Saskatchewan
Labour Relations Board

RELIANCE GREGG'S HOME SERVICES, A DIVISION OF RELIANCE COMFORT LIMITED PARTNERSHIP, Applicant v UNITED ASSOCIATION OF JOURNEYMAN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Respondent

UNITED ASSOCIATION OF JOURNEYMAN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Applicant v RELIANCE GREGG'S HOME SERVICES, A DIVISION OF RELIANCE COMFORT LIMITED PARTNERSHIP, Respondent

LRB Files No. 001-19 & 011-19; November 19, 2019
Chairperson, Susan C. Amrud, Q.C.; Board Members: Bert Ottenson and Allan Parenteau

For Reliance Gregg's Home Services,
a Division of Reliance Comfort Limited Partnership: Eileen Libby, Q.C.
For United Association of Journeyman and
Apprentices of the Plumbing and Pipefitting Industry
of the United States and Canada, Local 179: Greg Fingas

Preliminary issue – settlement privileged communications inadmissible – the three required conditions for settlement privilege to be recognized were present.

Reconsideration of bargaining units established in certification application granted – *Remai* criterion #4 applies – Board incorrectly applied s. 6-11(3) of *The Saskatchewan Employment Act* to workplace when parties agreed that the primary function of journeypersons and foremen was not to supervise apprentices.

Reconsideration of bargaining units established in certification application granted – *Remai* criterion #4 applies – exclusion of journeypersons in construction industry from definition of supervisory employees by s. 3 of *The Labour Relations (Supervisory Employees) Regulations* incorrectly interpreted to mean journeypersons outside construction industry are automatically supervisory employees – Board overlooked definition of supervisory employee.

Reconsideration of bargaining units established in certification application granted – *Remai* criterion #6 applies – Board made significant policy adjudication respecting application of supervisory employee provisions that required re-examination.

Reconsideration of dismissal of unfair labour practice application under s. 6-62(1)(a) dismissed – *Remai* criterion #4 does not apply - Board applied

existing law to facts – Union's disagreement with Board's findings of facts not a basis for reconsideration.

Reconsideration of dismissal of unfair labour practice application under s. 6-62(1)(a) dismissed – *Remai* criterion #6 does not apply – decision did not set general policy regarding employer communications – not precedential.

Background:

[1] Susan C. Amrud, Q.C., Chairperson: On July 10 and 11, 2019, the Board heard two Applications for Reconsideration of two decisions of the Board that affected the same parties.

[2] Reliance Gregg's Home Services, a Division of Reliance Comfort Limited Partnership ["Employer"] applies for reconsideration of a decision of the Board granted December 18, 2018[1] ["Certification Decision"]. In particular, the Employer takes issue with the following findings of the Board:

> *[31] An additional complication is the provisions of section 6-11(3) of the SEA which precludes the Board from including "supervisory" employees within the bargaining unit with those employees who are their supervisors. While the parties have agreed that there is no supervisory function performed by journeymen or foremen with respect to apprentices within the same unit as those journeymen or foremen, we are nevertheless precluded by section 6-11(3) from making an order that includes such employees.*
>
> *[32] This supervisory employee issue is resolvable in two ways. With respect to an Order under Division 13, the regulations as noted above, permit the Board to include apprentices within a construction unit under Division 13. With respect to any other unit of employees found to be appropriate, the parties may resolve any issue regarding inclusion of supervisory employees by entering into an irrevocable election in accordance with section 6-11(4)(a) of the SEA.*

[3] The second Application for Reconsideration was brought by the United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 ["Union"], of a decision of the Board granted December 31, 2018[2] ["ULP Decision"]. This decision dismissed an unfair labour practice application that was brought by the Union on a number of grounds. The Union asks for reconsideration of the dismissal of its claim that the Employer committed an unfair labour practice within the meaning of clause 6-62(1)(a) of *The Saskatchewan Employment Act* ["Act"].

