MOOSE JAW BOARD OF POLICE COMMISSIONERS, Applicant v CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 9-02, Respondent

LRB File Nos. 114-22; 080-22; September 29, 2022
Vice-Chairperson, Barbara Mysko; Board Members: Mike Wainwright and Shawna Colpitts

Counsel for the Applicant, Moose Jaw Board of Police Commissioners: Destiny Gibney

Counsel for the Respondent, Canadian Union of Public Employees, Local 9-02: Andrew Restall

Application for Summary Dismissal – Clause 6-111(1)(p) of *The Saskatchewan Employment Act* – Underlying Unfair Labour Practice Application – Summary Dismissal Not Granted.

Allegation of Delay – Subsection 6-111(3) of the Act – 90-day Timeline – Countervailing Considerations – Necessity of Weighing Evidence at a Hearing – Original Application Not Patently Defective Due to Late Filing.

Allegation of Breach of Duty of Good Faith Collective Bargaining – Sections 6-7, 6-62(1)(d), and 6-62(1)(r) of the Act – Process of Filling Vacant Position – Allegation of Breach of Collective Agreement – Refusal to Remit Grievance to Arbitrator.

Interpretation of Duty Based on Certification Orders – Third Party Rights – Negotiated Scope Clauses – Not Plain and Obvious that No Reasonable Chance of Success.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application for summary dismissal filed by the Moose Jaw Board of Police Commissioners [Employer] on July 4, 2022.

[2] The original application, filed by CUPE, Local 9-02 [CUPE], on May 24, 2022 alleges that the Employer has committed an unfair labour practice, pursuant to sections 6-7, 6-62(1)(d), and 6-62(1)(r) of *The Saskatchewan Employment Act* [Act], by refusing or failing to cooperate with the grievance process as set out in the collective agreement. The grievance alleges that the Employer breached the collective agreement when filling a vacant bargaining unit position [Position]. CUPE

has insisted on bringing the grievance before an arbitrator, and the Employer has refused to do so.

[3] In its reply to the original application, the Employer claims that the Position does not belong in CUPE's bargaining unit but in the unit represented by a different union, Moose Jaw Police Association [MJPA]. It says that it does not need to submit to arbitration because the provisions of the collective agreement do not apply to this Position.

[4] In the current application, the Employer states that the original application should be summarily dismissed because CUPE has failed to file it within the 90-day timeline set out in subsection 6-111(3) of the Act; has failed to plead material elements of the unfair labour practice claim; has not identified any additional obligations, prohibitions or provisions imposed on the Employer pursuant to clause 6-62(1)(r) of the Act; and the effect of the relief requested would force the Employer to violate its statutory obligations and to violate the statutory rights of a third party.

[5] The Employer asks that the Board consider the application for summary dismissal without an oral hearing. Upon receipt of this application, the Board set deadlines for the parties to file additional written submissions in support of their respective positions. The Employer filed additional written submissions. CUPE did not file additional written submissions, instead opting to rely on its reply.

[6] The Board also notified MJPA of the original unfair labour practice application and the application for summary dismissal. MJPA has filed no application to intervene and has not participated in these proceedings.

Evidence:

[7] The title of the Position in question is Victim Services Coordinator. The Employer describes the Position in the following terms:

> *(f) …The position directly provides counselling and guidance to victims of crime and requires attendance to crime scenes, accident scenes, homes of victims, court processes and other locations. The position is funded by the Ministry of Justice and provides services to both the Moose Jaw Police and the RCMP.*[1]

[1] Employer's reply to the original application.

[8] CUPE is certified to represent a bargaining unit of employees working for the Employer, pursuant to an amended order of the Board in LRB File No. 025-19, dated July 9, 2019, which states:

> *…that all clerical employees of the Board of Police Commissioners of the City of Moose Jaw except the Chief of Police, Deputy Chief of Police, Superintendent(s), Inspector(s), special constables, Executive Administrator, Financial Administrator, and all employees covered by the Canadian Association of Police certification order dated August 8, 1960 (LRB File No. 102-60), is an appropriate unit of employees for the purpose of bargaining collectively;*

[9] The order in LRB File No. 025-19 amends the original certification order, dated June 19, 1982, which found all clerical employees, subject to specified exceptions, to be an appropriate unit.

