GOVERNMENT OF SASKATCHEWAN, Applicant v NICOLE NOKUSIS, Respondent and SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent

LRB File Nos.174-22 and 026-22; February 21, 2023
Vice-Chairperson, Barbara Mysko; Board Members: Kris Spence and Jim Holmes

Counsel for the Applicant, Government of Saskatchewan:	Curtis W. Talbot, K.C.
The Respondent, Nicole Nokusis:	Self-Represented
Counsel for the Respondent, Saskatchewan Government and General Employees' Union:	R. Turner Purcell

Reconsideration Application – Remedy Granted on Application Pursuant to Section 6-8 of *The Saskatchewan Employment Act* – Amount to be Remitted by Employer – Employer Challenging Requirement to Remit.

First Stage of Reconsideration Application – *Remai* Criteria #4 and #5 – Whether Board Misinterpreted or Overlooked Key Statutory Provisions or Overlooked Relevant Prior Jurisprudence – Whether Board Breached Natural Justice.

Reconsideration Application Dismissed – No Basis for Reconsideration – No Misinterpretation or Oversight – No Breach of Natural Justice.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to a reconsideration application brought by the Employer, the Government of Saskatchewan, objecting to the remedy that was granted on an application made pursuant to section 6-8 of *The Saskatchewan Employment Act* [Act]. The original Reasons for Decision and Order were issued on September 29, 2022.[1]

[2] The applicant in the original application was Nicole Nokusis. The respondents were the Saskatchewan Government and General Employees' Union [Union] and the Government of Saskatchewan [Employer]. Neither respondent filed a reply to the application. A Union

[1] *Nokusis v Saskatchewan Government and General Employee' Union*, 2022 CanLII 90619 (SK LRB) [*Nokusis No. 1*].

representative attended the hearing as an observer but no one attended on behalf of the Employer.

[3] Section 6-8 of the Act allows the Board to make an order excluding an employee from a bargaining unit, as follows:

> ***6-8****(1) Subject to subsection (2), the board may, by order, exclude an employee from a bargaining unit if the board is satisfied that the employee objects to joining or belonging to a union or to paying dues and assessments to a union as a matter of conscience based on religious training or belief.*
>
> *(2) An employee excluded from a bargaining unit in accordance with subsection (1) shall pay an amount equal to any union dues and other assessments to a charitable organization registered in Canada pursuant to Part I of the Income Tax Act (Canada) that:*
>
> *(a) is agreed on by the employee and the union; or*
>
> *(b) if no agreement is made pursuant to clause (a), is designated by the board.*

[4] In *Nokusis v Saskatchewan Government and General Employee' Union,* 2022 CanLII 90619 (SK LRB) [*Nokusis No. 1*], the Board granted the application:

> *[44] To conclude, the Board will grant the application. Mrs. Nokusis shall be excluded from the bargaining unit and the union dues and assessments that otherwise would be payable by her will be forwarded by the Employer to a charity mutually agreed on by the Union and Mrs. Nokusis. In the event they are unable to agree on a charity, the Board will remain seized to determine the issue.*

[5] The issued Order states:

> *…*
>
> *(b) that all union dues and assessments with respect to Nicole Nokusis's employment at the Government of Saskatchewan be remitted regularly by the Government of Saskatchewan to a charity mutually agreed on by the Saskatchewan Government and General Employees' Union and Nicole Nokusis, until either the conclusion of the employment of Nicole Nokusis, or the revocation of this Order;*
>
> *(c) that the Board reserves its jurisdiction to determine the charity to which the Employer shall direct the dues and assessments that the Applicant would otherwise pay to the Certified Union named herein, in the event that the Applicant and the Certified Union do not agree.*

[6] The Employer states that the Board has misconstrued the statute by ordering that the Employer remit the dues when in fact subsection 6-8(2) requires the employee to tender payment to a charity. It says that the Board has ordered the Employer to make the remittances in the absence of any authority to do so. The Employer also states that the Board's decision was tainted by a breach of natural justice.

[7] Nokusis did not file a Reply to the application for reconsideration in the proper form. The Union filed a Reply. After receiving the Reply, the Board set dates for written submissions on the first stage of the reconsideration application. Although the Union's Reply is somewhat unclear, it has filed written submissions and the Employer has been given an opportunity for sur-Reply. No sur-Reply was received.

Analysis:

Reconsideration Principles:

[8] Section 6-114 of the Act states that an order or decision in a matter arising pursuant to Part VI is binding and conclusive of the matters stated in the order or decision. Section 6-115 states that every order or decision made pursuant to Part VI is final and there is no appeal from that order or decision. It also sets out the Board's authority to reconsider a decision:

> ***6-115****(1) Every board order or decision made pursuant to this Part is final and there is no appeal from that board order or decision.*
>
> *(2) The board may determine any question of fact necessary to its jurisdiction.*
>
> *(3) Notwithstanding subsections (1) and (2), the board may:*
>
> *(a) reconsider any matter that it has dealt with; and*
>
> *(b) rescind or amend any decision or order it has made.*
>
> *(4) The board's decisions and findings on all questions of fact and law are not open to question or review in any court, and any proceeding before the board must not be restrained by injunction, prohibition, mandamus, quo warranto, certiorari or other process or proceeding in any court or be removable by application for judicial review or otherwise into any court on any grounds.*

