Saskatchewan
Labour Relations Board

ANDRITZ HYDRO CANADA INC., Applicant v THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Respondent

LRB File No. 016-21; April 30, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Allan Parenteau

Counsel for the Applicant, Andritz Hydro Canada Inc.: Steve Seiferling

Counsel for the Respondent, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of The United States and Canada, Local 179: Ronni A. Nordal

Interim Application – Application for Reconsideration – Application for Stay of decision pending reconsideration – Section 6-103 of *The Saskatchewan Employment Act* – Jurisdiction of Board to Grant a Stay.

Interim Application – Section 15 of Regulations – Requirements for Application – Non-compliance – No Affidavit Filed – Reliance on Record of original proceedings.

Application of Test on Interim Application – Arguable Case is low threshold – No predetermination of issues – Balance of convenience – Balancing of labour relations harm – Insufficient evidence of risk of harm and exigent circumstances – Application for stay dismissed.

REASONS FOR DECISION

Introduction:

[1] Barbara Mysko, Vice-Chairperson: The Employer, Andritz Hydro Canada Inc., has applied for a stay of the Board's decision in LRB File. No. 279-19, issued January 22, 2021, pending the outcome of its reconsideration application of that decision.

[2] In LRB File. No. 279-19, the Board granted an order certifying the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry [UA] as the bargaining agent representing the employees in the proposed bargaining unit pursuant to the provisions of the construction industry division: *United Association v Andritz Hydro Canada Inc.*, 2021 CanLII 4217 (SK LRB) [Certification Decision]. On February 10, 2021, the Employer filed its reconsideration application.

[3] In the reconsideration application, the Employer states that the Certification Decision operates in an unanticipated way or results in an unintended effect, turned on a question of law that was not properly interpreted by the panel, is tainted by a breach of natural justice, and is precedential and should be expanded upon or changed. The Employer expands on each of these bases in some detail in the application. In the reconsideration application, the Employer also asks for a stay of the Certification Decision. On Motions Day on April 6, 2021, it was decided that a date would be scheduled for a hearing of the issue of the stay, to allow that issue to be considered in advance of the substantive application.

[4] In arguing for a stay, the Employer says that a serious issue has been raised and the balance of convenience favours granting an interim or interlocutory stay pending the outcome of the reconsideration application. A stay is important because, by operation of the Board's Certification Decision, the Employer is automatically subject to a collective agreement that it did not negotiate, in relation to which it had no choice of negotiator and no input into the terms and conditions. The Employer also relies on *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) v Farooq Azam Arain and Comfort Cabs Ltd.*, 2019 CanLII 79296 (SK LRB) [*Comfort Cabs*] and *Verdient Foods Inc. v United Food and Commercial Workers, Local 1400*, 2019 SKCA 137 (CanLII) [*Verdient CA*].

[5] The UA argues that the Board does not have jurisdiction to order a stay. The Board does not sit in appeal of its own decisions. The Employer has turned to the wrong forum to request a stay. The operative Regulations[1] specifically address reconsideration applications. In the provision dealing with reconsideration applications, there is no mention of an interim order. Even if there is jurisdiction, the Employer has failed to file a proper application for an interim order pursuant to section 15 of the Regulations.

[6] Finally, there is no reference to a stay in *Comfort Cabs*, and *Verdient CA* does not provide support for a stay of the Board's Certification Decision. *Verdient CA* deals with an application for a stay of proceedings made to the Court of Queen's Bench, not the Board.

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[1] *The Saskatchewan Employment (Labour Relations Board) Regulations*, RRS c S-15.1 Reg 1, 2014.

Analysis:

[7] The first question is whether the Board has jurisdiction to order a stay of its decision. The Employer relies on clause 103(2)(d) of the Act, stating that this provision provides a full answer to the jurisdictional question:

> ***6-103****(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*
> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
>
> *…*
>
> *(d) make an interim order or decision pending the making of a final order or decision.*

[8] The UA argues that section 6-103 does not provide the Board with jurisdiction to order a stay. That provision gives the Board the power to "make an interim order or decision pending the making of a final order or decision". The "final order or decision" are the order and decision that are subject to reconsideration. These are not pending. The decision has been rendered and the order issued and therefore they are final. The fact that the Employer has put the Decision and order in issue by filing a reconsideration application does not make them less final.

[9] In our view, this is an overly technical interpretation of section 6-103. Granted, by filing the reconsideration application, the Employer has put in issue the Certification Decision. However, the decision that is pending is the reconsideration decision. The reconsideration decision has not been decided.

[10] Section 6-103 allows the Board to perform those duties that are incidental to the attainment of the purposes of the Act. This includes making an interim order or decision pending the making of a final order or decision. Subsection 6-104(2) lists specific orders that the Board may make, which includes rescinding or amending orders. These powers are in addition to any other powers given to the Board pursuant to Part VI. Section 6-108 states that the Board may rescind or vary an order or decision notwithstanding that it has been filed with the Court of Queen's Bench and become enforceable as a judgment of the Court of Queen's Bench.

[11] An argument similar to the UA's was made in *United Food and Commercial Workers, Local No. 1400 v Barrich Farms* (1994) Ltd., 2008 CanLII 64691 (SK LRB) [*Barrich Farms*], and the Board found as follows:

> *[8] With respect to the third preliminary objection, the Union argued that, while the Employer's Application for Interim Relief indicates that the Employer is seeking a "stay" of the Board's certification Order pending its Application for Reconsideration, the Employer was de facto seeking to "set aside" the Board's certification Order pending an "appeal". The Union argued that the Board had no authority to set aside a certification Order on an interim application on the basis that doing so would be to grant a "remedial" remedy, something beyond the Board's authority on an interim application. In this respect, the Union relied upon the decision of this Board in Service Employees International Union, Locals 299, 333 & 336, et al v. Saskatchewan Association of Health Organizations, et al., [2006] Sask. L.R.B.R. 375 LRB File Nos. 119-06, 122-06 & 123-06. The Board notes that there is nothing in s. 5.3 of the Act which restricts the nature of the order that may be issued by the Board on an application for interim relief. In appropriate circumstances, an order staying a certification Order may well be in keeping with the Board's jurisprudence with respect to the preservative nature of an order pursuant to s. 5.3 of the Act.*

[12] Section 5.3 of *The Trade Union Act*, which was the operating provision in *Barrich Farms*, read as follows:

> *5.3 With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*

[13] In summary, Part VI contains no specific reference to a power to "stay" a decision, but makes clear that the Board has powers to make an interim order, and to rescind, amend, and vary orders and decisions. In our view, the Board has the power to stay a decision that is subject to a reconsideration application. A stay of a Board order pending reconsideration may, in appropriate cases, be consistent with the preservative nature of an interim order.

[14] Having found that the Board has jurisdiction to order a stay, it is now necessary to consider whether the Employer has satisfied the Board that a stay should be ordered.

[15] The Employer applies for a stay pursuant to clause 6-103(2)(d). The Employer accepts that it has the onus to persuade the Board that a stay should be ordered. Under the Regulations, the party that intends to obtain an interim order shall file, pursuant to section 15 of the Regulations, an application in Form 12 and an affidavit. The Employer has filed neither. The Employer suggests that these are technical breaches that can and should be remedied by operation of the Board's powers under section 6-112.

[16] The Board agrees that the form of the application is a technical breach that can be remedied pursuant to section 6-112. The Board has all of the information requested in Form 12. Therefore, the Board will proceed as though the application has been filed in Form 12. The Board will also proceed as though a draft interim order was filed on time, as an order was ultimately filed, the Board has the requisite information, and the UA takes no issue with the late filing.

[17] The next question is whether the absence of an affidavit is a technical breach that can be remedied pursuant to section 6-112. In terms of the evidence supporting its request for a stay, the Employer relies on the record in LRB File. No. 279-19. The Employer says that it could have filed a straightforward affidavit stating as much, and given the simplicity of such an affidavit, its absence is nothing more than a technical breach. On this basis, the Board is willing to proceed as though the affidavit has been filed, as described.

[18] This raises a question, however, about whether such an affidavit would have met the requirements of the Regulations. In particular, has the Employer identified with reasonable particularity the items listed in clause (b) of section 15? The Board is primarily concerned with subclauses (i) and (ii), which combined, require the applicant to provide the Board with the necessary information to assess the balance of convenience. This information also allows the respondent to assess the merits of the request and respond in turn.

[19] By stating that it relies on the record, has the Employer provided sufficient information to identify the evidence upon which it relies? To answer this question, it is necessary to consider the Employer's arguments. With respect to harm, the Employer makes the following claims:

- *The Employer had no role in negotiating the provincial agreement and therefore had no input into the terms and conditions of work;*
- *By contrast, the Employer invested in negotiating a different agreement, with other unions, and tailoring that agreement to the project;*
- *Due to the Certification Decision, a different set of terms and conditions will now have to apply to members of the UA, while a different agreement applies to the other building trades;*
- *By considering the overall work on the project, the Certification Decision put the project agreement, which has been negotiated with other building trades, in jeopardy;*
- *The provincial agreement was not negotiated with this project in mind, and does not reflect the nature of the work being performed;*
- *There is harm to the other building trades who have signed on to the project agreement, and have not had an opportunity to be heard;*
- *There is harm to the Employer with respect to the uncertainty with the other building trades and with respect to the overall project.*

[20] Section 15 of the Regulations requires that affidavits be confined to facts that the applicant or witness is able of the applicant's or witness's own knowledge to prove. In special circumstances, the Board may admit an affidavit that is based on information and belief. The reason for the restriction is straightforward. The premise of an interim application is that there are exigent circumstances that require an order. The underlying exigency necessitates an alternative to the usual hearing, so that the Board might assess the request in a timely and responsive

manner. The parties do not call witnesses and there is no cross examination. Therefore, the evidence must be capable of first-hand verification to reduce the potential indicia of unreliability and the potential for unanticipated consequences flowing from the interim order.

[21] In past cases, applicants have filed affidavits to support interim applications for a stay pending reconsideration: *International Brotherhood of Electrical Workers, Local 529 v Saunders Electric Ltd*., 2008 CanLII 64400 (SK LRB) [*Saunders*]; *United Food and Commercial Workers, Local No. 1400 v Wal-Mart Canada Corp.*, 2009 CanLII 2047 (SK LRB) [*Wal-Mart*]. *Saunders* underscores the importance of filing affidavits that are based on personal knowledge:

> *[10] The Affidavit of Don Saunders contains little new factual material. It does, however, contain considerable material which is not based upon his personal knowledge, but is either based on information or belief or is argumentative. In Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Loraas Disposal Services Ltd., [1997] Sask. L.R.B.R. 517, LRB File No. 208-97, at 523, the Board described its policy and practice respecting the form of admissible affidavit evidence in interim applications as follows:*
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> > *It has been the practice of this Board to require that affidavits filed in an application for interim relief be based on personal knowledge. The Board does not permit cross-examination of witnesses on their affidavits as there is not sufficient time on an interim application to hear viva voce evidence. If viva voce evidence is necessary, the applicant or respondent should request an expedited hearing, which the Board can generally accommodate.*
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> *[11] A number of recent applications to the Board seem to have forgotten this requirement. Applicants for interim relief must be mindful of this requirement, since, failing to do so, may, in appropriate circumstances, result in their application being dismissed, such as that which occurred in Grain Services Union (ILWU-Canada) v. Startek Canada Services Ltd., [2004] Sask. L.R.B.R. 15, LRB File No. 032-04.*

[22] In both *Wal-Mart* and *Saunders*, the respondents brought objections to portions of the affidavits that were based on information and belief. In both cases, the Board found that the objections were well-founded.

[23] The failure to file an affidavit is not a mere technical breach unless similarly reliable evidence has been put before the Board in some other fashion. The Board can accept that the record of witness evidence from an underlying decision may be a suitable substitute for an affidavit where the evidence being relied upon has been stated with reasonable particularity. However, in a case such as this, it can be difficult to conclude whether the facts and circumstances have been identified with reasonable particularly prior to concluding the assessment of the balance of convenience. Therefore, for the purposes of this case, the Board will proceed to apply the test for interim relief to the record, as has been put in issue by the Employer. This should not preclude the Board from approaching this exercise in the opposite order, in a future case.

[24] The Board will now turn to the test on an application for interim relief. The Employer cites the description of the test as set out by the Board in *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc.*, 2019 CanLII 76957 (SK LRB) [*Verdient LRB*], at paragraphs 21-4. In short, the Board utilizes a two-part test to guide its analysis: (1) whether the main application raises an arguable case of a potential violation under the Act; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application.

[25] The first part of the test – serious issue to be tried – is a low bar. The question is whether the underlying application raises an arguable case. To answer this question, the Board considers whether the underlying application discloses facts that, if established, would prove the alleged claim. The Employer is not required to demonstrate a probable contravention of the Act. The Board does not pay close attention to the relative strengths or weaknesses of the applicant's case. The Board should refrain from evaluating novel arguments or statutory interpretations.

[26] Both parties suggest that if the Board decides that the Employer has demonstrated an arguable case, it will necessarily have found that the Employer has satisfied the first stage of the reconsideration test. This is not correct. The tests for interim relief and reconsideration are different tests for different purposes. Deciding one does not decide the other. Interim decisions are not intended to foreclose the Board's full consideration on the merits. It would not be appropriate for the Board to fold the reconsideration test into the test for an interim order. The arguable case test should be applied in a way that allows the reconsideration application to be fully heard.

[27] In this case, for example, the Employer has alleged that the Certification Decision turned on a question of law that was not properly interpreted by the panel. At this stage, the Board does not decide whether the Decision turned on a question of law or whether that question was properly interpreted. Instead, the Board simply considers whether, if the Decision turned on a question of law that was not properly interpreted, there would be an arguable case that it should be reconsidered. The same reasoning applies to the other *Remai* factors raised by the Employer. This is a low standard, and it is necessarily so.

[28] The Board has applied the foregoing reasoning to the materials before it, and has found that the Employer has established an arguable case.

[29] The second part of the test relates to the balance of convenience, or as the Employer describes it, the balance of harms. At this stage, the Board considers whether the balance of convenience weighs in favour of granting the stay. The Employer is required to provide a description of the harm that will ensue if the order is not granted, with a view to demonstrating a meaningful risk of irreparable harm. The Board considers a variety of factors, including whether a sufficient sense of urgency exists to justify the stay. The Employer must demonstrate that the labour relations harm in not ordering a stay outweighs the labour relations harm in ordering it.

[30] The Employer says that, due to the Certification Decision, a different set of terms and conditions will now have to apply to members of the UA as compared with the other building trades. This will result in a two-tiered working environment. It is true that, due to the Certification Decision, the provincial agreement applies to the members of the UA. It is also true that other building trades have entered into a project agreement with this Employer. But the applicability of two different agreements does not by itself cause sufficient harm to the Employer to justify a stay of the Certification Decision.

[31] The Employer also suggests that the Certification Decision put the project agreement in jeopardy, because it "could require that the provincial agreements for each trade … apply to the work". The Employer seems to be suggesting that there is a perceived risk that other trades may wish to apply to certify under the construction division. However, there is insufficient evidence before the Board on the exigent jeopardy to the project agreement. This argument is too speculative to support an interim stay of the Certification Decision.

[32] Next, the Employer argues that the provincial agreement is not a suitable agreement to be applied to the project that has been undertaken. The Employer has not specified in what way this unsuitability creates a risk of exigent harm. Moreover, this argument is more appropriately made at the reconsideration stage.

[33] The Employer also alleges that, in the absence of a stay, there is a risk of harm to the other building trades. The Employer does not act on behalf of these other building trades. More to the point, the relevant harm for the current purposes is the harm to the parties (or by extension, to the unionized employees). Harm to other third parties is not relevant. The Employer answers this by suggesting that the uncertainty with respect to the other building trades and the uncertainty with respect to the overall project create a risk of harm for the Employer. Uncertainty, on its own, is not sufficient risk of harm, and is not exigent.

[34] In its application, the Employer requested the Board to stay its Decision on an interim or interlocutory basis as was done in *Comfort Cabs*. In our view, that case does not assist the Employer. Granted, the ballot box remained sealed while the Board reconsidered the original decision ordering a vote be conducted. However, the decision in that case contains no analysis of the test to be applied in considering an application for a stay. Furthermore, in the current case there is no outstanding tabulation.

[35] Finally, the Employer concludes by arguing that the balance of convenience weighs in its favour. There is no risk of harm to the UA. Unlike in *Verdient CA,* there is no requirement for collective bargaining and therefore no risk of harm to the collective bargaining process. What this argument overlooks is that the goal of collective bargaining, as that term is used by the Employer, is to achieve an agreement. Pursuant to the Certification Decision, the provincial agreement is the applicable agreement. A stay of the Certification Decision will delay the full implementation of the terms and conditions of that agreement.

[36] Furthermore, “collective bargaining” as defined in clause 6-1(1)(d) of the Act, includes “negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement”. If the Certification Decision is stayed, then the employees do not have access to any dispute mechanisms available under the provincial agreement.

[37] The Board has considered the Employer’s request carefully. In some cases, a request for a stay pending reconsideration may be consistent with the preservative nature of interim relief. However, the assessment of harm is essential to ensuring that the Board is fulfilling its statutory responsibility to facilitate collective bargaining rights and obligations. In this case, the Board is not persuaded that the balance of convenience weighs in favour of staying the Certification Decision pending the conclusion of the underlying matter.

[38] Given the foregoing, the Employer’s application for an interim order staying the Certification Decision pending its reconsideration is dismissed.

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

DATED at Regina, Saskatchewan, this **30th** day of **April, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson