Saskatchewan
Labour Relations Board

UNITED STEELWORKERS, LOCAL 5917, Applicant v LYLE BRADY, Respondent and EVRAZ RECYCLING, Respondent

LRB File No. 030-23 and 053-23; July 31, 2023
Chairperson, Michael J. Morris, K.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for United Steelworkers, Local 5917:	Samuel I. Schonhoffer
For Lyle Brady:	Self-represented
Counsel for Evraz Recycling:	Mathias Link

Employee-union dispute – Duty of fair representation – Summary dismissal – Allegation of undue delay – Board not prepared to determine issue on basis of pleadings and written arguments alone.

Allegation of undue delay – Preliminary hearing ordered regarding whether underlying application should be dismissed because of undue delay.

REASONS FOR DECISION

Background:

[1] Michael J. Morris, K.C., Chairperson: These are the Board's reasons regarding an application by the United Steelworkers, Local 5917 [Union] to summarily dismiss an application by Lyle Brady [Mr. Brady] alleging the Union breached its duty of fair representation to him [DFR application] under s. 6-59 of *The Saskatchewan Employment Act*[1] [Act].

[2] The Union submits that the DFR application should be summarily dismissed because of Mr. Brady's undue delay in filing it. Alternatively, the Union asks the Board to order a preliminary hearing to determine whether the DFR application should be dismissed because of undue delay, before any hearing on its merits.

[3] Mr. Brady is a former employee of Evraz Recycling [Employer], having tendered his resignation on August 25, 2021.[2] He filed the DFR application with the Board on February 14, 2023, approximately 18 months later.

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[1] *The Saskatchewan Employment Act,* SS 2013, c S-15.1 [Act].
[2] Particulars filed by Mr. Brady, dated April 21, 2023 [Particulars], para 43.

[4] In the DFR application, Mr. Brady alleges he was wrongfully dismissed, and was terminated by the Employer while on a medical leave.[3] Notably, the DFR application does not mention Mr. Brady having tendered his resignation. However, in a document entitled "Particulars", filed with the Board on April 21, 2023, after the Union's summary dismissal application was filed, Mr. Brady states that he provided a copy of his resignation letter to both the Union and the Employer on August 25, 2021, and that he was "forced to resign" because he felt he could no longer trust the Employer, and the Union would not grieve his safety complaints.[4]

[5] Without delving too deeply into the allegations in Mr. Brady's DFR application, it is fair to say that a fire occurred at the Employer's premises in the summer of 2021. Mr. Brady alleges he suffered adverse health effects from the fire, and afterward, that the Employer refused to mitigate the occupational health and safety risks that led to the fire, and also intimidated him to dissuade him from making an occupational health and safety complaint. Further, Mr. Brady alleges the Union unreasonably failed to grieve the unsafe working conditions or Employer intimidation, or to file an occupational health and safety complaint. According to Mr. Brady, the Employer's and Union's conduct is why he resigned. In its reply, amongst other things, the Union states that Mr. Brady told it that his resignation was voluntary, and that it wasn't until November and December of 2021 that Mr. Brady contacted the Union to complain about safety issues and impropriety at the workplace.[5] The Union states that some of the allegations were difficult to believe or understand, and that due to the passage of time as well as Mr. Brady's conduct preceding his resignation and afterward, the Union took no steps to investigate or grieve the allegations.[6]

[6] Following his resignation in August of 2021, Mr. Brady apparently filed (or tried to file) a complaint with the Ministry of Labour Relations and Workplace Safety's Occupational Health and Safety Branch [OH&S] in September of 2021.[7] He says he did so because the Union refused to grieve his complaints with the Employer.[8] According to Mr. Brady, "[many] safety officers encouraged me to report the safety issues while other officers stopped their interview before I was able to present my complete argument and facts."[9]

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[3] DFR application, para 9(C).
[4] Particulars, paras 2, 43 and 48.
[5] Union's reply to the DFR application, paras 16, 20, 22.
[6] Union's reply to the DFR application, para 20.
[7] Mr. Brady's reply to the Union's summary dismissal application, dated May 18, 2023 [Brady reply], p 1.
[8] Brady reply, p 1.
[9] Brady reply, p 1.