[10] The scope clause of the collective agreement, dated July 24, 2019 (effective from January 1, 2017), states:

> *For the purpose of this Agreement, the expression "Board Employees" or "Employees", shall apply to all employees of the Board of Police Commissioners, of the City of Moose Jaw, except the Chief of Police or* ***designate****, Deputy Chief of Police or* ***designate****, Superintendent(s), Inspector(s), Executive Secretary,* ***Finance Administrator****, employees who are members of the Moose Jaw Police Association and contracted Commissionaire services.*
>
> *The bargaining unit as outlined above may only be amended by mutual agreement or by order of the Saskatchewan Labour Relations Board.*

[11] The Position category is included in Schedule I (salary schedules) and in Article 25 (probationary period and permanency of employment) of the collective agreement, dated July 24, 2019 and in Schedule I (salary schedules) of the collective agreement, dated October 26, 2006 (effective from July 1, 2004).

[12] MJPA is also certified as the exclusive bargaining agent for a unit of employees described in an amended order in LRB File No. 363-96, as follows:

> *…(a) that the employees of the Police Department of the City of Moose Jaw, Saskatchewan, except the Chief Constable, Inspector, Sub-Inspector, Juvenile Officer, and Clerical Staff, constitute an appropriate unit of employees for the purpose of bargaining collectively;…*

[13] Neither party has filed a collective agreement negotiated between the Employer and MJPA.

[14] In the original application, CUPE states as follows:

…

c) Article 26 of the collective agreement between the parties outlines a grievance and arbitration process, whereby the parties are subject to binding arbitration upon referral of a grievance by the union.

d) On or about June 11, 2021 the union filed a grievance with the employer alleging an improper selection process for a vacant bargaining unit position. This grievance is known to the parties as grievance 2021-01 (MKAY) and concerns a bargaining unit [Position]. This [P]osition has been in-scope of CUPE's bargaining unit for at least 23 years.

e) On or about July 8, 2021 the parties agreed to meet for an informal grievance discussion. At this meeting, the parties agreed to hold the grievance in abeyance for the summer months, so that formal meetings could be arranged in the fall.

f) On or about September 27, 2021, the parties met for a "Step 1" grievance meeting. At this meeting, the union presented its grievance to the employer in accordance with Article 26 of the collective agreement.

g) On November 26, 2021, the employer issued a written decision denying the union's grievance. In its decision, the employer indicated that it did not believe that the union had proper "jurisdiction" over the [Position]. The employer has claimed, among other things, that the [Position] is not a "clerical" position, and that it should not be in-scope of CUPE's bargaining unit.

h) On December 8, 2021, the union advised the employer of its intent to forward grievance 2021-01 to arbitration, in accordance with Article 26 of the collective agreement.

i) From December 8, 2021, to April 8, 2021 the union has made several requests to the employer to forward grievance 2021-01 to arbitration in accordance with the collective bargaining agreement.

j) As of May 9, 2021, the employer continues to refuse to name a nominee to the Board of Arbitration or agree to appoint a Chair to hear grievance 2021-01.

[15] The dates, April 8, 2021 and May 9, 2021, included in CUPE's original application are understood to contain typos, referring incorrectly to 2021 instead of 2022.

[16] With respect to MJPA, the Employer states as follows in its reply to the original application:

. . .

5 … (g) The Employer erred in not originally offering the [Position] to the MJPA and not bargaining with MJPA regarding the [P]osition.

(h) MJPA has asked that the Employer recognize their exclusive right to represent and bargain regarding this (and another) position and advised that they would consider it an unfair labour practice if the Employer were to fail to recognize their exclusive authority pursuant to section 6-13(2) of the Act.

[17] According to CUPE's application, CUPE made several requests to the Employer to forward the grievance to arbitration. The Employer has refused to submit the name of a nominee.