[9] The authority to reconsider a Board decision is applied sparingly. Reconsideration is not meant to substitute for a hearing *de novo* or an appeal. Its purpose was explained in *Kennedy v Canadian Union of Public Employees, Local 3967*, 2015 CanLII 60883 (SK LRB) [*Kennedy*]:

> *9 The Board's authority and willingness to reconsider its prior decisions is often confused with a right of appeal. However, as Chairperson Bilson noted in the Remai Investment Corporation decision and as this Board has confirmed in numerous decisions since then, the power to re-open a previous decision must be used sparingly and in a way that will not undermine the coherence and stability of the relationships the Board seeks to foster. In other words, while the Board has authority to reconsider its own decisions, doing so is neither a right of appeal nor an opportunity for an unsuccessful applicant to re-argue and/or re-litigate a failed application before the Board. [] This Board's willingness to reconsider its prior decision is founded in the periodic need for the Board to address important policy issues arising out of our jurisprudence and/or to avoid injustices. However, the Board must*

> *balance the need for policy refinement and error correction with the overarching need for finality and certainty in our decision-making process. As a result, both our approach to reconsideration applications and the criteria upon which we rely establish a high threshold for any applicant seeking to persuade this Board to review a previous decision.*
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> *[citations removed]*

[10] In assessing the merits of a reconsideration application, the Board continues to rely on the criteria which were first described in *Remai Investment Corp. v Saskatchewan Joint Board, R.W.D.S.U.*, [1993] 3rd Quarter Sask Labour Rep 103, LRB File No. 132-93 [*Remai*], at 107-8:

> *…*
> *In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:*
>
> > *In [Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
> >
> > > *1. If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
> > >
> > > *2. if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
> > >
> > > *3. if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
> > >
> > > *4. if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
> > >
> > > *5. if the original decision is tainted by a breach of natural justice; or,*
> > >
> > > *6. if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[11] The Employer has the onus to establish that one or more of the *Remai* criteria have been met so that the Board may exercise its discretion to reconsider a decision. Of the six *Remai* criteria, the Employer relies on the fourth and fifth grounds.

[12] The Board will proceed to consider each of the criteria relied upon by the Employer, in turn.

Criterion No. 4 - If the original decision turned on a conclusion of law or general policy under the Act which law or policy was not properly interpreted by the original panel:

[13] The scope of criterion no. 4 was discussed in *Kennedy* at para 20:

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

[14] It was also explained in *Reliance Gregg's v Plumbers and Pipefitters*, 2019 CanLII 120618 (SK LRB) that, "*Remai* criterion #4 permits the Board to correct significant errors such as misinterpreting or overlooking key statutory provisions or overlooking relevant prior jurisprudence".[2]

[15] The Board will consider, first, whether it overlooked relevant prior jurisprudence in its original decision.

[16] The Employer acknowledges that in a previous case the Board required the Employer to remit the dues to the charity in question. That case is *A.R.R. v Saskatchewan Government and General Employees' Union*, 2011 CanLII 8557 (SK LRB) [*A.R.R.*] and the description of the remedy, which is equivalent to the order that was issued, is:

> *[25] In conclusion, the Board will grant the application. The Applicant shall be excluded from the bargaining unit and the union dues and assessments that otherwise would be*

[2] *Reliance Gregg's v Plumbers and Pipefitters*, 2019 CanLII 120618 (SK LRB) at para 11.

> *payable by her will be forwarded by the Employer to a charity mutually agreed to by the Union and the Applicant. In the event the parties are unable to agree to a charity, the Board will remain seized to determine that issue.*

[17] In *Nokusis No.* 1, four cases are cited in support of the religious exclusion. One of these is *A.R.R.*

[18] The earliest case cited is *Mary Ann Enns v Kindersley Union Hospital and Saskatchewan Union of Nurses*, [1993] 3rd Quarter Sask Labour Rep 149 [*Enns*]. There, the remedy is not described in the Reasons for Decision. The order that was issued states:

> *…that an amount equal to the monthly dues be donated by the Applicant to a charity agreed upon by the employee and the Certified Union, and in default of such agreement, to a charity designated by the Labour Relations Board.*

[19] Another is *Loewen v Royal University Hospital and Saskatchewan Union of Nurses, Local 75*, LRB File No 031-96, which describes the remedy at 4:

> *The Board therefore orders that Ms. Loewen be excluded from the collective bargaining unit assigned to SUN at the RUH. The Order will require the Employer to forward the union dues and assessments that otherwise would be payable by Ms. Loewen to a charity mutually agreed to by SUN and Ms. Loewen. In the event the parties are unable to agree to a charity, the Board will remain seized to determine the issue.*

[20] The order that was issued in that case states:

> *(b) that an amount equal to the monthly dues be donated by the Applicant to a charity agreed upon by the employee and the Certified Union, and in default of such agreement, to a charity designated by the Labour Relations Board.*