[7] After dealing with OH&S, Mr. Brady indicates he spoke with someone at the Board, who suggested he take his complaint(s) to the Saskatchewan Human Rights Commission [Commission].[10]

[8] Mr. Brady says he communicated with the Commission with respect to the alleged Employer intimidation in January of 2022, at which time he was asked to fill out the Commission's intake questionnaire.[11] He did so, "present[ing] the events on what really transpired on [his] employment with [the Employer] and how many instances [the Union] ignored [his] grievances", submitting the questionnaire to the Commission on April 29, 2022.[12] After this, he contacted the Worker's Compensation Board [WCB] about his alleged work-related injury, but his WCB claim was not accepted.[13]

[9] According to Mr. Brady, he was advised on November 16, 2022 that the Commission was not accepting his complaint.[14] He had some further communications with the Commission, and provided further information for its review. However, Mr. Brady indicates that by February 2023 it was clear that the Commission would not be assisting him.[15]

[10] According to Mr. Brady, the Commission told him to "go back to OH&S and also to the Employment Standards and clearly present specific facts".[16] Apparently Mr. Brady went back to OH&S at some point thereafter, and OH&S referred him to the Ministry of Labour Relations and Workplace Safety's Employment Standards Branch [Employment Standards].[17] According to Mr. Brady, he was then advised by Employment Standards in February of 2023 that the Board was where his complaint should be litigated, and that the Union should have been representing him properly, but had not been.[18]

[11] As aforementioned, the DFR application was filed with the Board on February 14, 2023.

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[10] Brady reply, p 1.
[11] Brady reply, p 1.
[12] Brady reply, p 1.
[13] Brady reply, p 1.
[14] Brady reply, p 2.
[15] Brady reply, p 2.
[16] Brady reply, p 2.
[17] Brady reply, p 2.
[18] Brady reply, p 2.

Argument on behalf of the Union:

[12] The Union asks that the DFR application be summarily dismissed because of undue delay in filing it, or alternatively, that the Board set a hearing to consider delay as a stand-alone issue, in advance of a full hearing on the merits of the DFR application.

[13] The Union submits that Mr. Brady has not provided a reasonable excuse for why he delayed filing the DFR application for approximately 18 months after his resignation. Further, the delay raises a presumption of prejudice to the Union.

[14] The Union notes that Mr. Brady is not a neophyte at filing applications against unions. In a previous decision involving a different union*, Lyle Brady v International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local Union 771* [*2017 Brady Delay Decision*],[19] Mr. Brady waited over a year to file an employee-union dispute. An application was made to summarily dismiss it for undue delay. The application was dismissed, in part, because Mr. Brady was noted to be an unsophisticated litigant.[20] The Union submits that this characterization can no longer apply. Mr. Brady, with counsel, ultimately litigated the employee-union dispute described in the *2017 Brady Delay Decision* to a conclusion in his favour: *2018 Brady Merits Decision*.[21]

[15] The Union submits that at the time of his resignation Mr. Brady was very familiar with the purpose and process of s. 6-59 applications, including the need for such applications to be filed in a timely manner.

[16] Mr. Brady's protracted attempts to complain about the Employer's conduct, to OH&S, the Commission, and Employment Standards, do not excuse his delay in filing the DFR application. Mr. Brady indicates he went to these authorities because the Union wasn't doing what he wanted. In other words, it wasn't as if he didn't have a complaint about the Union's conduct. The Union notes Mr. Brady stated he went to OH&S in September of 2021 because "the Union would not represent me on my grievances".[22] In the Union's view, especially in light of the *2017 Brady Delay Decision* and the *2018 Brady Merits Decision*, Mr. Brady knew how to initiate the DFR application

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[19] *Lyle Brady v International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local Union 771*, 2017 CanLII 68781 (SK LRB) [*2017 Brady Delay Decision*].
[20] *2017 Brady Delay Decision*, para 65.
[21] *Brady v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771 and Jacobs Industrial Services Ltd.*, 2018 CanLII 68442 (SK LRB) [*2018 Brady Merits Decision*]. In the *2018 Brady Merits Decision*, the Board found that the respondent union had breached s. 6-58 of the Act in circumstances where it had suspended him from its dispatch list.
[22] Brady reply, p 1.

and had no reasonable excuse for waiting approximately 18 months to do so. He did not need to hear from OH&S, the Commission or Employment Standards before filing the DFR application.

[17] The Union seeks to distinguish the decision in *Fraser*, where the Board refused to dismiss an application commenced 22 months after the triggering event (certain grievances being settled in manner contrary to the applicant's wishes).[23] The Union submits that in *Fraser*:

a) The applicant was exceptionally busy, working 60-70 hours a week, and that no similar circumstances have been pled by Mr. Brady;

b) The applicant's counsel had put the respondent union on notice of the intention to file a s. 6-59 application, unlike the circumstances involving Mr. Brady;

c) The applicant had no experience with the Board, unlike Mr. Brady; and

d) The issues could be resolved without heavy reliance on oral evidence, unlike the case with Mr. Brady's DFR application.

[18] The Union submits that the DFR application will involve significant contested testimony, noting the case does not involve documented disciplinary action. The Union says that there is a strong presumption that faded recollections will not be able to be relied upon to achieve a just hearing, and that these consequences should be borne by Mr. Brady, not the Union.

Argument on behalf of Mr. Brady:

[19] Mr. Brady admits that he was dissatisfied with the Union not grieving issues he had raised with it in August of 2021. For example, he states the following in his reply:

> *Since the Union would not represent me on my grievances against Evraz Recycling Regina inspite of the many attempts I had, and that my request was completely ignored and denied. Then, I have no recourse but to take my complaint to OH&S in September 2021. Many safety officers encouraged me to report the safety issues while other officers stopped their interviews before I was able to present my complete arguments and facts.*[24]

[20] However, in both his reply and his written argument, Mr. Brady suggests that it wasn't until February of 2023 that it became clear to him that he should file the DFR application:

> *On February 2, 2023, I submitted further information to Human Rights Commission and I was really waiting for a positive out-come in support of my complaint. After ten (10) days, I went back to the Human Rights Commission. The Commission explained to me verbally that they cannot accept my complaint for a couple of reasons. They suggested that I go*

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[23] *Fraser v Saskatchewan Government and General Employees' Union*, 2023 CanLII 8378 (SK LRB) [*Fraser*], at para 107.
[24] Brady reply, p 1.

> *back to OH&S and Employment Standards which I did. That's when I found out that the agent at Employment Standards explained to me all the facts concerning Employment Law and Duty of Fair Representation. After analyzing everything, I totally agree with what the Human Rights Commission's suggestion that I should go back to OH&S and the LRB. And this is how it came about the cause of delay in filing the case at LRB.*
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> *Thus I did go back to LRB and filed a case to Labour Relations Board on February 14, 2023, LRB File No. 030-23. …*[25]

[21] Mr. Brady argues that allowing the Union's application would set a dangerous precedent with respect to the protection of workers' rights. In Mr. Brady's view, the Union's assertions regarding the impact of the delay are unsupported, and are being made to avoid accountability for its failure to address safety issues. He says his DFR application should be heard on its merits.

Analysis and Decision:

[22] At the outset, the Board notes that it has not interpreted s. 6-111(3) of the Act as permitting it to refuse to hear the DFR application.

[23] Subsection 6-111(3) allows the Board to refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or ought to have known of the action or circumstances giving rise to the allegation:

> ***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.*

[24] A breach of the duty of fair representation in s. 6-59 can be characterized as an unfair labour practice by a union pursuant to s. 6-63(1)(h), which states (emphasis added):

> ***6-63****(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*
> *…*
>
> *(h) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to a union or an employee.*

[25] Brady reply, p 2; Brady submissions, pp 3-4.

[25] However, in *Coppins*, Chairperson Love determined that if the Legislature had intended applications alleging a breach of s. 6-59 to be subject to the 90 day period in s. 6-111(3), it would have specifically referenced s. 6-59 in s. 6-111(3), or not included applications under s. 6-59 in a separate division of the Act from those in Division 12:

> ***[21]*** *If the legislature had wanted to preclude applications under the duty of fair representation provisions of the SEA being filed outside of a ninety (90) day window, section 6-111(3) would have included a specific reference to those provisions. It did not. As such, the interdiction provided for filing of unfair labour practice applications outside of that ninety (90) day window cannot, in my opinion, be extended to include duty of fair representation applications.*
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> ***[22]*** *Duty of Fair Representation complaints are filed under Division 11 of the SEA and Unfair Labour Practice complaints are filed under Division 12 of the SEA. There is a clear demonstration of the unique nature of each of these complaints.*[26]

[26] Though Chairperson Love acknowledged that his conclusion was not completely unassailable,[27] the Board has consistently applied the ratio from *Coppins* on multiple occasions.[28] The Board will continue to do so here, in the interest of judicial comity.

[27] Absent reliance on s. 6-111(3), pursuant to s. 6-103 the Board may decline to hear an employee-union dispute if a hearing would be unable to achieve justice because of undue delay.[29] Perhaps unsurprisingly, the factors the Board considers when determining whether to hear a late-filed unfair labour practice allegation under s. 6-111(3)[30] are not entirely dissimilar from those it considers when determining whether to dismiss an employee-union dispute for undue delay.[31] For example, in both circumstances the Board will consider the length of the delay, the sophistication of the applicant, the prejudice to the responding party, and the nature of the claim/importance of the right asserted by the applicant.

[28] In addition to s. 6-103, referenced above, the Board has express powers to decide any matter before it without holding an oral hearing (clause 6-111(1)(q)), or through a preliminary hearing or procedure (clause 6-111(1)(h)). These provisions provide the Board with sufficient

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[26] *Coppins v United Steelworkers, Local 7689*, 2016 CanLII 79633 (SK LRB) [*Coppins*], at paras 21-22.
[27] *Coppins*, at paras 23-28.
[28] *2017 Brady Delay Decision*, at para 61; *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955*, 2017 CanLII 20060 (SK LRB) [*Hartmier*], at para 91; *Canadian Union of Public Employees v Reuben Rosom*, 2022 CanLII 100088 (SK LRB) [*Rosom*], at paras 13-14; *Saskatchewan Polytechnic Faculty Association v Ha*, 2023 CanLII 30423 (SK LRB), at para 16.
[29] *Saskatchewan Government and General Employees' Union, Local 1105 v Darryl Upper*, 2023 CanLII 10506 (SK LRB) [*Upper*], at paras 62-64.
[30] *Coppins*, at para 25.
[31] *Hartmier*, at para 120.

authority to adjudicate allegations of undue delay before proceeding to a hearing on the merits of an application, where appropriate.[32]

[29] It bears emphasizing that section 6-103 and clauses 6-111(1)(q) and 6-111(1)(h) each empower the Board separate and apart from clause 6-111(1)(p), which is often cited by applicants seeking summary dismissal for undue delay. Clause 6-111(1)(p) empowers the Board to summarily dismiss a matter where there is "a lack of evidence or no arguable case". As identified in *Deck*, summary dismissal based on delay "does not fit neatly" into the provision's wording.[33] Accordingly, it makes little sense to try to force a square peg into a round hole when there are square holes which can serve the purpose.