Arguments:

Employer:

Delay:

[18] Subsection 6-111(3) sets out a presumptive time bar to the making of an unfair labour practice application. CUPE has failed to provide any justification for filing outside the time period set out in that provision. As such, the Board has no choice but to summarily dismiss the application as being patently defective and as disclosing no arguable case.

[19] As an aggravating factor, CUPE has also failed to comply with the grievance timelines. The grievance was filed after the end of the business day on June 14, 2021. It was denied by written decision of the Chief of Police on October 15, 2021. CUPE escalated the grievance to the Board of Police Commissioners and the grievance was again denied on November 16, 2021. The parties agreed to meet on July 8, 2021 for a formal grievance hearing. At the hearing, CUPE advised that they were not prepared for a hearing and requested an informal discussion. The Employer consented. After the discussion, the parties agreed to reschedule the hearing. CUPE has not proceeded with the grievance in accordance with the timelines under the collective agreement and the Employer has reserved the right to object to the grievance based on CUPE's breach of the timelines.

Substantive Matter:

[20] With respect to clause 6-62(1)(r), the Employer's argument is straightforward. CUPE has not made any reference to any obligation, prohibition or other provision of Part VI that is imposed on or applicable to the Employer and that would ground a breach under this provision. Having failed to provide that basic information, this heading of the original application cannot be sustained.

[21] Next, the Employer argues that there is no such thing as an unfair labour practice pursuant to section 6-7 of the Act. Furthermore, CUPE fails to outline the "time" and "manner" required by Part VI or by an order of the Board which is alleged to have been violated by the Employer.

[22] With respect to clause 6-62(1)(d), the Employer points to the wording of the provision, and specifically, to the phrase "representatives of a union representing the employees in a bargaining unit". Where the term "bargaining unit" is used in an unfair labour practice provision, a precondition to finding a breach is that the employer be subject to an "applicable certification order". The

applicable certification order does not support CUPE's argument that the Position belongs in its bargaining unit.

[23] Not only is CUPE not certified to represent the Position, CUPE does not even allege that it is so certified. CUPE does not claim that the Position is clerical nor does CUPE claim that the Employer is incorrect in claiming that the Position is not clerical. CUPE's argument to the effect that the "collective agreement sets out the scope of the bargaining unit" manifestly disregards the statutory requirement that for purposes of Part VI the bargaining unit is to be "determined by the Board".

[24] MJPA is the certified bargaining agent for the Position. CUPE is asking for relief that will override the rights granted to MJPA by order of the Board. CUPE suggests that its negotiated agreement can alter another union's certification order. This cannot be the case. Where there is a conflict between a collective agreement and Part VI of the Act, Part VI prevails.

CUPE:

Delay:

[25] CUPE states that its application should not be dismissed for being untimely. It did not have full knowledge of the Employer's "absolute intention to disregard Article 26 of the collective agreement" until February 2022. Until at least April 20, 2022, it sought through written correspondence to seek to understand why the Employer believed that it could ignore the arbitration process. The Employer's breach is equivalent to an ongoing policy or practice that has an indefinite impact on the bargaining unit. The prejudice alleged by the Employer amounts to either "mere inconvenience or speculation". It is insufficient to override the serious nature of the application.

[26] Furthermore, CUPE's original application discloses a strong *prima facie* case of a violation of the Act. The Employer's actions amount to a unilateral removal of a position from the bargaining unit. Even if the Board accepts that CUPE knew or ought to have known about the alleged unfair labour practice on or before February 16, 2022, the delay in bringing the original application is so minimal as to be outweighed by the countervailing considerations. While the Employer has offered no examples of real or substantive harm, real harm will be done to CUPE by ignoring the fact that it has been representing the Position since at least 2004.

Substantive Matter:

[27] In relation to the substantive matter, CUPE repeats its argument that the original application discloses a strong *prima facie* case of a violation of the Act. All differences between the parties to a collective agreement, including whether a matter is arbitrable, are to be settled by arbitration. Labour arbitrators have the authority to consider matters of jurisdiction. For a party to an agreement to unilaterally decide not to participate in binding arbitration for the purpose of settling a grievance is a breach of the party's duty to bargain in good faith. The Employer has admitted to having refused to refer a grievance dispute under a collective agreement to arbitration. This is a serious offense.