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[1] *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of The United States and Canada, Local 179 v. Reliance Gregg's Home Services*, 2018 CanLII 127680 (SK LRB).
[2] *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of The United States and Canada, Local 179 v. Reliance Gregg's Home Services*, 2018 CanLII 127677 (SK LRB).

I. Preliminary issue:

[4] The Union attempted to submit at the hearing information respecting certain communications that occurred between counsel for the parties. The Employer objected and asked that paragraphs 10 and 11 and Exhibit A be struck from the Union's Reply, arguing that the communications were made without prejudice and are protected from disclosure by settlement privilege.

[5] The Employer referred to *Kaytor v Unser*[3] as establishing the three conditions that must be met to prevent the disclosure of communications on the grounds that they constitute settlement privileged communications:

> *First, the basics. The conditions that must be present for the privilege to be recognized are (cite omitted):*
>
> *(1) A litigious dispute must be in existence or within contemplation.*
> *(2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed.*
> *(3) The purpose of the communication must be to attempt to effect a settlement.*

[6] The Union argues that the information objected to is not privileged. Labelling correspondence as "without prejudice" is not determinative. There was no express or implied intention to keep the correspondence confidential. It is clear from Exhibit A that the Employer's intention was to communicate the same information to the Board.

[7] The Board finds that the three conditions referred to in *Kaytor v Unser*, *supra*, were present here. The communications occurred when the parties were already engaged in a litigious dispute regarding, among other issues, the appropriate bargaining unit. The communications were made with an express intention that they remain confidential. The purpose of the communications was to attempt to effect a settlement.

[8] At the conclusion of the hearing, the Board advised the parties that the information objected to by the Employer would be struck from the Reply. As noted in *Tucker-Lester v Lester*[4], settlement privilege exists to encourage full and frank discussions. At the heart of settlement privilege is the overriding public interest in favour of settling legal disputes. The Union's attempt to breach this privilege was not countenanced by the Board.

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[3] 2014 SKQB 181 at para 4, quoting from *Tucker-Lester v Lester*, 2012 SKQB 443 at para 7.
[4] *Supra*, at para 8.

II. Reconsideration of Certification Decision

Argument on behalf of the Employer:

[9] The Employer referred the Board to *Remai Investment Corp. v Saskatchewan Joint Board, RWDSU* [5] ["*Remai*"], which established the criteria that are used to this day to assess applications for reconsideration:

> *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 Council may wish to refine, expand upon, or otherwise change.*

[10] The Employer argues that *Remai* criterion #4 applies in this case. It referred the Board to the following description of criterion #4, in *Kennedy v Canadian Union of Public Employees, Local 3967* [6] ["*Kennedy*"]:

> *The fourth permissible ground for an application for reconsideration permits the Board to re-examine a prior decision in circumstances where the original decision turned on a conclusion of law or general policy which was not properly interpreted by the Board in the first instance. See: International Brotherhood of Electrical Workers, Local 213 v. Western Cash Register (1955) Ltd., [1978] 2 Can. L.R.B.R. 532. While it understandable why some applicants may see this ground as a general right of appeal on questions of law, a closer examination reveals that the scope of this particular ground is quite narrow. As Chairperson Bilson noted in the Remai Investment Corporation decision, this ground arose out of larger jurisdictions, where it is common for multiple panels to hear similar kinds of applications at the same time. These jurisdictions desire to maintain a uniform approach by their panels and, if divergence occurs on important issues of law and policy, this ground permits these boards to revisit its prior decisions if necessary to maintain uniformity. As a result, this ground is generally restricted to circumstances where there is an inconsistency between the decisions rendered by different panels on an important issue of law or policy. However, this ground has also been relied upon by the Board to re-examine a prior decision in circumstances where it is alleged the Board misapplied or misconstrued its enabling statute. See: United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp., [2009] CanLII 13640 (SK LRB), 173 C.L.R.B.R. (2d) 171, LRB File No. 069-04; and Saskatchewan Government and General Employees' Union v. Government of Saskatchewan, supra.*

[5] [1993] Sask Lab Rep 103 (SK LRB).
[6] 2015 CanLII 60883 (SK LRB) at para 20.