[21] The last decision is *Funk v Canadian Union of Public Employees, Local 4254 and Saskatoon (West) School Division No. 4*2, LRB File No 098-99 [*Funk*], in which the remedy is described at paragraph 13:

> *[13] The Board will grant the application. Ms. Funk shall be excluded from the bargaining unit and the union dues and assessments that otherwise would be payable by her will be forwarded by the Employer to a charity mutually agreed to by the Union and Ms. Funk. In the event they are unable to agree to a charity, the Board will remain seized to determine the issue. We wish to thank both Ms. Funk and Mr. Robb for the courteous presentation of the case to the Board.*

[22] The order issued in that case states:

> *(b) RESERVES its jurisdiction to determine the charity to which the Employer shall direct the dues and assessments that the Applicant would otherwise pay to the Certified Union named herein, in the event that the Applicant and the Certified Union cannot agree[.]*

[23] The reasons in *Loewen* and the orders issued in *Funk* and *A.R.R.* are consistent with the orders that have been issued by the Board since 1998. Since 1998, the Board's orders have specified that the employer is to remit the union dues, or in a minority of cases, that the union dues are to "be remitted regularly".

[24] All four of the foregoing cases were decided pursuant to section 5(l) of the since-repealed *Trade Union Act*, which provides:

> ***5****. The board may make orders:*
>
> *. . .*
> *(l) excluding from an appropriate unit of employees an employee whom the board finds, in its absolute discretion, objects:*
>
> *(i) to joining or belonging to a trade union; or*
>
> *(ii) to paying dues and assessments to a trade union;*
>
> *as a matter of conscience based on religious training or belief during such period that the employee pays:*
>
> *(iii) to a charity mutually agreed upon by the employee and the trade union that represents a majority of employees in the appropriate unit; or*
>
> *(iv) where agreement cannot be reached by these parties, to a charity designated by the board;*
>
> *an amount at least equal to the amount of dues and assessments that a member of that trade union is required to pay to the trade union in respect of such period;*

[25] For ease of reference, section 6-8 is reproduced again here:

> ***6-8****(1) Subject to subsection (2), the board may, by order, exclude an employee from a bargaining unit if the board is satisfied that the employee objects to joining or belonging to a union or to paying dues and assessments to a union as a matter of conscience based on religious training or belief.*
>
> *(2) An employee excluded from a bargaining unit in accordance with subsection (1) shall pay an amount equal to any union dues and other assessments to a charitable organization registered in Canada pursuant to Part I of the Income Tax Act (Canada) that:*
>
> *(a) is agreed on by the employee and the union; or*
>
> *(b) if no agreement is made pursuant to clause (a), is designated by the board.*

[26] Although the two provisions disclose a few differences, none of these differences are substantive and relevant. Unlike the provision in *The Trade Union Act*, section 6-8 of the Act requires that the charity be registered pursuant to the *Income Tax Act*. It omits the language "the amount of dues and assessments that a member of that trade union is required to pay to the trade union" and uses a shortened and structurally simplified clause referring to "any union dues and other assessments". However, it describes the act of the employee paying the union dues to the union in subsection (1), that is: "is satisfied that the employee objects to joining or belonging to a union or to paying dues and assessments to a union".

[27] The Employer argues that the Board has not always taken the approach found in *A.R.R.*, relying in particular on *Regina Pioneer Village*, [1992] 2nd Quarter Sask Labour Rep 60, LRB File No. 209-91 [*Regina Pioneer Village*]. In *Regina Pioneer Village*, the Board grappled with a joint request to decide the effect of a religious exclusion order granted pursuant to section 5(l) of *The Trade Union Act*, as follows:

> *Does a religious objector have the same terms and conditions of employment as do other workers who are covered by the collective agreement, with the exception that a religious objector is not obliged to join a trade union or pay dues to the trade union?* [3]

[28] After the order was issued the employer continued to assign work within the bargaining unit to the employee. The union objected to the work assignment and filed a grievance to that effect, stating that the employee was an "out-of-scope employee" as a result of the Board's order. The parties then brought the matter to the Board in the form of a reference of dispute. The Board noted that it was the first occasion for it to "consider the effect of a religious exclusion order granted under the provisions of The Trade Union Act".[4]

[29] The order that was issued in that case states:

> *…*
> *(b) that an amount equal to the monthly dues be donated by the Applicant to a charity agreed upon by the employee and the Certified Union, and in default of such agreement, to a charity designated by the Labour Relations Board.*

[30] This wording is consistent with the Board's orders issued prior to 1998.

[31] The Employer relies on the language in the decision in *Regina Pioneer Village* to argue that the employee and not the employer is required to remit the amount to the charity. The

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[3] *Regina Pioneer Village* at 61.
[4] *Ibid* at 63.