Analysis:

General:

[28] It is well established that the Board has authority to summarily dismiss an application, and that it may do so without holding an oral hearing. The source of this authority is found at section 6-111 of the Act:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *…*
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*
>
> *(q) to decide any matter before it without holding an oral hearing;*

[29] The authority to dismiss an application without an oral hearing was confirmed in *Siekawitch v Canadian Union of Public Employees, Local 21*, 2008 CanLII 47029 (SK LRB), at pages 4-5:

> *The above provisions, which came in to force in Saskatchewan in 2005, [and] originated in The Canada Labour Code, Part I, have been considered by several cases in the Federal jurisdiction. Those cases are clear authority for the proposition that the Board may proceed, in appropriate circumstances, to dismiss an application without an oral hearing where the documents provided on the application show there is either a lack of evidence or no arguable case. Those documents, which form a part of the record such as the Application and Reply, can be supplemented by reports of investigations conducted by the Board or written submissions of the parties.*

[30] Section 19 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* outlines the process to follow in making an application for summary dismissal. In an application for that purpose, the applicant is to request the Board to consider the application either

with or without an oral hearing. In the current case, the Employer has requested that the Board consider the application without an oral hearing.

[31] In *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB), the Board summarized the test to be applied in an application for summary dismissal:

> *[8] The Board recently[5] adopted the following as the test to be applied by the Board in respect of its authority to summarily dismiss an application (with or without an oral hearing) as being:*
>
> > *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant is able to prove everything alleged in his/her claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
> >
> > *2. In making its determination, the Board may consider only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his/her claim.*
>
> *[9] Generally speaking, summary dismissal is a vehicle for the disposition of applications that are patently defective. The defect(s) must be apparent without the need for weighing of evidence, assessment of credibility, or the evaluation of novel statutory interpretations. Simply put, in considering whether or not an impugned application ought to be summarily dismissed, the Board assumes that the facts alleged in the main application are true or, at least, provable. Having made this assumption, if the Board is not satisfied that the main application at least discloses an arguable case, and/or if there is a lack of evidence upon which an adverse finding could be made, then the main application is summarily dismissed in the interests of efficiency and the avoidance of wasted resource.*

[32] The foregoing test has been consistently and repeatedly relied upon by the Board.

[33] In summary, the question for the Board to consider is whether, assuming CUPE proves the allegations, the claim has no reasonable chance of success, in other words, whether it is plain and obvious that the original application should be dismissed as disclosing no arguable case or a lack of evidence. The Employer bears the onus on the present application.

Application to Dismiss Due to Delay:

[34] Pursuant to subsection 6-111(3) of the Act, the Board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the date that the underlying action or circumstances were or ought to have been discovered, as follows:

> ***6-111***
> *…*
> *(3) Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the*

> *opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.*
>
> *(4) The board shall hear any allegation of an unfair labour practice that is made after the deadline mentioned in subsection (3) if the respondent has consented in writing to waive or extend the deadline.*

[35] Clearly, the Employer has not provided consent in accordance with subsection 6-111(4) of the Act.

[36] In support of its application, the Employer relies on *Saskatchewan Polytechnic Faculty Assn. v Saskatchewan Polytechnic*, 2016 CarswellSask 502 [*SPFA v Sask Poly*]. In *SPFA v Sask Poly*, the Board confirmed that the principles that had been applied under the previous legislation continue to apply in the context of subsection 6-111(3). Among these is the widely accepted principle that time is of the essence in labour relations disputes.

[37] The Board also confirmed that, in the absence of consent given in accordance with subsection 6-111(4), it has discretion to adjudicate the application in question. This principle is consistent with the discretionary language of subsection 6-111(3) of the Act. The Board found that, when exercising its discretion, it should apply the non-exhaustive list of countervailing factors identified in *Toppin v U.A., Local 488 (2006)*, 2006 CarswellAlta 313, [2006] Alta LRBR 31, 123 CLRBR (2d) 253 (Alta LRB) [*Toppin*]. The list of countervailing considerations includes the sophistication of the applicant, the reason for the delay, the actual prejudice, and in evenly balanced cases, the importance of the rights asserted and the apparent strength of the complaint.

