it (the *audi alteram partem* rule). In that case the Court held:

> *I am therefore satisfied that the Board has breached the principles of natural justice by awarding remedies without allowing the parties an opportunity to present evidence and argument with respect to the award of damages. (para 43)*

[42] Finally, with respect to factor #6, the Union argues that this decision is precedential because it means that even though the Board found that the Union members were unlawfully locked out, it provided them with no remedy. The Union argues that by providing that monetary compensation is only payable from September 20 to October 3, 2014, the Board made an error and departed from precedent.

[43] The City responded to each of these arguments.

[44] With respect to factor #2, the City argues that the Union cannot rely on this factor when it knew of the issues and simply chose not to adduce the evidence. The Union was clearly aware during the course of the hearing that the Board was considering an appropriate remedy for the entire length of the lockout. It chose not to request damages for the period after the Mongovius Application was no longer pending, even after being invited to do so by the Vice-Chairperson.

[45] The City says that the Order did not operate in an unanticipated way, as contemplated by factor #3. It states that the Union did not ask the Board to divide its consideration of substantive and remedial issues, therefore it was not unexpected that the Board would deal with both issues in its decision. The purpose of a reconsideration application is not to allow a party a second chance at its submissions on remedy. It referred the Board to *Sheet Metal Workers' International Association, Local 296 v Atlas Industries Ltd.*, 1998 CarswellSask 930 ["*Atlas Industries*"] in support of this argument:

> *15 In our view, there are sound labour relations reasons for refusing to grant a reconsideration application in this instance. The remedial issues were clear at the outset of the Union's application and the Board's Order was not unpredictable, if the Board found that the work did fall within the construction industry. Neither party requested the Board to reserve its jurisdiction with respect to the remedial request at the original hearing to permit further arguments, once the main issue of whether the work fell within the construction industry was determined.*
>
> *16 In the Mary Banga case, supra, the Board held that where the remedy ordered on an application was not novel or dramatic, the Board would not hear a reconsideration application. In our view, the Mary Banga case, supra, signals to the parties who appear before the Board that they should be prepared to deal with both substantive and remedial issues at the main hearing unless the Board agrees to a procedure which would permit the parties to split the hearing into a two stage process, one stage to deal with substantive issues and the second stage to deal with remedial issues.*
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> *17 In this instance, the reconsideration application raises an issue that clearly was before the Board on the main application, that is, the appropriate remedy to be granted in the event the Board found in favour of the Union. If the Board permitted the Employer to now raise the issue through an application for reconsideration, it would be encouraging parties to Board proceedings to use the process of reconsideration as a method of splitting*

> *hearings into substantive and remedial hearings. While in some circumstances the Board will agree to reserve on its remedial jurisdiction, this approach is generally taken when the remedial issues may be resolved by agreement between the parties following the decision of the Board and where the reservation of jurisdiction expedites the hearing of the main application by reducing the evidentiary issues to those raised on the substantive portion of the application. For instance, the question of monetary loss is often reserved on an application for reinstatement of an employee who is discharged in circumstances which are alleged to violate s. 11(1)(e) of The Trade Union Act, R.S.S. 1978, c T-17. Otherwise, the Board does not encourage the practice of splitting off remedial issues from the substantive issues because this practice would result in unnecessary delays in obtaining final resolutions to labour relations disputes.*

[46] With respect to factor #5, the City states that the Union was clearly on notice that the Board was considering the period of the lockout after October 3, 2014. The Union chose not to present evidence or argument on the issue, leading to an outcome that was the product of its choices at the hearing. The City argues that the purpose of a reconsideration application is not to permit an unsuccessful party a right of appeal or the opportunity to reargue or re-litigate the original application.

[47] The City characterized the Union's argument respecting factor #6 as suggesting that the principle of "no right without a remedy" justifies reconsideration. The City does not agree that this is an argument that the Board should consider, or that the Union received no remedy.

Relevant Legislative Provisions:

> ***Board powers***
> *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;*
> *(g) amending a board order if:*
>
> *(i) the employer and the union agree to the amendment; or*
> *(ii) in the opinion of the board, the amendment is necessary;*
>
> *(h) notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of a certification order or collective bargaining order is pending in any court, rescinding or amending the certification order or collective bargaining order;*
>
> ***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:

[48] On a reconsideration application, the Board starts from the premise that Board decisions are to be considered 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), 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.*
>
> > *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.*

[49] The procedure followed by the Board on an application for reconsideration is a two-step process. The first question is whether any of the factors cited in *Remai Investment Corporation* have been met. If the Board decides that one or more of the factors apply, additional evidence may be relevant.

[50] As noted above, the Union relied on factors 2, 3, 5 and 6.

[51] Factor 2 applies if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons. In paragraph 67 of the decision at issue here, the Board stated:

> *In its application, the Union seeks compensation for monetary losses suffered by its members as a result of the unlawful conduct of the City. In our opinion, such compensation is appropriate. An Order was issued directing the City to pay compensation to the members of the Union for monetary loss suffered in being locked [sic] in contravention of s. 6-62(1)(l)(i) of The Saskatchewan Employment Act.* ***However, by agreement of the parties, this Board heard no evidence or argument as to the quantification of such losses other than as to the period of time during which this compensation would be payable.*** *(emphasis added)*

[52] Therefore, the crucial evidence that was not adduced by the Union, for good and sufficient reasons, must pertain to the issue of during what period of time compensation would be payable. The Union has not satisfied the Board that there was crucial evidence that applied to this issue, or that there were good and sufficient reasons why it was not adduced at the hearing on October 14, 2014. The Union has not satisfied the Board that this factor has been met.

[53] Factor 3 applies if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect. The effect of the Order was not unanticipated by the Board. The effect it intended was confirmed in its January 30, 2015 Order and March 3, 2015 Reasons for Decision on this file, respecting Bylaw No. 9224, for example:

> *The City of Saskatoon was ordered by the Board to cease and desist from it lockout of members of the Amalgamated Transit Union, Local 615 (the "Transit Union") and to refrain from declaring another lockout until such time as it had again complied with s. 6-34 of The Saskatchewan Employment Act. In addition, City of Saskatoon was ordered by the Board to pay compensation to the members of the Transit Union for monetary loss suffered while the "application pending" statutory freeze was in effect; being the period from September 20, 2014 until October 3, 2014. (para 5)*
>
> *In our opinion, to maintain a rational connection between the breach and the consequences therefrom, our remedy must mirror the temporal limits of the statutory freeze; which commenced on June 3, 2014 and continued until October 3, 2014; (para 21)*
>
> *The remedy imposed for unlawfully locking out members of the Transit Union while an application was pending before the Board was monetary compensation but that compensation was limited to the period of the statutory freeze. (para 23)*

[54] The Union has provided no evidence or argument to satisfy factor 3. The Board adopts the reasons in *Atlas Industries*, quoted at paragraph 45, above.

[55] Factor 5 applies if the original decision is tainted by a breach of natural justice. 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*.

[56] The Union states that the Board breached its duty of fairness to the Union because it heard no evidence with respect to losses or contraventions of the Act for the time period after October 3, 2014. However, the Board noted in its decision that this was done with the agreement of the parties:

> *In its application, the Union seeks compensation for monetary losses suffered by its members as a result of the unlawful conduct of the City. In our opinion, such compensation is appropriate. An Order was issued directing the City to pay compensation to the members of the Union for monetary loss suffered in being locked [sic] in contravention of s. 6-62(1)(l)(i) of The Saskatchewan Employment Act. However, by agreement of the parties, this Board heard no evidence or argument as to the quantification of such losses other than as to the period of time during which this compensation would be payable.* [13]

[57] In its submission the Union states that the pleadings could not have alleged or claimed that the lockout was unlawful until the lockout notice was invalidated by the Board in October 2014. Yet that is exactly what the pleadings claim:

> *The said lockout and purported changes are unlawful, and in violation of section 6-62(1)(l)(i) of the Act;*[14]

[58] This hearing was held on October 14, 2014, in other words, after the Mongovius Application was no longer pending. The parties had agreed that the Board would not decide the quantum of damages but only the timeframe during which they would be payable. The Board does not agree with the Union that the issue of an appropriate remedy for the period from October 3 to 17, 2014 was not before the Board or was outside the scope of the Union's pleadings. The Union's application of September 22, 2014 stated:

> *The Union and its members have suffered and are suffering monetary losses and irreparable pension losses as a result of this unlawful lockout, and the Union seeks damages and payment for the said losses pursuant to section 6-104(2)(e) of the Act and*

[13] *Supra,* footnote 1, para 67.

[14] Unfair Labour Practice Application filed by Union, September 22, 2014, para. 3(h).

> *section 14(1)(d) of the Regulations, as well as a restraining order respecting any further lockout action pending final resolution of LRB File Nos. 079-14 and 097-14. (emphasis added)*[15]

[59] The Union argues that the underlined words mean while the Mongovius Application was pending. The Board interpreted them to mean the entirety of the unlawful lockout. The Union suggests that this issue was not raised or argued at the hearing, but this was not the case. As the City noted at page 2/3 of its Reply to this Application:

> *The question as to any remedial relief flowing from the unlawful lockout was a live issue before the Board and was finally and conclusively determined by the 210-14 Board. Both parties had the opportunity to provide evidence and argument and indeed did make argument regarding the remedial relief arising from the unlawful lockout, which lockout continued at the time of the hearing of 210-14.*

[60] The Union cannot now say that natural justice was not afforded to it when what actually happened is that the Board made a decision that it does not like. If the Union had further evidence or argument that it wanted the Board to consider in determining the period of time during which compensation would be payable, but chose not to provide it, a reconsideration application is not an opportunity to correct that error.

[61] 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, <u>for reasons beyond the control of the party making the application</u>, was not presented at the first hearing.* (emphasis added)

[62] The Union has not satisfied the Board that the original decision is tainted by a breach of natural justice.

[63] Factor 6 applies if the original decision is precedential and amounts to a significant policy adjudication that the Board may wish to refine, expand on or otherwise change. The Board agrees with the City that the original decision is not precedential. While the Union may have preferred

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[15] *Supra,* footnote 14, para. 3(i).

that the Board provide further elaboration with respect to why it did not consider it necessary to award damages for the period of the unlawful lockout after October 3, 2014, sparse reasons is not a ground for reconsideration.

[64] In its October 17, 2014 Order, the Board held that the unlawful lockout lasted from September 20, 2014 until the date of its decision. In its determination, the appropriate remedy was compensation for monetary loss only until October 3, 2014, the date the statutory freeze ended. The Union is of the view that this remedy is insufficient; that is not a ground for reconsideration.

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

[66] The Union's application is dismissed.

DATED at Regina, Saskatchewan, this 23rd day of November, 2018.

LABOUR RELATIONS BOARD

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Susan C. Amrud, Q.C.
Chairperson