[11] *Remai* criterion #4 permits the Board to correct significant errors such as misinterpreting or overlooking key statutory provisions or overlooking relevant prior jurisprudence[7]. Both of those circumstances exist here.

[12] The Board's decision to separate apprentices and journeypersons into separate bargaining units was based on the Board's conclusion that the Act required separate bargaining units. The Board held that the journeypersons and foremen were supervisory employees, and therefore must be placed in a separate bargaining unit, despite the undisputed evidence that they did not perform supervisory functions.

[13] Subsection 6-11(3) of the Act was not properly interpreted by the Board, the Employer argues, because it neglected to take into consideration the definition of supervisory employee in clause 6-1(1)(o) of the Act. The Board did not refer to the definition of supervisory employee in its decision. The definition clearly indicates that whether an employee falls within that classification is based on the actual duties performed by the employee, rather than his or her job title. The definition requires that a supervisory employee's "primary function" must be to supervise employees.

[14] The Employer cited *Workers United Canada Council v Amenity Health Care LP*[8] ["*Amenity Health Care*"] and *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v Energy Crane Service*[9] ["*Energy Crane Service*"] as examples of cases where the definition was appropriately applied. In both cases, the Board considered in detail the role actually performed by the employees in issue.

[15] Notwithstanding the clear evidence that the journeypersons at issue in this workplace do not perform supervisory functions, the Board concluded it was required by subsection 6-11(3) of the Act to create separate bargaining units for apprentices and journeypersons. The Employer submits that this was a significant error of law and misinterpretation of the definition of supervisory employee in the Act. It was also inconsistent with the approach the Board has taken in previous decisions. The Employer submits that the Board should reconsider the Certification Decision to ensure consistency among Board decisions, and to correct a result that the Employer submits turned on a clear misinterpretation of the Act.

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[7] *Canadian Union of Public Employees, Local 600-3 v Government of Saskatchewan (Community Living Division, Department of Community Resources)*, 2009 CanLII 49649 (SK LRB).
[8] 2018 CanLII 8572 (SK LRB).
[9] 2018 CanLII 91958 (SK LRB).

[16] The Employer also argues that the references in the Certification Decision to *The Labour Relations (Supervisory Employees) Regulations* ["Regulations"] appear to reflect the incorrect conclusion that they mean that, outside the construction industry, a combined unit of journeypersons and apprentices is only possible if an employer and union file an irrevocable election to include them in the same bargaining unit.

[17] The Employer also relies on *Remai* criterion #6, and this description of it in *Kennedy*:

> *The final permissible ground for an application for reconsideration deals with circumstances where the original decision was precedential and amounted to a significant policy adjudication. Simply put, this ground permits the Board to take a "second look" when it makes major new policy adjudications or when it departures from past jurisprudence on a significant issue. However, in both cases, the matters in issue must have significant impact on the labour relations community in general.*[10]

[18] The Employer submits that the Board's decision departed from the previous decisions addressing whether an employee is a supervisory employee. The Employer submits that the Board's characterization of the journeypersons here as supervisory employees was precedential and a policy shift from the approach taken in *Amenity Health Care* and *Energy Crane Service*. Due to the limited number of times the definition has been interpreted, this decision is likely to be precedential. By focusing on the job title of journeyperson, instead of the work those employees were actually doing, the Board departed from its previous policy approach. This change in approach could have broad effects.

Argument on behalf of the Union:

[19] The Union argues that this application should be dismissed because the Employer is raising new arguments respecting the composition of the bargaining unit that it did not raise at the original hearing. In its Replies, the Employer took no position as to whether journeypersons and apprentices should be combined or divided.

[20] The Union relies on *Atlas Industries Ltd. (Re)*[11] for its argument that the Employer is not entitled to remain entirely silent on a matter in issue through a hearing, then seek reconsideration because it wants to raise a new position on that point:

> *14 At the hearing of the initial application, the Employer opposed the application based on its belief that the work performed by it did not fall within the definition of "construction*

[10] At para 25.
[11] [1998] SLRBD No 43 (SK LRB).