Employer relies specifically on two excerpts from the decision. One of these excerpts is the Board's summarized quotation of the legislative provision, section 5(l), followed by the statement "for as long as the employee tenders the equivalent amount of union dues to a charity as outlined in the section". The second excerpt is:

> *Where the Board concludes, pursuant to Section 5(1), that an employee objects to belonging to a trade union or paying dues as a matter of conscience based on religious training or belief it may order that the employee, in lieu of paying the dues required in Section 36(1) to the union, tender the same to a charity mutually agreed upon by the employee and the trade union, or as designated by the Board.* [5]

[32] In *Regina Pioneer Village*, the question considered by the Board was whether the legislative intent was to deprive the employee of the benefits of the collective agreement, including by filling in-scope positions. To answer this question, the Board considered the context of the entire Act and the intention of the Legislature and found that a religious exclusion order has the effect of ensuring that the "religious objector has the same terms and conditions of employment as do other workers who are covered by the collective agreement with the exception that he/she is not obliged to join the trade union or pay dues to the same."

[33] The Board was not grappling with the question that is currently before the Board. Therefore, the phrases that refer to the employee tendering dues to a charity, even if they were found to suggest *direct* payment to a charity, are limited in their application. Moreover, as will be explained in the following sections, reference to payment (or tendering) by an employee is not determinative as to whether those payments are made directly.

[34] The orders that were issued 25-plus years ago are not relevant to the form of the Order that the Board crafted in *Nokomis No. 1*. Since 1998, the Board has repeatedly ordered that the employer remit the amounts to the charity, and in a minority of cases that the union dues are to "be remitted regularly". The orders issued since 1998 are consistent with the Order issued in the present case.

[35] Given the foregoing, it cannot be said that the Board could have overlooked relevant prior jurisprudence.

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[5] *Ibid* at 67.

Modern Principle of Statutory Interpretation:

[36] The next question is whether the Board has misinterpreted or overlooked key statutory provisions. To determine this question, the Board will apply the modern principle of statutory interpretation.

[37] The Court of Appeal in *Ballantyne v Saskatchewan Government Insurance*, 2015 SKCA 38 (CanLII) [*Ballantyne*] described the approach to be taken when applying the modern principle:

> *[19] The leading case with respect to statutory interpretation is the Supreme Court of Canada's decision in Re Rizzo & Rizzo Shoes Ltd., 1998 CanLII 837 (SCC), [1998] 1 SCR 27 [Rizzo Shoes]. A number of principles set out in that case are applicable to the case at hand, namely:*
>
> > *1. The words of an Act are to be read in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its objects, and the intention of the legislature (See: Rizzo Shoes at para. 87). (See also: Saskatchewan Government Insurance v Speir, 2009 SKCA 73 at para 20, 331 Sask R 250; and Acton v Rural Municipality of Britannia, No. 502, 2012 SKCA 127 at paras 16-17, [2013] 4 WWR 213 [Acton]).*
> >
> > *2. The legislature does not intend to produce absurd consequences. An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent or if it is incompatible with other provisions or with the object of the legislative enactment (See: Rizzo Shoes at para. 27).*
> >
> > *3. Any statute characterized as conferring benefits must be interpreted in a broad and generous manner (See: Rizzo Shoes at para. 21). This principle is enshrined in s. 10 of The Interpretation Act, 1995, SS 1995, c. I-11.2 (See: Acton at paras. 16-18).*
> >
> > *4. Any doubt arising from difficulties of language should be resolved in favour of the claimant (See: Rizzo Shoes at para. 36).*
>
> *[20] In Sullivan on the Construction of Statutes, 6th ed (Markham: LexisNexis, 2014) at 28-29, Ruth Sullivan sets out three propositions that apply when interpreting the plain meaning of a statutory provision:*
>
> > 1. *It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.*
> >
> > 2. *Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.*
> >
> > 3. *In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.*

> *[21] In sum, in interpreting s. 123(1) of the Act, the ordinary meaning of the words of that provision must be read in the context of the Act as a whole and in the context of Part VIII in particular. It is also important to keep in mind the purpose of the Act and the legislature's intention in enacting the provision. The provision is benefit conferring and accordingly must be given a broad and purposive interpretation. It must also be interpreted in a manner that will not lead to absurdities. With this background in mind, I turn to the Commission's decision in this case.*

[38] Section 2-10 of *The Legislation Act* states:

> ***2-10****(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.*
>
> *(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.*

[39] In determining ordinary meaning, a decision maker may consider "purpose, related provisions, drafting conventions, legislative presumptions and avoidance of absurdities": *Holt v Saskatchewan Government Insurance*, 2018 SKCA 7, at para 37; Ballantyne, *supra*.

Application to the Case:

[40] First, the Board will consider the words of section 6-8 in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature. To do so, the Board may consider "purpose, related provisions, drafting conventions, legislative presumptions and avoidance of absurdities".

[41] The ordinary meaning of "an employee shall pay an amount …to a charitable organization" is that the employee is responsible for the payment and the payment is made to the charity. The source of the payment is identified and the destination of the payment is identified. The method or means of payment is not. This suggests that there is room for an intermediary to be responsible for the remittance. The employee is to pay the amount to the charity, whether directly or indirectly.

[42] The implied inclusion of indirect payment is consistent with the language in subsection 6-8(1), which states: "…if the board is satisfied that the employee objects to joining or belonging to a union or *to paying dues and assessments to a union*" [emphasis added]. On this point, the Union makes the following argument:

> *The language of s.6-8(1) does not distinguish between instances where an employee pays the dues directly to the Union or instances where the dues are remitted to the Union by the employer: both of these instances constitute the payment of dues by the employee.*

[43] The wording of section 6-8, read as a whole, suggests that payment by the employee to the charity (as with payment by the employee to a union) may be affected through the Employer's remittance to the charity.

[44] The Union argues that this interpretation is consistent with union security clauses which make the payment of dues by an employer a condition of employment. The Union states that the payment of the equivalent amount to a charity is also a condition of employment. The relevant provision of the Act, section 6-42, states:

> ***6-42****(1) On the request of a union representing employees in a bargaining unit, the following clause must be included in any collective agreement entered into between that union and the employer concerned:*
>
> > *"1. Every employee who is now or later becomes a member of the union shall maintain membership in the union as a condition of the employee's employment.*
> >
> > *"2. Every new employee shall, within 30 days after the commencement of the employee's employment, apply for and maintain membership in the union, and maintain membership in the union as a condition of the employee's employment.*
> >
> > *"3. Notwithstanding paragraphs 1 and 2, any employee in the bargaining unit who is not required to maintain membership or apply for and maintain membership in the union shall, as a condition of the employee's employment, tender to the union the periodic dues uniformly required to be paid by the members of the union".*
>
> *(2) Whether or not any collective agreement is in force, the clause mentioned in subsection (1) is effective and its terms must be carried out by that employer with respect to the employees on and after the date of the union's request until the employer is no longer required by this Part to engage in collective bargaining with that union.*
>
> *(3) In the clause mentioned in subsection (1), "the union" means the union making the request.*
>
> *(4) Failure on the part of any employer to carry out the provisions of subsections (1) and (2) is an unfair labour practice.*
>
> *(5) Subsection (6) applies if:*
>
> > *(a) membership in a union is a condition of employment; and*
> >
> > *(b) either:*
> >
> > > *(i) membership in the union is not available to an employee on the same terms and conditions generally applicable to other members; or*
> > >
> > > *(ii) an employee is denied membership in the union or the employee's membership is terminated for reasons other than the failure of the employee to tender the periodic dues, assessments and initiation fees uniformly required to be paid by all other members of the union as a condition of acquiring or maintaining membership.*

> *(6) In the circumstances mentioned in subsection (5), if the employee tenders payment of the periodic dues, assessments and initiation fees uniformly required as a condition of acquiring and maintaining membership, the employee:*
>
> > *(a) is deemed to maintain membership in the union for the purposes of this section; and*
> >
> > *(b) shall not lose membership in the union for the purposes of this section for failure to pay any dues, assessments and initiation fees that are not uniformly required of all members or that in their application discriminate against any member or members.*

[45] According to the required union security clause "any" employee in the bargaining unit who is not required to maintain membership shall tender to the union the dues required to be paid by the members of the union. Pursuant to subsections (2) and (4), the employer is required to carry out the terms of the union security clause. The Board in *Regina Pioneer Village* found that, despite the language of Section 5(l) of *The Trade Union Act*, which permitted an "exclusion" from the bargaining unit, a "religious objector" is "an integral part of the appropriate unit":

> *By including Section 5(l) in The Trade Union Act, it is our view that the Legislature intended to make provision for those employees who, although an integral part of the appropriate unit, would not be required, because of genuine religious beliefs, to either join the trade union or pay union dues. The Legislature did not intend thereby to deprive those employees of either their employment or the benefits of the collective bargaining process.*[6]

[46] The majority of the Court of Appeal in *Yorkton Union Hospital v Saskatchewan Union of Nurses*, 1993 CanLII 6637 (SK CA) affirmed the reasoning in *Regina Pioneer Village*, explaining:

> *I would therefore interpret s. 5(l) as excluding the person from the bargaining unit only to the extent of the obligations and release from obligations referred to in subclauses (i), (ii), (iii) and (iv) of s. 5(l). In all other respects, the person is to be treated as if she remained a member of the unit and therefore governed by the terms of the Collective Agreement, or if there is no agreement, the same terms and conditions of employment as apply to members of the bargaining unit.*[7]

[47] Relatedly, the Board in *Regina Pioneer Village* addressed the application of the union security clause to a person who is subject to a "religious exclusion" order, at 6:

> *The requirement in Section 36(1) of The Trade Union Act for the employee to tender to the union periodic dues uniformly required, must be read in conjunction with the provisions contained in Section 5(l)(iii) and (iv) directing alternative means of submitting equivalent dues. A religious objecting employee not required to maintain union membership may continue in his employment, provided he pays the equivalent sum outlined in Section 5(l). In this way the employee, although not within the union, is nevertheless paying compensation in consideration for receiving the benefits negotiated by the union in the*

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[6] *Ibid* at 71.
[7] *Yorkton Union Hospital v Saskatchewan Union of Nurses*, 1993 CanLII 6637 (SK CA) at 27-8.

> *collective bargaining agreement. Doing so constitutes compliance by the employee with Section 36(1). If the Union had no obligation to the religious objector, why then would the Legislature, in Section 5(e), provide the Union with input as to where the equivalent sum is to be paid?*

[48] If the Employer is required to carry out the terms of the union security clause, then it stands to reason that the Employer should be remitting the dues.

[49] Furthermore, section 6-42 uses language similar to section 6-8, referring to the payment of dues by the employees. The union security clause mentioned in section 6-42 refers to the "periodic dues uniformly required *to be paid by* the members of the union". Subsection (5) refers to "the periodic dues, assessments and initiation fees uniformly required *to be paid by* all other members of the union". Subsection (6) refers to a "*failure to pay* any dues, assessments and initiation fees that are not uniformly required of all members". These references suggest that when the union dues are deducted from an employee's wages that the employee is considered to have paid the dues to the union.

[50] To be sure, section 6-42 should be read together with section 6-43, which states:

> ***6-43****(1) On the request in writing of an employee and on the request of a union or union local representing the employees in the bargaining unit, the employer shall deduct and pay in periodic payments out of the wages due to the employee the union dues, assessments and initiation fees of the employee.*
>
> *(2) The employer shall pay the dues, assessments and initiation fees mentioned in subsection (1) to the union or union local representing the employee.*
>
> *(3) The employer shall provide to the union or union local the names of the employees who have given their authority to have the dues, assessments and initiation fees mentioned in subsection (1) paid to the union or union local.*
>
> *(4) Failure to make payments or provide information required by this section is an unfair labour practice.*

[51] The Employer observes that section 6-43 specifically authorizes an employer to deduct dues on the request in writing of an employee and on the request of a union, and specifies that the employer shall pay the dues to the union. According to the Employer, the omission of any reference to an employer making deductions for the purpose of ensuring compliance with section 6-8 is revealing. The Employer argues that this omission means that the Legislature did not intend that the amount paid to a charity would be remitted by an employer.

[52] Clearly, section 6-43 sets out the circumstances under which an employer will be found to have committed a specific unfair labour practice in relation to the deduction and payment of dues which are payable to the union. These circumstances include the making of a request in writing by an employee and a request by a union. It is on these requests that the employer's duty arises. There is no need for a similar provision in relation to a payment to a charity because an application for a religious exclusion, if granted, results in an order from this Board. The existence of an order makes a request, on the part of an employee or a union, redundant.

[53] Section 6-43 also requires the employer to provide information to the union. This requirement ensures that the scope of the employer's duties in respect of the deduction and payment of union dues is transparent and that the union has the information it needs to monitor the employer's compliance with those duties. Again, there is no need for a similar obligation in respect of payments to charities because an application for a religious exclusion, if granted, will reveal the name of the employee who is subject to the order of the Board.

[54] In other words, section 6-43 sets out the conditions that are necessary to ensure that the payments are made. Where there is an adjudicative process established specifically to determine whether a religious exclusion order should be granted, a similar provision is unnecessary.

[55] The Employer also argues that section 6-43 is connected to section 2-36 of the Act, and in particular clause 2-36(2)(e):

> ***2-36****(1) Except as permitted or required pursuant to this Act, any other Act or any Act of the Parliament of Canada, an employer shall not, directly or indirectly:*
>
> > *(a) make any deductions from the wages that would be otherwise payable to the employee;*
> >
> > *(b) require that any portion of the wages be spent in a particular manner; or*
> >
> > *(c) require an employee to return to the employer the whole or any part of any wages paid.*
>
> *(2) In addition to deductions permitted or required pursuant to law, an employer may deduct from an employee's wages:*
>
> > *(a) employee contributions to pension plans or registered retirement savings plans;*
> >
> > *(b) employee contributions to other benefit plans;*
> >
> > *(c) charitable donations voluntarily made by the employee;*

> *(d) voluntary contributions by the employee to savings plans or the purchase of bonds;*
>
> *(e) initiation fees, dues and assessments to a union that is the bargaining agent for the employee;*
>
> *(f) voluntary employee purchases from the employer of any goods, services or merchandise; and*
>
> *(g) deductions for purposes or categories of purposes that are specified pursuant to subsection (3).*
>
> *(3) For the purposes of clause (2)(g), the Lieutenant Governor in Council may specify purposes and categories of purposes by regulation or by special order in a particular case.*
>
> *(4) No employer shall require an employee to purchase special clothing that identifies the employer's establishment.*
>
> *(5) An employer who requires an employee to wear a special article of clothing that identifies the employer's establishment shall provide that special article of clothing free of cost to the employee*

[56] The purpose of section 2-36 is to ensure that an employee has possession and control of their wages except as permitted or required. Clauses (1)(a), (b), and (c) prohibit the employer from making deductions from wages that are otherwise payable to the employee, prohibit the employer from requiring the wages be spent in a particular manner, and prohibit the employer from requiring an employee to return to the employer wages, except as permitted or required.

[57] Section 2-36 is not intended to provide an exhaustive list of all possible deductions. It sets out specific deductions that are allowed, which include "initiation fees, dues and assessments to a union that is the bargaining agent for the employee" (clause 2-36(2)(e)), but the permitted deductions that are listed are explicitly "[i]n addition to deductions permitted or required pursuant to law". The fact that section 2-36 does not refer to payments by an employee to a charity is of no consequence. When an order is issued, such deductions are required by law.

[58] Next, the Employer states that its position is strengthened by the general direction of employment standards legislation as disclosed in section 2-15, which states:

> ***2-15*** *Subject to this Part, an employer shall pay an employee his or her total wages payable in accordance with the terms and conditions of:*
>
> *(a) the employee's employment contract; or*
>
> *(b) if the employer is bound by a collective agreement, the collective agreement.*

[59] This provision does not support the Employer's argument. It requires an employer to pay an employee's total wages in accordance with the employment contract or the collective agreement. It does not restrict the deductions that may be made from total wages. Deductions are addressed under section 2-36.

[60] Other than the language in section 6-8, the Act includes no language about dues that are to be paid to a charity. In our view, this consistent omission does not signal that the dues must be paid by the employee directly to the charity. Rather, this consistent omission suggests that the payment to a charity should be treated in a manner that is consistent with the payment of dues to a union, by implication. In order for it to be required that an employee pay the amount directly to a charity, the legislative provisions would have to state as much explicitly.

[61] Furthermore, the Board has discretion in crafting orders that are necessary or appropriate to attain the purposes of the Act:

> ***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:*
>
> > *(a) conduct any investigation, inquiry or hearing that the board considers appropriate;*
> >
> > *(b) make orders requiring compliance with:*
> >
> > > *(i) this Part;*
> > >
> > > *(ii) any regulations made pursuant to this Part; or*
> > >
> > > *(iii) any board decision respecting any matter before the board;*
> >
> > *(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act;*
> >
> > *(d) make an interim order or decision pending the making of a final order or decision.*

[62] In *Regina Pioneer Village*, the Board made an important statement about its role in deciding the labour relations matters that come within its jurisdiction:

> *The Board, in interpreting The Trade Union Act, is required to bring to bear its experience, knowledge and understanding of the labour relations system, in order to ensure that its interpretations achieve the objects and purposes of the Act. In C.U.P.E. v. New Brunswick Liquor Corporation (1979) 2 S.C.R. 227, Dickson, J. states at 235:*

> *"... a labour board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, is understood in Canada, and its labour relations sense acquired from the accumulated experience in the area."*[8]

[63] The Order requiring the Employer to make the remittances is necessary and appropriate to attain the purposes of this Act.

[64] First, the Order ensures greater consistency among the employees that are required to either pay their dues to the Union or pay their dues to a charity and ensures that there is no differential treatment of employees on the basis of religion, except as is specified in the Act. Such differential treatment has been, properly, circumscribed by both the Legislature and through the Board's jurisprudence.

[65] Second, it provides a method for the Union to ensure that the payments are being made and assurance to the Union and the Employer that the union security clause is being carried out. If the Board issued an order requiring the employee to make the payments directly to the charity, the burden on the Union to prove non-payment would be unnecessarily onerous. A religious exclusion is an exception to the standard conditions of the union security clause. Where possible, the Board should limit the burden on the Union to prove non-compliance.

[66] Third, the Order ensures that the proper calculations and payments are being made, by requiring the party that is experienced in administering the payment of union dues to make those payments.

[67] In summary, the Order is consistent with the words of section 6-8 read in context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its objects, and the intention of the Legislature. There is no basis to conclude that the Board could have overlooked or misinterpreted key statutory provisions.

[68] As such, there is no basis to proceed to stage two of the reconsideration process pursuant to criterion no. 4.

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[8] *Ibid* at 69-70.

Criterion No. 5 - If the original decision is tainted by a breach of natural justice:

[69] Next, criterion no. 5 permits reconsideration if the order was tainted by a breach of natural justice, or in other words, a breach of the duty of procedural fairness. It is well established that the content of natural justice, or procedural fairness, varies with the circumstances. In assessing whether a breach has occurred, the Board should consider whether a party has had a fair opportunity to be heard.[9]

[70] The Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*] set out five factors to assist in determining the content of procedural fairness in a particular context. These are:

1. *The nature of the decision and the decision-making process employed;*
2. *The nature of the statutory scheme and the precise statutory provisions;*
3. *The importance of the decision to the individuals affected;*
4. *The legitimate expectations of the party challenging the decision;*
5. *The nature of the deference accorded to the body.*

[71] The Board is a quasi-judicial tribunal subject to procedural fairness expectations befitting such a tribunal. However, the importance of the decision to the Employer is on the lower end of the spectrum, when compared with the usual matters that come before the Board, such as certification applications, unfair labour practice applications, and employee-union disputes involving termination grievances.

[72] In arguing that the Order should be reconsidered due to a breach of natural justice, the Employer relies on *Westfield v Canadian Union of Public Employees, Local 8443*, 2017 CanLII 20062 (SK LRB) [*Westfield*], in particular, on the following excerpt:

> *[26] This conclusion comes from the basic rule of natural justice that persons affected by a decision have the right to be heard with respect to that decision. Not only do they have the right to be heard, they also have the right to be notified and attend the meeting at which such decisions are to be considered. In this case none of the Applicants, or for that matter, any of the other impacted employees were provided any notice that the decision to advance to arbitration was being reconsidered. Nor were they given notice to be present and speak to that decision.*

[9] *Deck v Saskatchewan Health Authority*, 2019 CanLII 57387 (SK LRB) at para 20.

[73] In *Westfield*, the Board decided that the union had failed to provide natural justice to employees when it changed course on a grievance without giving notice.

[74] *Westfield* is not comparable to the current case. In the current case, on February 15, 2022, the Board provided the Employer with notice of the application made pursuant to section 6-8 and ten business days to file a Reply. The following day, counsel for the Employer confirmed receipt of the application and advised the Board that the employer "will not be filing a Reply nor will it have any involvement in this matter". On April 20, 2022, the Board also provided the Employer, as part of a mass emailing, notice of the motions' day schedule on which date the application was to be scheduled for a hearing. Later that day, counsel for the Employer responded that the Employer would not be participating. Clearly, the Employer had sufficient notice of the application and of the scheduling of the hearing in this matter and chose not to participate.

[75] The Employer also relies on the language of the Regulations, which it states created a legitimate expectation that the employee would be required to pay the amount directly to the charity and failed to put the Employer on notice of the necessity of making submissions on the matter. Section 17 of the Regulations states:

> *17 A person who intends to apply to the board for an order pursuant to section 6-8 of the Act excluding an employee from a bargaining unit of employees as a matter of conscience based on religious training or belief shall file an application in Form 16 (Application re Exclusion on Religious Grounds).*

[76] Form 16, which is to be completed by an applicant for an exclusion, includes an undertaking by the applicant, which states:

> *The applicant undertakes for the period that the applicant is excluded from the bargaining unit, to pay an amount at least equal to the amount of dues and assessments that a member of that bargaining unit is required to pay to the union with respect to that period:*
>
> > *(a) to a charity agreed on by the applicant and the union; or*
> >
> > *(b) if agreement cannot be reached by the applicant and the union, to a charity designated by the board.*

[77] The Employer argues that it had a right to rely on the wording of the Board's Regulations in deciding whether it had an interest in participating in the proceedings. It relies on *SJRWDSU v Saskatchewan Gaming Corporation - Casino Moose Jaw*, 2002 CanLII 52917 (SK LRB), in which the Board acknowledged that it had made a mistake when it mislead a party as to the case it had to meet, as follows:

> *[12] As we expressed in the November 25, 2002 Reasons for Decision, the Board regrets that it incorrectly summarized the support evidence at the original hearing. In this sense, we agree with counsel for RWDSU that the focus of the hearing changed for RWDSU, from one where it thought it had filed evidence of majority support to one where there was a possibility that its support was less than 50%. We agree that this misstatement of the evidence was serious and amounts to a breach of natural justice in the sense that RWDSU was not permitted to argue the initial case based on a fair understanding of the evidence. The Board ought to have posed its questions in a hypothetical sense to flesh out the issues that required determination, such as how to treat the revocation cards filed by PSAC and the overlapping support cards. Unfortunately, the Chairperson left the impression that the support card issues had been determined in a manner that reduced RWDSU's support below 50%.*

[78] The wording of Form 16 simply reflects what is found elsewhere in the Act, which is that the duty of an employee to pay includes, by implication, payment by methods or means that are indirect. It should be clear that the applicant, and not any other party, would have had to undertake to pay the amount in question because the amount comes from the applicant's wages, and therefore, it is an amount owing by the applicant.

[79] Regardless, the Board's most recent published decision in which a religious exclusion order was granted includes the form of the remedy that was granted in the current case. Moreover, the fact that union dues are regularly remitted by an employer is a strong indication of the possibility that an employer will be required to remit the dues to a charity. It is up to the parties who are served with an application, especially represented parties, to determine whether they have a legal interest in a matter. This expectation provides certainty as to the parties' obligations and ensures consistency in the Board's proceedings.

[80] It is not uncommon for employers to have an interest, in particular, in the remedy portion of a dispute between employees and unions. However, where an employer indicates that it is not going to have any involvement in the matter, it is reasonable for the Board to rely on that information without having to verify whether it applies to subsequent stages of the proceeding.

[81] Lastly, the Employer argues that the Board committed a breach of natural justice when it did not provide the Employer with the Order in this case. These circumstances were unfortunate but have no bearing on whether the Employer was heard in relation to the Order after the Order was issued. The Board does not issue orders that are conditional upon hearing from the parties.

[82] The Employer has not provided any indication that there is any other matter, such as evidence related to the alleged breach of natural justice that is required to be weighed, that would justify proceeding to the second stage of the reconsideration process. As such, all of the issues can be resolved in the first stage.

Conclusion:

[83] Given the foregoing conclusions, the application for reconsideration is dismissed.

[84] The Board thanks the parties for their submissions, all of which have been reviewed and were helpful.

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

DATED at Regina, Saskatchewan, this **21st** day of **February, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson