UNIVERSITY OF SASKATCHEWAN and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, and ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION, CO-APPLICANTS

LRB File No. 120-12; March 22, 2019
Chairperson, Susan C. Amrud, Q.C.; Members John McCormick and Mike Wainwright

For the Co-Applicant/Employer, University of Saskatchewan:	David M.A. Stack, Q.C.
For the Co-Applicant/Union, Canadian Union of Public Employees, Local 1975:	Sachia Longo
For the Co-Applicant/Association, Administrative and Supervisory Personnel Association:	Gary L. Bainbridge, Q.C.

Joint Reference of Dispute filed by parties in 2012 with the goal of resolving scope issues – After two pre-hearings and mediation, agreement in principle reached in 2016 – Agreement in principle failed, no further action taken – CUPE applied to withdraw from Reference – ASPA consented, University objected - CUPE's application to withdraw granted.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, Q.C., Chairperson: On July 4, 2012, the University of Saskatchewan ["University"], the Administrative and Supervisory Personnel Association ["ASPA"] and the Canadian Union of Public Employees, Local 1975 ["CUPE"] jointly filed a Reference of Dispute ["Reference"] with the Board[1]. The Reference referred a dispute to the Board pursuant to section 24 of *The Trade Union Act*, as follows:

> *The parties signed Memoranda of Agreement (MOAs) agreeing to review the scope of each of the CUPE, Local 1975 and ASPA bargaining units and applicable certification orders.*
>
> *The parties subsequently entered into a Mediation Agreement in which they agreed to participate in a mediation supported by Richard I. Hornung as the Mediator. That agreement provided:*

[1] LRB File No. 120-12.

A. Phases

Phase 1

The Mediator will facilitate a process whereby the parties will attempt to come to a shared agreement on criteria that clearly define the scope and jurisdiction of the bargaining units.

Where agreement is reached, the parties will submit a consent application to the Saskatchewan Labour Relations Board for a revision to the certification orders. Where agreement cannot be reached, the parties will submit a joint application to the Saskatchewan Labour Relations Board pursuant to section 24 of the Trade Union Act.

Phase 2

Based on amended certification orders, the Mediator will facilitate discussion to ensure positions are in the appropriate bargaining unit, or exempt from being in a bargaining unit. Where agreement is reached, the parties will discuss implementation. Where agreement is not reached, the parties will submit a joint application to the Saskatchewan Labour Relations Board pursuant to section 24 of the Trade Union Act.

In either phase, if agreement cannot be reached, the Mediator may make non-binding recommendations to assist with any Saskatchewan Labour Relations Board application.

The success of this process will depend on the cooperation and commitment of all parties and the timeliness of the process.

No agreement was reached under either phase of the Mediation Agreement.

[2] The Board file reflects the following actions in this matter:

- The first pre-hearing was held on April 24, 2013.
- The second pre-hearing was held on November 8, 2013.
- At the second pre-hearing, dates were set for a hearing on May 12 – 16, 2014. On February 24, 2014, the parties jointly agreed to adjourn those dates.
- The Board asked for an update in July 2015, and was advised that the parties were participating in a mediation process that was still ongoing.
- In December 2015, the Board was informed that mediation had not been completely successful and hearing dates were requested.
- At the January 2016 Motions Day the matter was set down for hearing on June 13 – 17, 2016.

- In March 2016 the parties requested different dates be set; at the April 2016 Motions Day the matter was set down for hearing on September 6 – 9, 2016.

- On August 10, 2016 the parties notified the Board that a settlement in principle had been reached[2].

- The next communication to the Board was a letter from CUPE on December 13, 2018, requesting the matter be withdrawn.

[3] CUPE's letter of December 13, 2018 asked that the matter be placed on the January 2019 Motions Day for the purpose of withdrawal. When the matter was heard, at the February 2019 Motions Day, ASPA indicated that it did not oppose the request[3]; the University opposed the request.

Argument on behalf of CUPE:

[4] CUPE asks the Board to consider the following issues:

- Can CUPE withdraw its consent to the Reference such that the Board no longer has jurisdiction to decide the matter?
- Should the Board dismiss the Reference for want of prosecution?

[5] CUPE's position is that it can withdraw its consent to the Reference. In support of that position it cited several cases, none admittedly exactly on point.

[6] First, practice and procedure are within the control of the Board:

> *The Board has full control over its practice and procedure with respect to applications which are brought before it.*[4]

[7] Second, the issue on an application to withdraw is whether withdrawal would constitute an abuse of process:

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[2] Email from counsel for the University to the Board Registrar, cc to counsel for CUPE and ASPA: "I am advised that the parties have reached a settlement in principle of this matter and are finalizing the documentation. With a view to freeing up the Board's September schedule, the parties have agreed to request that the Board adjourn the September hearing dates sine die. I anticipate that we will be able to advise you in the near future that the reference will be withdrawn by the parties entirely once the settlement documentation has been finalized".

[3] ASPA has since confirmed this position in writing.

[4] *United Association of Journeymen and Apprentices of The Plumbing and The Pipefitting Industry of The United States and Canada Local 179 v Modern Niagara Western Inc.*, 2016 CanLII 1344 (SK LRB), at para 38 ["*Modern Niagara*"].

> *In the absence of evidence that the withdrawal of an application for certification constitutes an abuse of process, an applicant may withdraw the application before it has been determined by the Board.*[5]

[8] *Amalgamated Transit Union, Local 615 v The City of Saskatoon*[6] ["*ATU*"], a decision of an Essential Services Tribunal, stated:

> *The Tribunal agrees with the submissions made by the Union that it no longer had jurisdiction to act under Part VII of the SEA following the withdrawal of the notice given by the Union under section 7-6. It is clear that the Union does not require the consent of the City to give notice under section 7-6. There is nothing in that section, nor in Part VII that would require the other party to consent to the withdrawal of the notice.*

[9] On the basis of these cases, CUPE states that it should be able to withdraw from the Reference, thereby extinguishing the Board's jurisdiction to hear the Reference.

[10] In the Board's view, *ATU*, and the cases it relied on, are not applicable to this matter, since they did not involve joint applications. In *ATU*, the union did not require the city's consent to give notice. In this case, section 24 of *The Trade Union Act* required the agreement of all three parties to initially refer the dispute to the Board.

[11] Alternatively, CUPE argues, the Board should dismiss the Reference for want of prosecution. It relies on the following comments from *Saskatchewan Joint Board Retail, Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 568 v Off the Wall Productions Ltd.*, 2009 CanLII 2603 (SK LRB):

> *[16] Periodically, applications are filed with the Board that, for one reason or another, seem to fall into a period of unexplained hiatus. For example, applications are sometimes filed with the Board and are subject to an initial flurry of activity but later experience an extended period of inactivity (as in the present case). Sometimes, applications are adjourned sine die by the parties, with neither party seemingly desirous of advancing the claim thereafter. As was done in the present case, the Board's practice is to have the Board Registrar contact the applicant every few months seeking an update on the status of their application and asking whether or not the matter should be adjourned, withdrawn or scheduled for hearing. Often, the Board Registrar will receive a letter from an applicant indicating they wish to withdraw their application. However, occasionally and for reasons unknown to the Board, some applicants neither advance their application nor communicate with the Board, notwithstanding the passage of many months with no advancement of their claims.*

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[5] *International Union of Operating Engineers Hoisting & Portable & Stationary, Local 870 v Rural Municipality of Meota No. 468*, 2002 CanLII 52905 (SK LRB) ["*Meota*"] at para 26.

[6] LRB File No. 150-16; September 30, 2016, at para 13.

> *These abandoned applications consume the scarce resources of the Board and can represent contingent liabilities for respondents.*
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> . . . .
>
> *[20] In the Board's opinion, the Board Registrar followed an appropriate procedure. The Union had ample opportunity to prosecute and/or advance its claims against the Employer and was reminded on a reasonable and periodic basis by the Board Registrar of the need to do so. It is reasonable and appropriate for the Board to assume the application has been abandoned by the Union. In a similar situation before the British Columbia Labour Relations Board, that Board dismissed an application for want of prosecution following a lengthy and unexplained delay in proceedings, during which the Applicant was no longer communicating with the Board. See: High Grade Mill Installations v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local No. 1-3567, 2008 CanLII 31318 (BC L.R.B.).*
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> *[21] Even if the Union were to take the position that it has not abandoned its application, the effluxion of time is sufficient (over 24 months) that the Employer could be presumed to have suffered prejudice in its ability to respond to the Union's application, including the unavailability of witness, the recognized corrosive effect on the memories of witnesses, and the general deterioration of evidence associated with excessive delay. See: Evelyn Brody v. East York Health Union, [1997] O.L.R.D. No. 157. See also: McLennan and Teamsters, Local 464 (2001), 69 C.L.R.B.R. (2nd) 54.*
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> *[22] The Union has provided no explanation for its delay and, as such, has not overcome the presumption of prejudice to the Employer associated with excessive delay. See: McKenly Daley v. Amalgamated Transit Union and Corporation of the City of Mississauga, [1982] O.L.R.B. Rep. March 420; Brody, supra and Dishaw, supra.*
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> *[23] Finally, the Board is satisfied that it has jurisdiction to invoke its authority pursuant to s. 18(p) and (q) on its own initiative as well, as upon the application of a Respondent.*

[12] CUPE argues that the facts show that the parties have collectively abandoned the Reference; it is merely asking the Board to endorse that fact. Given the length of the period of inactivity (28 months, as of December 2018) and the contingent liability the case poses to CUPE and the University, the Reference should be dismissed. The contingent liability CUPE refers to is that this matter, as a pending application to the Board, prohibits a lockout by the University pursuant to subclause 6-62(1)(l)(i) of *The Saskatchewan Employment Act* ["Act"] or a strike by CUPE members pursuant to subclause 6-63(1)(b)(i) of the Act.

Argument on behalf of ASPA:

[13] ASPA filed a letter with the Board on February 26, 2019. In it, ASPA reiterated its position that it is not opposed to CUPE's request to withdraw from this matter. Its rationale is as follows:

> *This Reference of Dispute was a three-party request. By definition, if one party no longer wishes to be part of the Reference, there is no dispute to adjudicate. The provisions under*

> *which this Reference were made (section 24 of The Trade Union Act, now repealed) requires that a "dispute" be referred to the Board. If one party to a three-party dispute withdraws, there is no longer any dispute within the meaning of this provision. In short, parties should not be compelled to take part in a dispute if they do not believe that one any longer exists.*

Argument on behalf of the University:

[14] The University argues that, since the parties agreed to this process, it is not open to CUPE to withdraw, as that would be a breach of its contractual commitment. The contractual commitment to which it refers is the following paragraph, that appeared in the 2007-2009 CUPE 1975 Collective Agreement (appended to the Reference):

> *The parties agree that they will review the scope of the CUPE bargaining unit at each University and the applicable certification orders. The Union shall have 90 days following the signing of the Collective Agreement to identify positions which it believes should fall within it's [sic] scope. A process will be developed to review the scope of these positions and determine if they fall within the appropriate bargaining unit. The parties agree that they will submit a joint application to the Labour Relations Board to amend the applicable certification orders in accordance with the review.*

[15] All three parties also signed a Mediation Agreement (also appended to the Reference) in which they agreed to:

- participate in a mediation process;
- attempt to come to a shared agreement on criteria that clearly define the scope and jurisdiction of the ASPA and CUPE bargaining units;
- if agreement is reached, submit a consent application to the Board to revise their certification orders;
- submit a joint application to the Board pursuant to section 24 of *The Trade Union Act* if agreement cannot be reached, for revision of the certification orders;
- based on the amended certification orders, hold further discussions with the mediator to ensure positions are in the appropriate bargaining unit or exempt from being in a bargaining unit;
- again, if agreement cannot be reached, submit a joint application to the Board under section 24 of *The Trade Union Act*.

[16] Although the Reference is not clear, it appears that its purpose was to refer both issues to the Board.

[17] The University disagrees that the parties have abandoned this matter. It advises that the agreement in principle, referred to in the August 10, 2016 email, failed. It indicates that, prior to proceeding with a hearing, it then sought to simplify the issues to be determined in this matter by commencing LRB File No. 254-16. That application asks the Board if the "supervisory employee" provision at section 6-11 of the Act applies to the ASPA bargaining unit. A decision on that matter has not yet been issued by the Board.

[18] In the University's view, the two issues before the Board are:

- can CUPE unilaterally withdraw from the three-party joint Reference to the Board?
- has CUPE established that the Reference should be struck for want of prosecution?

[19] In support of its argument that CUPE cannot withdraw from the Reference the University cited *CAW-Canada v Saskatchewan Indian Gaming Authority Inc.*, 2001 CarswellSask 885 (SK LRB) ["*CAW-Canada*"]:

> *35 The parties referred to s. 24 of the Act when waiving the preconditions. Section 24 of the Act permits the parties to refer any dispute to the Board for determination. We conclude from the agreement reached between the parties that they intended to allow the Union to proceed with its application for first agreement assistance, if required, as a reference of dispute under s. 24 of the Act without requiring the Union to meet the preconditions set out in s. 26.5 of the Act. In our view, this is a permissible use of s. 24 of the Act and demonstrates positive and creative problem solving. Time and expense were spared by settling the unfair labour practice applications without a hearing; the parties resumed collective bargaining with the assistance of a conciliator from Saskatchewan Labour; and the Union's right to seek Board assistance, if needed, to conclude the collective agreement was preserved through the vehicle of s. 24 of the Act. The agreement clearly contemplated that the parties would continue bargaining toward agreement even though it was recognized that the Union might ultimately rely on its application to ask the Board for assistance in concluding the first collective agreement.*

In that matter, the Board held that the union could, in accordance with the parties' agreement, refer the dispute to the Board without first complying with section 26.5 of *The Trade Union Act*.

[20] The University noted that the cases cited by CUPE stand for the principle that an applicant can withdraw from legal proceedings, provided this would not amount to an abuse of process. In its view, since the parties entered into an agreement to place the dispute before the Board, it would be an abuse of process for CUPE to breach that agreement.

[21] The University referred the Board to the following comments in *Modern Niagara*:

> *[37] The dispute which is before this Board, in its essential character, does not deal with whether or not there has been a breach of the agreement between the parties and if and what, if any, damages would flow therefrom, but rather, it is a question of whether or not the Board should defer the application for certification, on equitable principles of estoppel, based on the terms of the agreement, or on other equitable principles related to the application for certification which is before the Board.*
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> *. . .*
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> *[42] **. . .** Here, the Union by the MOA agreed that it would not seek to represent employees of the Employer during the term of the MOA and a six (6) month period thereafter. The Employer relied upon this representation and hired Union members to perform work on its behalf. As noted by the B.C. Board in Coutts, it would be both inequitable and an abuse of the Board's procedures to permit the certification application to proceed in these circumstances.*

[22] Based on these comments, the University argues that to allow CUPE to withdraw from the Reference would be inequitable and an abuse of the Board's procedures. CUPE made a commitment to pursue the Reference, and they should not be allowed to casually or tactically set it aside.

[23] The University also opposes CUPE's suggestion that the Reference should be dismissed for want of prosecution. It cites two cases that it suggests indicate that the Board has endorsed a two-part test for a want of prosecution application: whether there is an arguable case and, if so, whether it is appropriate for the application to be dismissed summarily[7]. However, those cases were applications for summary dismissal, not want of prosecution, and therefore are inapplicable to the issue before the Board in this matter.

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[7] *Soles v CUPE Local 477*, 2006 CanLII 62947 (SK LRB); *Dishaw v Canadian Office & Professional Employees Union, Local 397*, 2009 CanLII 507 (SK LRB).

[24] The University also referred the Board to the updated test to be applied to want of prosecution applications in the courts, as set out by the Court of Appeal in *International Capital Corp. v Robinson Twigg & Ketilson*, 2010 SKCA 48. It is not necessary to review that test in detail as the Board agrees with the University that want of prosecution is not applicable to a joint application where all parties are responsible and accountable for prosecution of the matter.

[25] The University argues that consideration of the factors set out above should lead the Board to deny CUPE's application to withdraw. It states that this matter "has progressed to the eve of a hearing". It also states that there is no evidence before the Board of any actual or anticipated prejudice to any party if the Reference was to proceed.

Relevant Statutory Provisions:

[26] This Reference was filed in 2012, pursuant to section 24 of *The Trade Union Act* which, at that time, read as follows:

> ***Board to determine any dispute on request of parties***
> *24 A trade union representing the majority of employees in a unit of employees may enter into an agreement with an employer to refer a dispute or disputes or a class of disputes to the board and the board shall hear and determine any dispute referred to it by either party pursuant to such agreement and the finding of the board shall be final and conclusive and shall in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties and enforceable as an order the board made in accordance with this Act.*

[27] Section 24 of *The Trade Union Act* is now found at section 6-110 of the Act:

> ***Board may determine dispute on consent***
> *6-110(1) A union representing the employees in a bargaining unit may enter into an agreement with an employer to refer a dispute or a category of disputes to the board.*
>
> *(2) Two or more unions certified for an employer, or in the case of Division 13 for two or more employers, may enter into an agreement with the employer or employers to refer a dispute respecting the jurisdictional lines between or among the bargaining units to the board.*
>
> *(3) On a reference made in accordance with subsection (1) or (2), the board shall hear and determine any dispute referred to it by any party to that agreement.*
>
> *(4) A finding of the board as a result of a hearing pursuant to this section:*
>
> *(a) is final and conclusive;*
>
> *(b) is binding on the parties with respect to all matters within the legislative jurisdiction of Saskatchewan; and*
>
> *(c) is enforceable as a board order made pursuant to this Part.*

Other than for the addition of subsection (2) and drafting improvements, the provisions are identical.

[28] CUPE also referred the Board to the following sections of the Act as being relevant in this matter:

> ***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:*
>
> *(l) to declare or cause a lockout or to make or threaten any change in wages, hours, conditions or tenure of employment, benefits or privileges while:*
>
> *(i) any application is pending before the board;*
>
> ***Unfair labour practices – unions, employees***
> *6-63(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*
>
> *(b) to commence to take part in or persuade an employee to take part in a strike while:*
>
> *(i) any application is pending before the board;*

Analysis and Decision:

[29] The University argues that the Board should not permit CUPE to withdraw from the Reference, as that would constitute a breach of the agreement that led to the filing of the Reference. However, a careful review of that agreement shows that is not the case. The parties agreed that they would "submit a joint application to the Labour Relations Board". The application was submitted, in 2012, almost seven years ago. It was a laudable attempt to find a collaborative way to resolve scope issues. As noted in *CAW-Canada*, references demonstrate "positive and creative problem-solving" by the parties and should be encouraged. However, when, after almost seven years it has not moved forward to resolve the scope issues, and the parties no longer all agree to the use of this mechanism, withdrawal by CUPE would not constitute an abuse of the Board's process. The fact that CUPE agreed seven years ago to attempt to resolve issues through this mechanism does not mean they can be held captive by it forever.

[30] CUPE does not agree with the University's submission that this case deals with the same legal issues as does LRB File No. 254-16. In its view, the fact that LRB File No. 254-16 is ongoing is not relevant to the issue before the Board in this matter[8]. The Board agrees. The University has not satisfied the Board that LRB File No. 254-16 is integrally related to this matter. In fact, as the filing of LRB File No. 254-16

[8] CUPE had been a party to LRB File No. 254-16, but withdrew from it effective February 6, 2019.

indicates, since the Reference has not accomplished what the parties hoped it would when it was filed in 2012, other remedies are available under the Act to resolve their differences.

[31] If the Board was to deny CUPE's request to withdraw from the Reference, the result would not be, as the University suggests, merely an "inconvenience" to its bargaining and job action strategies. It would be an interference with CUPE members' constitutional right to strike. Therefore, the Board is of the view that compelling reasons must exist for it to make that decision. No such compelling reasons exist here.

[32] In *Meota*, the Board stated that "In the absence of evidence that the withdrawal of an application for certification constitutes an abuse of process, an applicant may withdraw the application before it has been determined by the Board". The University appears to suggest that since the Reference was a joint application, CUPE cannot rely on this principle as it is not an applicant but a co-applicant. In the Board's opinion, the parties are all applicants.

[33] Since all three parties are applicants, the Board finds that CUPE cannot withdraw the application, but it can withdraw from further participation in the application.

[34] The application by CUPE to withdraw from the Reference is granted.

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

Dated at Regina, Saskatchewan, this **22nd** day of **March, 2019**.

LABOUR RELATIONS BOARD

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Susan C. Amrud, Q.C.
Chairperson