[30] In applying for an employee-union dispute to be dismissed through a preliminary procedure pursuant to the Board's authority referenced in paragraph 28, above, a union may, as occurred here, request as primary relief that the Board dismiss the application on the basis of the pleadings and written argument alone, *and* request as alternate relief that the Board order the issue of delay be adjudicated through a preliminary oral hearing. Ultimately, the Board may grant either form of relief, or neither. If it grants neither, the Board may defer the issue of delay to be adjudicated at the hearing into the merits of the underlying application.[34]

[31] Although it may seem obvious, a party requesting that an application be dismissed for undue delay *before* it is heard on its merits should bring their application requesting this remedy promptly (i.e., before the Board schedules the underlying application's hearing on its merits). This is consistent with what is required for summary dismissal applications.[35]

[32] *Hartmier* is the leading authority on the factors the Board considers when deciding whether an application alleging an employee-union dispute should be dismissed for undue delay. It sets these out as follows:

> ***[120]*** *This survey of relevant Board Decisions reveals that while each decision turned on the particular facts of the case, nevertheless a number of factors figure prominently in the Board's analysis of undue delay applications in duty of fair representation claims. The more prominent factors include:*

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[32] *United Food and Commercial Workers Union, Local 248-P v Stamper*, 2023 CanLII 39149 (SK LRB) [*Stamper*], at para 11; *Upper*, at para 69.
[33] *SEIU-WEST v Alison Deck*, 2021 CanLII 23381 (SK LRB) [*Deck*], at para 23.
[34] This is what occurred in the *2017 Brady Delay Decision*. At para 67: "Whether or not justice can be done in this case, is also seriously compromised by the lack of satisfactory evidence on this point. What remedies may be available will be determined based upon the case as finally presented."
[35] *Saskatchewan Employment (Labour Relations Board) Regulations, 2021*, s 19(5).

- ***Length of Delay:*** *The length of delay is critical. An applicant will bear the burden to explain the reasons for any delay and the longer the delay, the more compelling must be the reasons for the delay in filing the application. Now that the Legislature has mandated a statutorily prescribed time limit for the filing of unfair labour practice applications, the Board's tolerance for exceptionally long delays has decreased significantly.*

- ***Prejudice:*** *Labour relations prejudice is presumed in cases of delay; however, if the delay is extensive or inordinate this factor will weigh more heavily in the analysis. The longer the delay, the greater the prejudice to a respondent. Evidence of actual prejudice to a respondent likely will result in the main application being dismissed.*

- ***Sophistication of Applicant:*** *An applicant's knowledge of labour law and labour relations matters, generally is an important consideration when assessing the veracity of the reasons for the delay.*

- ***The Nature of the Claim:*** *The issues at stake for an applicant will be weighed in the balance. If the consequences of dismissing an application for reasons of delay are significant to an applicant, this will weigh in favour of permitting the application to proceed despite a lengthy delay in its initiation.*

- ***The Applicable Standard:*** *When adjudicating delay applications, the standard which has been applied consistently is: can justice be achieved in the matter despite a lengthy delay in commencing it?*[36]

[33] In considering the relevant factors, the ultimate question that must be answered is whether justice can be achieved in spite of a lengthy delay in filing the application.[37]

[34] Though the Board has indicated that "tolerable" delay tends to be measured in months, not years,[38] unlike some of its peers[39] the Board has not, to date, set a specific time limit that will result in a rebuttable presumption that an application should be dismissed because of undue delay. The Board explained this as follows, in *Fraser*:

> ***[103]*** *In summary, although other Boards have set policies imposing specific time limits on employee-union applications, this Board has not.[4] Instead, this Board's approach is to determine whether justice can be achieved in hearing the dispute with consideration given to the five factors that are outlined in Hartmier. There is no specific timeline that will result in a rebuttable presumption or that will result in the Board refusing to hear the application.*

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[36] *Hartmier*, at para 120.
[37] *Hartmier*, at para 135; *Rosom*, at para 36; *Fraser*, at para 103; *Upper*, at para 59.
[38] *Hartmier*, at para 123; *Stamper*, at para 11.
[39] In *Motion Picture Studio Production Technicians, W.W. v Local 891 of The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada*, 2020 BCLRB 45 (CanLII), at para 43, the B.C. Board quoted its policy, that "if the delay is more than one year, the complaint will generally be dismissed unless very compelling reasons for the delay are provided." In *Lolos v Ontario Federation of Health Care Workers*, 2015 CanLII 30943 (ON LRB), at para 5, the Ontario Board stated "On the issue of undue delay, the Board has stated that delay should be measured in months, rather than years, such that delay in excess of one year will not be tolerated unless there are significant mitigating circumstances…". In *FVM v Glass, Molders, Pottery, Plastics & Allied Workers International Union*, 2013 CanLII 71975 (MB LB), the Manitoba Board stated, under the heading "IV. Timeliness": "Over the course of many years, the Board has developed the practice of not entertaining unfair labour practice complaints which are filed more than 6 months beyond the facts alleged comprising the unfair labour practice…".

> *The consequence is some variability in the timelines that will be found to be acceptable, depending on the facts as presented to the Board.*[40]

[35] Thus, based on this Board's jurisprudence, the fact that approximately 18 months passed from Mr. Brady's resignation until his filing of the DFR application is not, on its own, necessarily dispositive of whether the DFR application should be dismissed.

[36] The Board will proceed to examine the *Hartmier* factors, based on the pleadings before it.

[37] With respect to the length of the delay, the approximately 18 month delay between Mr. Brady's resignation and his filing of the DFR application is lengthy enough to warrant an inquiry into whether it is undue. Employee-union disputes arising from an employee's departure from the workplace tend to be filed promptly when the circumstances surrounding the employee's departure are not grieved. This is because it is generally in the interests of all parties to such disputes to have them addressed sooner rather than later.

[38] With respect to prejudice, the Union is correct that the Board can presume prejudice to a respondent based on witnesses' memories fading where an applicant files an employee-union dispute after a significant delay. At this point, however, the Board is unable to ascertain whether any potential prejudice may be mitigated, including by the existence of contemporaneously created documents. Further, if there is any evidence of actual prejudice, the respondents to the DFR application should be given the opportunity to present it.

[39] With respect to the sophistication of the applicant, Mr. Brady suggests that he was not aware that a duty of fair representation complaint to the Board was an appropriate and available remedy for him to pursue until February of 2023.[41] Whether this assertion is credible is something that is obviously disputed by the Union, particularly in light of the *2017 Brady Delay Decision* and *2018 Brady Merits Decision*. Despite the Union's forceful argument, the Board does not consider itself well-placed to make this credibility assessment on the basis of the pleadings alone.

[40] In terms of the nature of the claim, based on the DFR application it is obvious that Mr. Brady is seeking compensation, and seemingly, reinstatement. However, it appears that his complaints and the remedies he seeks may be primarily directed against the Employer, as opposed to the Union.[42] What is being sought from whom may affect who, if anyone, is prejudiced,

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[40] *Fraser*, at para 103.
[41] Brady reply, p 2.
[42] DFR application, paras 9A) through 9F).

and ultimately whether justice can be done through the Board adjudicating the DFR application.[43] This should be clarified, if possible.

[41] As is presumably apparent from the foregoing discussion, the Board is not in a position, on the basis of the pleadings alone, to make a determination on the ultimate question: Can justice be achieved in spite of the delay in filing the DFR application?

[42] Accordingly, the Board cannot grant the Union's primary requested relief.

[43] However, the Board will grant the Union's alternate requested relief. The Board will order a preliminary hearing to determine whether the DFR application should be dismissed because of undue delay, before any hearing on its merits.

[44] The Board's registrar will contact the parties to set up a case management and scheduling conference for the preliminary hearing.

[45] An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this **31st** day of **July, 2023.**

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson

[43] See the cases (*Nistor* and *Leedahl*) discussed at paras 101-104 of *Hartmier*.