> *industry" which is set out in s. 2(e) of the CILRA, 1992. The Employer did not argue that if the Board found its work to fall within the definition of "construction industry," the Board should limit the application of the collective agreement to those employees who perform installation work and not apply it to all of the employees who are covered by the Union's certification Order.*
>
> *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.*

[21] In all certification applications, the Board has discretion to determine an appropriate bargaining unit description. In the face of extensive submissions as to the law and policy implications, the Board determined that separate units for journeypersons and apprentices were appropriate in this case. Nothing in the circumstances merits a reconsideration of that decision.

[22] The Union relies on paragraph 32 of the Certification Decision, in which the Board indicated to the parties that, if they prefer to bargain through a single bargaining unit, they can enter into an irrevocable election pursuant to subsection 6-11(4) of the Act. The Union argues that, if the Employer is of the view that journeypersons and apprentices should be in the same bargaining unit, that is the mechanism to be used to accomplish that end.

Relevant Legislative Provisions:

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

> ***Interpretation of Part***
> *6-1(1) In this Part:*
>
> *. . .*
> *(o)* ***"supervisory employee"*** *means an employee whose primary function is to supervise employees and who exercises one or more of the following duties:*
> *(i) independently assigning work to employees and monitoring the quality of work produced by employees;*
> *(ii) assigning hours of work and overtime;*
> *(iii) providing an assessment to be used for work appraisals or merit increases for employees;*
> *(iv) recommending disciplining employees;*
> *but does not include an employee who:*
> *(v) is a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs;*
> *(vi) acts as a supervisor on a temporary basis; or*
> *(vii) is in a prescribed occupation;*
>
> ***Determination of bargaining unit***
> *6-11(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:*

(a) if the unit of employees is appropriate for collective bargaining; or
(b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.
(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.
(3) Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.
(4) Subsection (3) does not apply if:
(a) the employer and union make an irrevocable election to allow the supervisory employees to be in the bargaining unit; or
(b) the bargaining unit determined by the board is a bargaining unit comprised of supervisory employees.
(5) An employee who is or may become a supervisory employee:
(a) continues to be a member of a bargaining unit until excluded by the board or an agreement between the employer and the union; and
(b) is entitled to all the rights and shall fulfil all of the responsibilities of a member of the bargaining unit.
(6) Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.

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] The Regulations include the following provision:

Certain occupations not included
3(1) For the purposes of clause 6-1(1)(o) of the Act, employees in the following occupations are not supervisory employees:
(a) registered psychiatric nurse, as defined in The Registered Psychiatric Nurses Act;
(b) registered nurse, as defined in The Registered Nurses Act, 1988;
(c) non-commissioned officer, within the meaning of The Police Act, 1990;
(d) foreman, general foreman and journeyperson in the construction industry.

Analysis and Decision:

[25] The Board agrees with the Employer that *Remai* criteria #4 and 6 apply to the Certification Decision. With respect to criterion #4, the Board had, earlier the same year, issued two decisions[12] that appropriately applied clause 6-1(1)(o) and subsection 6-11(3) of the Act. Those decisions were not referred to in the Certification Decision. Those decisions provide helpful guidance in the interpretation of these relatively new provisions. In *Amenity Health Care*, the Board did not exclude shift supervisors from the bargaining unit because, after a lengthy review of their duties, it came to the conclusion that their primary job function was not to supervise other employees. Similarly, in *Energy Crane Service*, even though the employee in question performed some limited

[12] *Amenity Health Care* and *Energy Crane Service*.

supervisory tasks, he could be part of the bargaining unit because his primary function was not to supervise employees. The Board failed to consider those cases. The clear and uncontradicted evidence before the Board was that the Employer's journeypersons and foremen did not perform any of the supervisory functions described in the definition of supervisory employees.

[26] The Certification Decision is inconsistent with *Amenity Health Care* and *Energy Crane Service*, in its failure to analyze the work of the journeypersons and foremen in light of the definition of supervisory employee. This oversight led to a misapplication of subsection 6-11(3) to this workplace.

[27] The Certification Decision made the following significant findings with respect to the issue of supervisory employees:

> *[31] An additional complication is the provisions of section 6-11(3) of the SEA which precludes the Board from including "supervisory" employees within the bargaining unit with those employees who are their supervisors. While* ***the parties have agreed that there is no supervisory function performed by journeymen or foremen with respect to apprentices within the same unit as those journeymen or foremen****, we are nevertheless precluded by section 6-11(3) from making an order that includes such employees.*
>
> *[32] This supervisory employee issue is resolvable in two ways. With respect to an Order under Division 13, the regulations as noted above, permit the Board to include apprentices within a construction unit under Division 13. With respect to any other unit of employees found to be appropriate, the parties may resolve any issue regarding inclusion of supervisory employees by entering into an irrevocable election in accordance with section 6-11(4)(a) of the SEA. (emphasis added)*

[28] The Board agrees with the Employer that this description of the law is incorrect. It ignores entirely the definition of supervisory employees in clause 6-1(1)(o) of the Act. Both parties agreed that the journeypersons and foremen do not perform supervisory functions. Subsection 6-11(3) says: "the board shall not include in a bargaining unit any supervisory employees". The journeypersons and foremen are not supervisory employees. That means that subsection 6-11(3) does not apply to this workplace.

[29] Subclause 6-1(1)(o)(vii) excludes from the definition of supervisory employee those occupations prescribed in the Regulations. The purpose of that subclause and section 3 of the Regulations is to eliminate the requirement to determine, on a case by case basis, whether an employee in a listed occupation meets the definition of supervisory employee. Employees who fill the positions listed in section 3 are not supervisory employees, even if, on a review of their duties, they would meet that definition. For employees in positions not listed in section 3, the definition in

clause 6-1(1)(o) of the Act applies, and the Board is required to assess the tasks undertaken by those employees to determine whether or not they meet the requirements spelled out in that clause.

[30] With respect to *Remai* criterion #6, the process used to determine whether an employee is a supervisory employee is a significant issue. The Board's focus on formal job positions instead of supervisory duties is a significant precedent and reflected a new policy adjudication that the Board has determined must be re-examined. It is inconsistent with *Amenity Health Care* and *Energy Crane Service*, and with the Act and Regulations. The Certification Decision set a precedent for the interpretation of the Regulations that the Board has determined needs to be revised. In section 3 of the Regulations, journeypersons in the construction industry are deemed not to be supervisory employees. That provision has no relevance to determining whether any employee outside the listed occupations is or is not a supervisory employee. It does not mean that journeypersons outside the construction industry are automatically supervisory employees. It means that, outside the construction industry, the specific job duties of a journeyperson must be analyzed in accordance with the definition of supervisory employee for a determination to be made.

[31] The Board's decision to treat the journeypersons and foremen as supervisory employees appears to have been influenced by the Regulations. The Board erred in interpreting the Regulations to mean that journeypersons are always supervisory employees, except in the construction industry.

[32] The Union based its argument on its view that the Employer is raising a new issue on this application, something it says the Board should not countenance on a reconsideration application. The Employer counters that its position on this application is consistent with the position it took at the original hearing. It may be that neither party spent significant time on this issue in argument, given their agreement that the journeypersons and foremen did not perform supervisory functions. In any event, in light of the significant precedent set by the Certification Decision on this issue, the Board has determined that this is an appropriate case for reconsideration.

[33] The Union did not apply for a bargaining unit composed of both journeypersons and apprentices outside Division 13 of Part VI. Its three applications proposed three bargaining units:

(a) Employees engaged in construction work;

(b) Journeypersons engaged in maintenance work; and

(c) Apprentices engaged in maintenance work.

[34] However, the Board has full discretion to determine an appropriate bargaining unit and is not bound by the Union's application. Subsection 6-11(2) of the Act provides that in determining if a unit of employees is appropriate for collective bargaining, the Board may include or exclude persons in the unit proposed by the Union.

[35] 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 *Remai* criteria have been met. If the Board decides that one or more of the criteria apply, additional evidence may be relevant. The Board has decided that, in this case, no additional evidence is required to make a final determination of this application. The only evidence that is relevant to this determination is whether the journeypersons and foremen are supervisory employees, and the Employer and Union agree that they are not.

[36] In the Certification Decision, the Board decided that Division 13 of Part VI of the Act did not apply to this workplace[13]. It then considered in detail past jurisprudence with respect to determination of an appropriate bargaining unit, and came to the conclusion that a larger, more inclusive unit was a more appropriate unit for collective bargaining.

[37] Unfortunately, then, the Board's misinterpretation of the Act and Regulations led to the Board coming to the following conclusion:

> *[66] It is the Board's decision that the following units of employees are appropriate for collective bargaining:*
>
> *1. All journeyman plumbers, steamfitters, pipe-welders, gas-fitters, refrigeration mechanics, instrumentation mechanics, sprinkler fitters and foremen connected with these trades employed by Reliance Gregg's Home Services, a division of Reliance Comfort Limited Partnership in the City of Saskatoon, in the Province of Saskatchewan.*
>
> *2. All apprentice plumbers, apprentice steamfitters, apprentice pipe-welders, apprentice gas-fitters, apprentice refrigeration mechanics, apprentice instrumentation mechanics, and apprentice sprinkler fitters.*
>
> *3. That the Board Agent shall forthwith count all ballots cast, excluding the ballot cast by Brandon Heintz, and shall report the results of that vote to a panel of the Board for the issuance of an appropriate Order.*
>
> *4. That U.A. 179 and Gregg's may file an irrevocable election with the Board pursuant to section 6-11(4)(a) within 30 days of this decision. In the event such an election is filed, the*

[13] Neither party asked for a reconsideration of that decision.

> *certification Orders shall be issued for one bargaining unit combining the two bargaining units set out above.*

[38] The only reasonable interpretation of #4, above, is that, on a correct interpretation of the Act, the Board would have ordered that the appropriate bargaining unit of employees in this workplace was one bargaining unit combining the two bargaining units described in #1 and #2:

> *All journeyman plumbers, steamfitters, pipe-fitters, welders, gas-fitters, refrigeration mechanics, instrumentation mechanics, sprinkler-fitters and all apprentices and foremen connected with these trades employed by Reliance Gregg's Home Services, a division of Reliance Comfort Limited Partnership in the City of Saskatoon, in the Province of Saskatchewan.*

[39] The Report of Agent of the Board dated December 20, 2018 with respect to journeymen and foremen resulted in the following outcome:

No. of Eligible Voters	11
No. of Votes for Union	6
No. of Votes against Union	5
No. of Spoiled Ballots	0
No. of Ballots Cast	11
No of Employees Not Voting	0

[40] The Report of Agent of the Board dated December 20, 2018 with respect to apprentices resulted in the following outcome:

No. of Eligible Voters	8
No. of Votes for Union	2
No. of Votes against Union	5
No. of Spoiled Ballots	0
No. of Ballots Cast	7
No of Employees Not Voting	1

[41] The Board finds that the appropriate remedy is for the Board to amend the findings in the Certification Decision by combining the two bargaining units as set out above. Filing an irrevocable election pursuant to clause 6-11(4)(a), as the Union suggests, would not address the issue here, because the journeypersons and foremen are not supervisory employees. Combining the results in the two Reports of Agent of the Board, to be consistent with the combining of the bargaining units, leads to the following outcome:

No. of Eligible Voters	19
No. of Votes for Union	8
No. of Votes against Union	10
No. of Spoiled Ballots	0
No. of Ballots Cast	18
No of Employees Not Voting	1

[42] Accordingly, the Certification Order for the bargaining unit of journeypersons will be rescinded.[14] An Order to that effect will issue with these Reasons.

III. Reconsideration of ULP Decision

Argument on behalf of the Union:

[43] The Union relies on *Remai* criteria #4, 5 and 6 in support of this application.

[44] The Union says the ULP Decision improperly applied the Board's existing jurisprudence as to employer communications, justifying reconsideration under *Remai* criterion #4. The Union refers to *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*[15] ["*SAHO*"] as establishing the test to be applied in assessing intimidation or interference arising out of employer communications. It says that the Board misstated the *SAHO* test. The Union argues that the Board misinterpreted and misapplied its precedents as to employer interference, intimidation and coercion in the course of a certification campaign.

[45] The most troubling argument raised by the Union is its suggestion that *Remai* criterion #5 applies because the Board breached the principles of natural justice. The original hearing of evidence occurred before former Vice-chairperson Mitchell. Before argument, former Vice-chairperson Mitchell was appointed as a Justice of the Court of Queen's Bench. The parties agreed that the matter could be concluded by Vice-chairperson Love listening to the recordings of the evidence before hearing the argument, and then rendering a decision in conjunction with the original panel. That is what occurred. The Union argues that the only rationale for the Board rejecting the Union's evidence is that Vice-chairperson Love did not actually listen to the recordings of the evidence. This is such a reprehensible suggestion that it will be considered or referred to no further.

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[14] No Order was issued for a bargaining unit of apprentices, as the majority of votes cast did not support the Union.
[15] 2014 CanLII 17405 (SK LRB).

[46] With respect to *Remai* criterion #6, the Union argues that the decision represents a significant policy adjudication as to the types of employer communications that represent unfair labour practices in the context of a certification campaign. The decision goes further than any previous decision in both assuming away the inherent imbalance in power between employers and employees, and overlooking evidence on that point. The Union argues that the Board created a precedent that it says will radically alter the Board's established jurisprudence respecting the consideration of employer communications, by placing an onus on the Union to establish that a particular employee failed to exercise rights under the Act as a precondition to a finding of an unfair labour practice arising out of an employer's interference, intimidation or coercion.

[47] The Union cites numerous decisions[16] defining circumstances in which interference, intimidation or coercion was found, and argues that despite the fact these decisions were before the Board, its decision significantly departed from their analysis. It argues that the ULP Decision does not appropriately protect employees. The fact that coercion is achieved through multiple small steps rather than a single large one does not represent justification to avoid scrutinizing the Employer's actions. The Board's analysis of the existence of interference, intimidation or coercion must consider the entirety of the Employer's campaign and the cumulative impact of its actions. The ULP Decision did not explain the Board's failure to either give effect to the employees' testimony or reject any of it on the basis of credibility.

Argument on behalf of the Employer:

[48] The scope of *Remai* criterion #4 is narrow. The ULP Decision cited numerous precedents and quoted extensively from *SAHO*. The Union has not demonstrated that the Board overlooked important statutory provisions or case law. Disagreements with the manner in which the Board weighed the evidence is not a basis for reconsideration.

[49] The ULP Decision did not turn on an erroneous interpretation of law or general policy. The Board did not ignore or depart from the Board's established jurisprudence. The Board did not depart from the established principle that the effect of communications is judged based on how they would affect an employee of reasonable intelligence and fortitude. The Union is simply asking the Board to re-examine the evidence, reweigh the evidence and reach different determinations

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[16] *Securitas Canada Ltd. and UFCW, Local 1400, Re*, 2015 CanLII 43778 (SK LRB); *Cypress Regional Health Authority v SEIU-West*, 2016 SKCA 161; *UA, Local 496 and Bilton Welding and Manufacturing Ltd., Re*, 2018 CarswellAlta 165 (AB LRB); *UBCJA, Local Union 2103 and Quorum Construction (BC) Ltd.*, *Re*, 2017 CarswellAlta 2915 (AB LRB); *UNITE HERE v Novotel Canada Inc.*, 2012 CanLII 57428 (ON LRB); *Service Employees International Union, Local 1 Canada v PRP Senior Living Inc. o/a Sunrise of Aurora*, 2013 CanLII 15847 (ON LRB).

of fact or mixed fact and law regarding the significance of particular communications by the Employer.

[50] The Union argues that the reasoning in the ULP Decision was not sufficient. The Employer points out that perfect reasons are not required[17]. The ULP Decision made note of the evidence, assessed the evidence in light of the objective test for improper employer communications established in the case law, but was not persuaded that the evidence tendered met the relevant tests. The reasons are sufficient and do not demonstrate that the Board ignored relevant evidence.

[51] With respect to *Remai* criterion #6, the ULP Decision was not a significant policy adjudication or a precedent setting decision. The ULP Decision is an application of existing law to the particular facts of this case. The Board was simply not convinced that the Employer's communications would improperly influence an employee of reasonable intelligence and fortitude. The Board was not applying a standard requiring intent in all cases. The testimony of employees is not determinative when making an objective assessment of Employer communications.

Relevant Statutory Provisions:

[52] The interpretation of the following provision of the Act is at issue in this application:

> ***Unfair labour practices – employers***
> *6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
> *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*

Analysis and Decision:

[53] In reconsideration applications, the Board starts from the premise that the power of reconsideration is used sparingly. A reconsideration application is not a right of appeal nor an opportunity for a party to reargue issues that were not accepted at the original hearing.

[54] In *Kennedy*, the Board made the following finding:

> *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*

[17] *NLNU v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62.

> *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.*[18]

[55] The Board is not satisfied that *Remai* criterion #4 is met. In substance, the Union is seeking to have the Board review the evidence again and reach different findings of fact regarding the nature and context of the Employer's communications with its employees. The Board did not ignore the evidence, but decided what evidence it would accept, how it would weigh that evidence and the significance of the evidence in relation to the legal framework. The Union may disagree with the Board's findings in this regard, but that does not give rise to a basis for reconsideration.

[56] In the ULP Decision, the Board made reference to the effect on the employees of the Employer's communications. The Board was not persuaded by the evidence that the Employer's communications amounted to interference, intimidation or coercion. The Board reviewed the law, made findings of fact and applied the law to those facts.

[57] With respect to *Remai* criterion #6, the Board did not set a significant precedent. This decision does not change the law. The Board did not purport to set general policy regarding employer communications, but determined whether the specific communications by this Employer constituted unfair labour practices in the context of the organizing campaign by the Union, based on the legal standards established by the existing jurisprudence. This decision is not precedential. It is consistent with previous Board decisions. It was merely an application of existing law to a set of facts. The Board was simply not convinced. While the Union disagrees with the Board's findings, it has not satisfied any of the *Remai* factors.

[18] At para 9.

[58] In *NLNU v Newfoundland & Labrador (Treasury Board)*[19], the Supreme Court of Canada made the following finding:

> *Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn., [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.*

[59] While the Union may argue that the ULP Decision did not refer to every piece of evidence that was before the Board in that matter, that is not the standard that must be met. The Board is not required to set out in its decisions every piece of evidence heard at a hearing and its view respecting its relevance to the issue at hand. To find otherwise would be unworkable.

[60] A careful consideration of the ULP Decision shows that the Board reviewed the applicable law. It described the evidence. The Board reviewed each of the impugned communications in detail. It reached the conclusion that the Union did not meet its onus of proving that the communications contravened clause 6-62(1)(a) of the Act.

[61] A proper, narrow interpretation of *Remai* criteria #4 and 6 confirms that they have not been satisfied in this case. Accordingly, the Application for Reconsideration of the ULP Decision is dismissed.

[62] The Board thanks the parties for the comprehensive oral and written arguments they provided, which the Board has reviewed and found helpful.

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

DATED at Regina, Saskatchewan, this **19th** day of **November, 2019.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson

[19] *Supra*, at para 16.