[38] In *Toppin*, it was held that late applications should be dismissed unless countervailing considerations exist. Moreover, the longer the delay, the stronger must be the countervailing considerations before the application will be allowed to proceed.

[39] For purposes of the current application, the Board will proceed by accepting the premise that late complaints should be dismissed unless countervailing considerations exist. Upon accepting this premise, it is necessary for the Board on an application made pursuant to subsection 6-111(3) of the Act to, first, determine, whether the application was filed late, and second, determine whether countervailing considerations exist.

[40] The Employer's choice of procedure introduces an additional layer to the Board's analysis. The Employer has made this application pursuant to clause 6-111(1)(p) of the Act, seeking that the Board invoke its summary procedure in determining whether the original application can be dismissed for late filing. In doing so, the Employer seeks to rely on the test that the Board has

adopted in relation to summary dismissal applications. In other words, the Employer asks the Board to find that it is plain and obvious that the original application has no reasonable chance of success.

[41] The Employer also relies on *Saskatchewan Government and General Employees' Union v Quint Development Corporation*, 2018 CanLII 68440 (SK LRB) [*Quint*], a reconsideration decision in relation to an order granting summary dismissal. The original application had been brought within the 12-month period referred to in subsection 6-12(3), which states:

> ***6-12****(1) Before issuing a certification order on an application made in accordance with section 6-9 or amending an existing certification order on an application made in accordance with section 6-10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.*
> *…*
>
> *(3) Notwithstanding subsection (1), the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same union.*

[42] The Board in *Quint* applied the test applicable on a reconsideration and dismissed the application, finding that none of the relevant grounds for reconsideration had been proven to apply. The Board noted that the decision subject to reconsideration was not precedential, as it was "consistent with the past approach of the Board, to apply a cooling-off period before a subsequent Application for Bargaining Rights will be allowed."[2] The purpose of subsection 6-12(3) was found to be "to prevent unnecessary or prolix applications for certification."[3]

[43] It was within this context that the Board found that there had been no denial of natural justice, and that given the lack of evidence, "the Board had no choice but to summarily dismiss the application as being patently defective and disclosing no arguable case".[4]

[44] The original application in the current case is an unfair labour practice application. It does not involve a cooling off period.

[45] In *SEIU-WEST v Alison Deck*, 2021 CanLII 23381 (SK LRB), a summary dismissal application of two employee-union disputes, the Board made the following observation:

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[2] *Saskatchewan Government and General Employees' Union v Quint Development Corporation*, 2018 CanLII 68440 (SK LRB), at para 32.
[3] *Ibid*, at para 37.
[4] *Ibid*, at para 45.

> *[23] Summary dismissal based on delay does not fit neatly into the wording of s. 6-111(p), given the Board's authority is only available under that clause where there is a lack of evidence or no arguable case. Nonetheless, this Board has considered delay in summary dismissal cases in the past: see Dishaw v Canadian Office & Professional Employees Union, Local 397, 2009 CanLII 507 (SK LRB); Brady v International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, 2017 CanLII 68781 (SK LRB).*

[46] It is clear that the Board has the authority to make a preliminary determination as to whether it will refuse to hear allegations of an unfair labour practice made more than 90 days after the discovery date. However, in a straightforward hearing on a preliminary question, the Board will hear and weigh all the evidence relevant to the preliminary question.

[47] By contrast, in the current application the Employer asks the Board to apply the summary dismissal test due to the alleged late filing. If invoking the summary dismissal process, the Board is restricted to considering only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish the claim. In making its determination, the Board must avoid weighing evidence, assessing credibility, or evaluating novel statutory interpretations.

[48] The Board has decided to dismiss the request for summary dismissal due to late filing, for the following reasons.

[49] First, in every case in which late filing is alleged, it is necessary for the Board to consider when the 90-day timeline began to run. This question poses a particular difficulty in the current case. The parties do not agree on the appropriate date. The Employer states that the discovery date was November 17, 2021. CUPE states that the discovery date was not until at least February 16, 2022. If CUPE's position is accepted, then the original application was filed approximately one week after the 90-day timeline had expired.

[50] These conflicting positions require the Board to weigh evidence in order to make findings of fact and to draw a conclusion about the discovery date. Moreover, it has been said that the longer the delay in filing, the stronger must be the countervailing considerations to justify "permitting" the application to proceed. It is therefore necessary to determine the length of the delay, and then assess the countervailing considerations against the length of the delay, to decide whether the application will proceed.

[51] As assessment of the countervailing considerations likewise requires the Board to weigh evidence. CUPE explains the reason for the delay being its involvement in ongoing discussions with the Employer. It claims that the prejudice to the Employer amounts to "inconvenience or

speculation". It asks the Board not to overestimate its sophistication as applicant. Any one or all of these factors may require the Board to weigh evidence in order to make findings of fact and draw conclusions about their effect.

[52] The Employer argues that, because CUPE did not cite countervailing factors in its application that its application should be summarily dismissed. Even if the Board were to accept this premise, the Board interprets the original application differently than does the Employer. In the application, CUPE outlines the general timeline of events, which forms part of its justification for the delay. The underlying facts are the context within which any delay has occurred and will be relied upon by CUPE as extenuating circumstances.

[53] In conclusion, the Board cannot find, through its summary dismissal process, that the original application is patently defective by reason of delay. Given this conclusion, it is not necessary for the Board to address the more general question, being whether the summary dismissal process and related test are well-suited to applications brought pursuant to subsection 6-111(3) of the Act.

[54] For the foregoing reasons, the Board will not grant the request to summarily dismiss the original application due to delay in filing. However, the Employer has pleaded delay in its reply to the original application at paragraph 5(i) and may proceed to make that argument at a hearing on the substantive matter.

Application to Dismiss Due to Absence of Arguable Case:

[55] In considering whether the original application discloses an arguable case, it is necessary to start by reviewing the principles underlying the statutory provisions that are alleged to have been breached. In this case, those provisions are sections 6-7, 6-62(1)(d), and 6-62(1)(r) of the Act.

[56] Section 6-7 outlines the scope of the duty:

> ***6-7*** *Every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to this Part or by an order of the board.*

[57] Collective bargaining is defined at clause 6-1(1)(e) of the Act:

> *(e) "collective bargaining" means:*

> *(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;*
>
> *(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;*
>
> *(iii) executing a collective agreement by or on behalf of the parties; and*
>
> *(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union;*

[58] Clauses 6-62(1)(d) and 6-62(1)(r) of the Act establish unfair labour practices, as follows:

> ***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:*
>
> > *(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;*
> > *…*
> > *(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.*

[59] In seeking summary dismissal, the Employer relies on case law considering the duty to bargain in good faith in relation to the creation of new positions.

[60] It relies, in particular, on the principle that where a new position is created in an "all-employee" unit, it remains in the bargaining unit unless excluded by order of the Board or agreement of the parties: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v Battlefords and District Co-operative Limited*, 2015 CanLII 19983 (Sask LRB) and *Re: Wascana Rehabilitation Centre*, [1991] 3d Quarter Sask Labour Rep 56. The Employer says that MJPA's certification order sets out an all-employee bargaining unit. Thus, any positions that are not listed as being included in the bargaining unit certified to CUPE are necessarily included in the MJPA bargaining unit.

[61] The Employer argues that, because CUPE's certification order does not "apply" to the Position in question, the Employer cannot be found to have breached clause 6-62(1)(d) of the Act. In support of this argument, it relies on *United Steel, Local 2014 v United Cabs*, 2019 CanLII 57373 (SK LRB) [*United Cabs*] and describes the Board's holding in that case in the following terms:

> *…the Board confirms…that in cases where the term 'bargaining unit' is used in unfair labour [practice provisions], having an applicable certification order becomes a pre-condition to the operation of the [relevant provision].*

[62] The Employer's description does not accurately capture the nuance and specificity of the Board's holding in *United Cabs.* At paragraph 34 of that decision, the Board concluded:

> *[34] The next argument the Union raised was that United Cabs contravened clause 6-62(1)(n). It argues that United Cabs changed the conditions of employment by deciding to enforce the dress code. Clause (n) applies when conditions of employment of "employees in a bargaining unit" are changed. Clause 6-1(1)(a) of the Act defines "bargaining unit" to mean "a unit that is determined by the board as a unit appropriate for collective bargaining". In this matter, the Board had not, at the applicable time, made such a determination. The Board did not make a determination that the taxicab drivers were employees, or that they constituted a unit appropriate for collective bargaining, until May 21, 2019. Clause 6-62(1)(n) does not apply to this incident because, at the time it occurred, no union represented employees in a bargaining unit in this workplace.*

[63] By contrast, CUPE states that the Position (or the category of position) has been treated by the Employer as being in-scope of CUPE's bargaining unit since at least July 1, 2004. It relies for this argument on the contents of previous collective agreements and on the parties' conduct. It says that the Employer has a duty to abide by the terms of the collective agreement in filling the vacant Position. If it does not, it is breaching the collective agreement, and if it refuses to submit to the arbitration process set out at Article 26 of the collective agreement, it is failing to bargain in good faith. For this latter assertion, CUPE relies on a combination of sections 6-7, 6-62(1)(d), and 6-62(1)(r) of the Act, and, section 6-45, which describes an arbitrator's jurisdiction to settle disputes between parties to a collective agreement.

[64] In support of its argument that the Employer's refusal to submit to the arbitration process is a failure to collectively bargain, CUPE relies on two cases.

[65] First, it relies on *Saskatoon Board of Police Commissioners v Saskatoon City Police Association*, 2000 SKQB 481 (CanLII) [*Saskatoon Board of Police*], a Court of Queen's Bench decision considering the substantive equivalent of section 6-45 of the Act.[5] Paragraph 4 of that decision states:

> *[4] The Saskatchewan Labour Relations Board in a unanimous decision, after noting that it would not explore the merits of the Board's position with respect to the authority of the Chief of Police to dismiss probationary constables without reference to the provisions of the collective agreement stated as follows at p. 5 of its decision:*

[5] Section 25(1) of the now-repealed *Trade Union Act*, RSS 1978, c T-17.

> *For our purposes, it is sufficient to note that there is a dispute between the Union and the Employer over the "meaning, application or alleged violation [of provisions contained in the collective agreement], including a question as to whether the matter is arbitrable." It may be that an arbitration board will agree with the Employer's position. However, the Act requires the Employer to refer the dispute to arbitration and to have it settled in that forum. A failure to do so constitutes a violation of s. 25(1) and s. 11(1)(c) - the latter provision requiring the Employer to "bargaining collectively" with the Union, which is defined in s. 2(b) as including "the negotiation from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union."*
>
> *In this case, the Employer's refusal to refer the dispute to arbitration constitutes an unfair labour practice and an Order will issue directing the Employer to refer the two grievances to arbitration in accordance with the provisions contained in its collective agreement with the Union and s. 25(1) of the Act.*

[66] The Court upheld the Labour Relations Board's decision and made the observation, at paragraph 8, that "[a]rbitrators routinely have to decide such jurisdictional questions." In *Saskatoon (Board of Police Commissioners) v Saskatoon (Police Assn.)*, 2001 SKCA 82 (CanLII), the Court of Appeal affirmed the Board's decision again, stating, at paragraph 9:

> *…Once there is a finding that there is a dispute between the parties, s. 25 of The Trade Union Act is engaged and requires that all differences between the parties to a collective agreement, including whether a matter is arbitrable are to be settled by arbitration.*

[67] CUPE also relies on the Board's description of the foregoing cases found at paragraphs 139 and 140 of *International Brotherhood of Electrical Workers, Local 2038 v Waiward Steel LP*, 2019 CanLII 57388 (SK LRB).

[68] Furthermore, in *Saskatchewan Mutual Insurance Company v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 8933*, 2021 SKCA 137 (CanLII) [*SMI*], the Court of Appeal for Saskatchewan explained that the scope clause in a collective agreement may supersede a certification order:

> *[72] Given the foregoing, a CBA scope clause that is negotiated after the issuance of a certification order defines the parameters of what may be excluded in the future from the bargaining unit and the categories of new positions that may be populated by the employer. The scope clause and the exclusions therein inform the parameters within which the parties must continue to bargain when a new position is created purporting to be captured by the exclusion. Put another way, the scope clause in the CBA governs the duty to collectively bargain new positions and the extent of that duty.*

[69] In the present case, the most recent certification order for CUPE was issued on July 9, 2019. That order describes the scope of the bargaining unit as inclusive of "all clerical employees of the Board…except the Chief of Police….and [except] all employees covered by the Canadian Association of Police certification order dated August 8, 1960[.]"

[70] The most recent collective agreement is dated July 24, 2019 (effective from January 1, 2017). The agreement defines the scope of the bargaining unit in a manner that is arguably broader than the certification order, as follows:

> *…the expression 'Board Employees' or 'Employees', shall apply to all employees of the Board of Police Commissioners, of the City of Moose Jaw, except the Chief of Police….employees who are members of the Moose Jaw Police Association…*
>
> *…*
>
> *The bargaining unit as outlined above may only be amended by mutual agreement or by order of the Saskatchewan Labour Relations Board.*

[71] CUPE includes in its materials a previous collective agreement, dated October 26, 2006 (effective from July 1, 2004), that describes the scope of the bargaining unit with reference to the then existing certification order, as follows:

> *For the purposes of this Agreement, the expression "Board Employees" or "Employees", shall apply to all employees of the Board coming within the scope of the bargaining unit represented by Local Number 9, C.U.P.E. (by order of the Labour Relations Board, dated the 19th day of June, 1982, and amendments thereto).*

[72] This agreement also appears to include reference to the Position category in its wage schedule.

[73] The Employer states that MJPA is the exclusive bargaining agent for the Position, as demonstrated by the wording of the relevant certification orders. It says further that a negotiated agreement between two parties cannot alter the certification order of a third party. However, this argument does not take into account the description of the law as it relates to the effect of negotiated scope clauses as expressed in *SMI*, the wording of the collective agreements, or the parties' past conduct. Nor did the Employer or CUPE file any of the collective agreements that might have been negotiated between the Employer and MJPA. Moreover, the arguments made by both parties suggest that it is necessary to weigh evidence at a hearing on the matter.

[74] As such, assuming CUPE is able to prove everything alleged in its claim, the Board cannot conclude that it is plain and obvious that the original application has no reasonable chance of success. The Employer has not discharged its onus to prove that there is no arguable case of a breach of clause 6-62(1)(d) of the Act.

[75] Lastly, the Employer has also stated that CUPE's claims pursuant to sections 6-7 and 6-62(1)(r) must fail.

[76] With respect to section 6-7, the Employer reasons that this provision does not establish an unfair labour practice. It also claims that CUPE does not disclose a breach of a duty to collectively bargain in the "time" or the "manner" required by Part VI or by order of the Board.

[77] With respect to clause 6-62(1)(r), the Employer argues that CUPE has not made any reference to an obligation, prohibition or other provision of Part VI that has been imposed on and breached by the Employer, and therefore, has failed to fully particularize its complaint.

[78] As previously mentioned, section 6-7 outlines the scope of a party's duty to engage in good faith collective bargaining. A breach of the duty to bargain in good faith is a breach of this provision. By extension, a breach by an employer of section 6-7 is a breach of a provision of Part VI imposed on an employer and therefore such an employer may be found to have committed an unfair labour practice pursuant to clause 6-62(1)(r).

[79] As for the "manner" and "time" of bargaining imposed on the Employer, the definition of collective bargaining includes "negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union". The Board on the present application has not concluded that the Position is or is not covered by the CUPE collective agreement. Therefore, it is not plain and obvious that the claims pursuant to sections 6-7 and 6-62(1)(r) have no reasonable chance of success.

[80] For all of the foregoing reasons, the application to summarily dismiss the original application is dismissed. An appropriate order will accompany this decision.

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

DATED at Regina, Saskatchewan, this **29th** day of **September, 2022.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson