The Labour Relations Board
Saskatchewan

COMMUNICATION, ENERGY AND PAPERWORKERS UNION OF CANADA, Applicant v. J.V.D. MILL SERVICES, Respondent

LRB File No. 087-10; September 27, 2010
Chairperson, Kenneth G. Love, Q.C.; Members: Gloria Cymbalisty and Ken Ahl

For the Applicant Union:	Leah Terai
For the Respondent Employer:	Kevin Wilson Q.C.
For the Proposed Intervenors: Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers, the United Brotherhood of Carpenters and Joiners of America, Local 1985, and the United Brotherhood of Carpenters and Joiners of America (Millwrights Union, Local 1021)	Drew Plaxton
For the Proposed Intervenors: Local 01 Saskatchewan of the International Union of Bricklayers & Allied Craftworkers and its parent organization the International Union of Bricklayers & Allied Craftworkers (BAC)	R. Graeme Aitken

Intervenors – Application for intervention by Trade Unions certified to represent members of designated trade under *The Construction Industry Labour Relations Act* – Application for certification by non traditional trade union for all employee group in accordance with recent amendments to *The Construction Industry Labour Relations Act*

Intervenors – Intervenors seek party status as interested parties – Board discusses rules regarding intervenor status – provides guidance regarding three (3) different classes of intervenor – outlines rules for Public Law Intervenor class

Intervenors – Board permits intervenors to intervene to assist the Board in reaching conclusion concerning recent changes to *The Construction Industry Labour Relations Act* where proposed intervenors can assist the Board in providing a prospective not shared by other parties.

INTERIM DECISION

Background:

[1] **Kenneth G. Love, Q.C. Chairperson:** The Communications, Energy and Paperworkers Union of Canada ("CEP") applied to be certified as the bargaining agent for "all employees of J.V.D. Mill Services Inc. in Saskatchewan except office, sales managers and supervisors." The application alleged that this group of employees was an appropriate unit for the purposes of bargaining collectively within the meaning of clause 5(a) of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*").

[2] The process for certification of employees engaged in the construction industry in Saskatchewan was governed by *The Construction Industry Labour Relations Act, 1992* (the "*CILRA*"). Prior to July 1, 2010, certifications under the *CILRA* were to be made on a craft basis and employees covered by those certifications bargained through their certified bargaining agents with a certified employer group comprised of unionized employers. On July 1, 2010, amendments to the *CILRA* were proclaimed into law which permitted a union to apply pursuant to *The Trade Union Act* to be certified under that *Act* in an appropriate unit:

> *4(2) Nothing in this Act:*
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> *(a) precludes a trade union from seeking an order pursuant to clause 5(a), (b) or (c) of The Trade Union Act for an appropriate unit consisting of:*
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> *(i) employees of an employer in more than one trade or craft; or*
> *(ii) all employees of an employer; or*

[3] CEP applied for certification on July 19, 2010 in accordance with the provisions of the *CILRA* noted above. The proposed intervenors applied to the Board for standing in the application. In its application, the Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers and the United Brotherhood of Carpenters and Joiners of America (Millwrights Union, Local 1021) also made an application alleging that the Employer was a related employer or a successor employer to employers already certified by the Board. However, prior to the hearing of this matter, that application was withdrawn.

[4] A hearing of the matter was commenced on August 10, 2010. Both of the proposed intervenors renewed their application for intervenor status. After hearing argument from the parties and the proposed intervenors concerning the application by the proposed

intervenors, the Board determined to grant the application for status by the parties as public policy intervenors. Their intervention in the matter would be limited to advancing arguments to the Board with respect to the changes to the *CILRA* and the Board's authority thereunder. They would not be permitted to call witnesses or to cross examine witnesses produced by the parties.

[5] The hearing was adjourned to dates in October, 2010. These reasons therefore, relate solely to the Board's decision to grant intervenor status to the proposed intervenors.

Facts:

[6] The Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers, the United Brotherhood of Carpenters and Joiners of America, Local 1985, and the United Brotherhood of Carpenters and Joiners of America (Millwrights Union, Local 1021) (collectively, the "Carpenters") is the bargaining agent on behalf of the Carpenter and Millwright trade divisions as set forth in the *CILRA* and the ministerial designations made pursuant thereto.

[7] Some of the employees listed on the Statement of Employment filed by the Employer in respect of the within application are listed as carpenters or millwrights. In its application, the Employer lists its nature of business as Construction.

[8] Local 01 of the International Union of Bricklayers & Allied Craftworkers (the "Bricklayers") are a trade union operating in the Province of Saskatchewan chartered by the International Union of Bricklayers and Allied Craftworkers (BAC). Local 01 is the bargaining agent on behalf of the Bricklayers and Allied Craftworkers as set forth in the *CILRA* and the ministerial designations made pursuant thereto.

[9] One employee is listed as a bricklayer on the Statement of Employment filed by the Employer in respect of the within application.

Relevant statutory provision:

[10] Section 19(3) of the *Act* and *ss. 16 and 17 of the Regulations* provide as follows:

> *19(3) For greater certainty but without limiting the generality of subsections (1) and (2), in any proceedings before it, the board may, upon such terms as it deems just, order that the proceedings be amended:*

> *(a) by adding as a party to the proceedings any person or trade union that is not, but in the opinion of the board ought to be, a party to the proceedings;*
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> *(b) by striking out the name of a person or trade union improperly made a party to the proceedings;*
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> *(c) by substituting the name of a person or trade union that in the opinion of the board ought to be a party to the proceedings for the name of a person or trade union improperly made a party to the proceedings;*
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> *(d) correcting the name of a person or trade union that is incorrectly set forth in the proceedings.*

. . .

16 Upon the filing of any application, the secretary shall make reasonable efforts to determine the names of persons, trade unions and labour organizations having a direct interest in the application and shall as soon as possible forward a copy of the application to every such person, trade union and labour organization.

17(1) When an application for certification is made, any trade union claiming to represent any of the employees in the unit of employees in respect of which the application is made, may intervene by giving notice in writing to the board within 12 days after the date on which the application was received in the office of the board or within 10 days after the date on which a copy of the application was forwarded to such trade union by the secretary of the board, whichever is the later.

(2) The notice of intervention shall be in Form 10 and shall be verified by statutory declaration.

(3) The notice of intervention may contain a counter-application for certification.

(4) The intervening trade union shall comply with regulation 5(3).

Analysis and Decision:

[11] Intervenor status, whether granted by the Board or by a court, enables someone who is effectively a stranger to the application or litigation, to participate in the proceedings. Practice before the Board has generally recognized three distinct category of persons interested and participating in proceedings. These are (a) persons added as parties to the application, (b) parties with a direct interest in the proceedings, and (c) public law intervenors. In decisions of the Board, such parties have been variously referenced as "interested parties" or as "intervenors". The distinction between these two types of status has become blurred in their

application. By this decision, the Board will attempt to clarify and rationalize both the distinction and its nomenclature.

[12] The granting of intervenor status by the Board, or by the courts, is discretionary. Generally speaking, the courts exercise this discretion based on considerations of fairness (to the applicant or the party seeking status) and/or the potential to assist the court.[1] Section 19(3) of the *Act* allows that "the board may, upon such terms as it deems just" add parties to a proceeding. Courts rely upon their inherent jurisdiction to deal with applications for intervenor status. The Board must rely upon its statutory authority in s. 19(3) of the *Act*, the direction given to the Board Secretary/Registrar in s. 16 of the *Regulations* or in the circumstances referenced in s. 17 of the Regulations, to entertain such applications.

[13] In the article by Sheila M. Tucker and Elin R.S. Sigurdson entitled *Interventions in British Columbia: Direct Interest, Public Law & 'Exceptional Intervenors',* (the "Article") as noted by the authors, the three forms of intervenor status can be described as follows:[2]

1. The applicant has a direct interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be directly affected by the answer ("direct interest intervenor");

2. The applicant has a demonstrable interest in the answer to the legal question in dispute in that it has legal rights or obligations that may be affected by the answer, can establish the existence of "special circumstances", and may be of assistance to the court [Board] in considering the issues before it (”exceptional intervenor"); and

3. The applicant has no legal rights or obligations that may be affected by the answer to the legal question in dispute, but can satisfy the court [Board] that its perspective is different and its participation may assist the court [Board] in considering a public law issue before it ("public law intervenor").

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[1] I am indebted to the work of Sheila M. Tucker and Elin R.S. Sigurdson in their article entitled *Interventions in British Columbia: Direct Interest, Public Law & 'Exceptional Intervenors', Canadian Journal of Administrative Law and Practice, Vol. 23, No. 2, June 2010.*

[2] *Supra*, note 1 at p. 186

[14] As pointed out in this article, there appears to be a growing distinction to be drawn respecting the three distinct groups of persons seeking to add their voice to proceedings before the Courts and before Boards and Tribunals such as this Board. Because of this, the Board has determined to provide these reasons related to the granting of status to parties before the Board for the guidance of future applicants seeking to join proceedings before the Board, and to distinguish those types of status and the terms on which they may be granted. We adopt the three categories of intervenor status as reflective of the categories of status that may be granted by the Board. Granting of status in any particular case, will, of course, be discretionary, and dependent upon the facts in each particular case.

The Direct Intervenor

[15] As noted by the Board in its decision in *Regina Police Association v. Regina Board of Police Commissioners and The City of Regina*[3]*:*

> *[T]he Board is guided in deciding whether to accord recognition to a claimant for standing, as in many other procedural issues, by considerations of fairness… This includes, of course, the consideration of fairness to the respondent Union.*

Similarly, the Board will consider whether the broad concept of "Justice" can be promoted by the involvement of the party in the proceedings.

[16] As noted by the Board in the *Regina Police Association* decision, *supra*, it has generally not "really attempted to draw any clear distinction between the two types of participation", that is, status as an intervenor as distinct from status as an interested party.

[17] In its previous jurisprudence, the Board has concentrated its focus on the direct interest intervenor. That is, for intervenor or interested party status to be granted to a party, a direct interest in the matter in dispute was required to be shown.[4]

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[3] [1994] 1st Quarter Sask. Labour Rep. 86, LRB File Nos. 159-93 & 160-93.

[4] See *Regina Police Association*, supra note 2; *Merit Contractors Association Inc. v. Saskatchewan Provincial Building and Construction Trades Council et al.*, [1996] Sask. L.R.B.R. 119, LRB File No. 098-95; *Health Sciences Association of Saskatchewan v. Regina District Health Board,* [1995] 3rd Quarter Sask. Labour Rep. 131, LRB File Nos. 025-95 &118-95; and Saskatchewan Government and General Employees Union and Government of Saskatchewan, [1999] Sask. L.R.B.R. 404, LRB File No. 114-99

The Exceptional Intervenor

[18] In *Health Sciences Association of Saskatchewan and Sunrise Health Region, Canadian Union of Public Employees and Service Employees International Union*,[5] the Board recognized the principles underlying the concept of "exceptional intervenor"[6] when it permitted the Service Employees International Union to intervene with respect to an application before the Board where the applicant/intervenor had no direct interest in the specific outcome. The Intervenor in that case represented employees who occupied similar positions to that being considered by the Board.

[19] It should be noted that in their Article, the authors, at page 187 note that "[T]he exceptional intervenor is not an established concept. Rather, a review of the case law reveals an intermediary form of standing, and this article attempts to identify a rational and principled basis for its existence".

[20] At p. 196 of their Article, the authors discuss whether or not a party having pending litigation raising the same legal issue as the case in which they are seeking standing is a sufficient interest to merit exceptional intervenor standing. They point out that the Supreme Court of Canada has described this "precedent-based interest" as a tenuous basis for intervention[7]. As support for this statement, the authors also quote from the judgment of Madam Justice Wilson in *Scofield v. Ontario (Minister of Consumer & Commercial Relations)*[8] as follows:

> *It seems to me that the Bolton and Solosky decision stand for the proposition that, in order to obtain standing as a person "interested" in litigation between other parties, the applicant must have an interest in the actual lis between those parties. While I would not be prepared to construe rule 504a so narrowly,* ***it seems to me that the decision of that lis may be applied subsequently by another Court as a precedent resolving a lis between other parties is not a sufficient interest to justify a grant of standing to one of those other parties*** *[emphasis added].*

[21] In *Health Sciences Association of Saskatchewan and Regina District Health Board*[9], the Board adopted a similar approach with respect to an application for intervenor status

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[5] [2008] CANLII 87263, LRB File No. 036-08
[6] Not specifically by that name, however.
[7] Reference re *Workers' Compensation Act*, 1983 (Newfoundland) [1989] 2 S.C.R.335
[8] [1980] 112 D.L.R. (3rd) 132 (Ontario C.A.)
[9] Supra, at footnote 5

on the basis that a future application for a bargaining unit might include persons who were the subject of the application before the Board. At p. 136, the Board says:

> *In this case, although Ms. Gallagher stated that the Saskatchewan Government Employees' Union had some prospect of making a future application for a bargaining unit which would include the paraprofessional employees, we do not think that a claim of such speculative nature can be the basis for intervenor status.*

[22] As expressed by the terminology for this type of intervenor status, "exceptional" requires that there be some additional factor or factors that the proposed intervenor can demonstrate in order for them to be accorded standing in the matter. The authors in their article conclude as follows at p. 199:

> *Approached this way, exceptional intervenor standing requires an applicant to establish a genuine interest in the matter (e.g., involvement in pending litigation involving the same issue) and circumstances that differentiate the applicant from all others with the same interest. It is in the latter sense that the "exceptional intervenor" must persuade the court that it is, in fact, exceptional. The circumstances that might be advanced to differentiate the applicant in this respect are unlimited.*

[23] Similarly, as the terminology suggests, the granting of standing under this proviso should be used sparingly and only in clearly "exceptional" circumstances when a direct interest cannot be shown by the applicant for standing.

<u>The Public Law Intervenor</u>

[24] Public Law (or often called Public Interest) intervenor status is granted when a court "is satisfied that the participation of the applicant may help the court make a better decision".[10] Public Interest Standing has been recognized by the courts in Saskatchewan[11]. The principles to be applied in determining whether to grant status to a public interest intervenor were set out by the Saskatchewan Court of Appeal in *R. v. Latimer:*[12]

1. Whether the intervention will unduly delay the proceedings?
2. Possible prejudice to the parties if intervention be granted?
3. Whether the intervention will widen the *lis* between the parties?

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[10] See Interventions in British Columbia, supra note 1 at p. 199

[11] See *Whatcott and Saskatchewan Human Rights Tribunal and Attorney General for Saskatchewan and Canadian Constitutional Foundation* [2008] SKCA 95 (CanLII) and *Ahenakew and Her Majesty the Queen and Canadian Jewish Congress* [2006] SKQB 110 (CanLII)

4. The extent to which the position of the intervenor is already represented and protected by one of the parties? and
5. Whether the intervention will transform the court into a political arena?

[25] The Court in *Latimer*, *supra,* also noted that "[A]s a matter of discretion, the court is not bound by any of these factors in determining an application for intervention but must also balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the "*lis"*.

[26] The Board has also recognized that it must be cognizant of balancing the interests of the parties in having access to make representations to the Board and preserving the resources of the Board. As noted by the Board in *Re: Merit Contractors Association*[13] at paragraph 20:

> *These statutes represent an embodiment of public policy, and a wide range of persons may have an "interest" in a broad sense, in bringing to our attention various issues which may arise in conjunction with the implementation of these policies. As both the courts and other tribunals like our own have concluded, however, some limits must be set in allowing the assertion of interests which are contingent in nature. In* <u>*Canadian Council of Churches v. The Queen*</u> *(1992), 88 D.L.R. (4th) 193, the Supreme Court of Canada expressed the concern in this way:*
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> > *I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the Courts and preserving judicial resources. It would be disastrous if the Courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.*

<u>Conclusion:</u>

[27] The proposed intervenors argued that they each had a direct interest in this matter as employees whom they would normally represent were included within the bargaining

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[12] [1995] CanLII 3921, 128 Sask. R. 195 at pp. 196-97
[13] *Supra,* note 5.

unit which was applied for by CEP. However, for the reasons given in *Health Sciences Association of Saskatchewan,*[14] this argument must fail.

[28] The Respondents did not provide any factual basis to support any suggestion that they should be granted "exceptional" intervenor status. The Board can see no reason to grant status on this basis.

[29] In their application, the Bricklayers and the Carpenters make the following statement:

> *(c) With the greatest of respect the Bricklayers assert that since this is the initial (or, at least, initial significant and/or challenged) application for Certification under the newly amended CILRA; the Board must get it right. In our respectful submission getting it right means, at the very least, ensuring that workers have an opportunity to vote on whether they wish to be represented by a trade union (another stated goal of the Bill 80 amendments). This cannot occur if entire trades or crafts are not on site and eligible to vote.*

[30] As noted above, the Board had not, prior to this, considered the granting of intervenor status to a public interest intervenor[15]. However, as pointed out in the application by the Bricklayers, this is the first application for certification received by the Board since the proclamation of the amendments to the *CILRA* on July 1, 2010. As such, the Board believes that granting public interest intervenor status in this case is appropriate. We have determined to restrict the participation of the parties to presentation of argument only to assist the Board in its consideration of the amendments to the *CILRA* and their application to the application before it. The intervenors will not be permitted to call evidence or to cross-examine witnesses called by the Applicant or the Employer.

[31] The grant of intervenor status is, with respect to all of the proposed intervenors save for the International Union of Bricklayers & Allied Craftworkers (BAC), the international chartering organization for Local 01 Saskatchewan of the International Union of Bricklayers & Allied Craftworkers. This organization has no direct interest in the proceedings and has no interest which cannot be adequately represented by Local 01.

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[14] *Supra* note 5.

[15] Although, arguably, one could say that the process followed by the Board in Re: *Merit Contractors Association (supra* at note 5) and in determining the Newbery units in International Erectors and Riggers (A Division of Newbery Energy Ltd.), C.G.W.U. Local 890 [1979] Sept. Sask. Labour Rep. 37 contemplated a public intervenor process.

[32] In considering the principles enunciated by the Court of Appeal in *Latimer, supra,* we have determined the following:

1. The intervention of the proposed intervenors will not unduly delay or protract the proceedings;
2. There will be no undue prejudice to the Applicant from the granting of intervenor status based on the restrictions imposed on participation of the intervenors;
3. The *lis* may be broadened due to the participation of the intervenors, but this is the purpose for permitting the intervention to occur. It will permit the Board to have a different perspective on the application based upon the arguments and analysis proposed by the intervenors. This, in our opinion, justifies the broadening of the *lis*;
4. The position to be adopted by the intervenors is quite different from the position of the other parties; and
5. There is always a risk that "political" issues may creep in when public interest intervenors are granted status. However, the intervenors are represented by experienced council who we are certain will restrict their arguments so as to avoid turning the hearing into a political arena.

[33] The Board is of the opinion that the potential benefit in allowing the proposed intervenors to participate in the hearing outweighs any potential risks. Furthermore, the Board believes that any additional time and cost associated with the participation of the intervenors in the application are justified insofar as this application is the first to be heard under the amendments to the *CILRA*.

Dissent by Member Cymbalisty

[34] Board Member Cymbalisty dissents with respect to the majority's adoption of three (3) intervenor models as a template for future proceedings before this Board. It is her belief that the rules regarding intervention (rules under which the Board has discretion) should not be too narrowly construed. In addition, while agreeing with the granting of intervenor status

to the proposed Intervenors, Board Member Cymbalisty disagrees with the limits placed by the majority with respect to the Intervenor's participation in the hearing. In the circumstances of this case, she would allow the Intervenors the right to lead evidence and to cross-examine witnesses called by the other parties to the proceedings in order to ensure that all relevant issues are presented for the Board's consideration.

[35] For the reasons set out above, there will be an Order as follows:

1. The Saskatchewan Regional Council of Carpenters, Millwrights and Allied Workers, the United Brotherhood of Carpenters and Joiners of America, Local 1985, and the United Brotherhood of Carpenters and Joiners of America (Millwrights Union, Local 1021) are granted intervenor status on LRB File No. 087-10;

2. Local 01 of the International Union of Bricklayers & Allied Craftworkers is granted intervenor status on LRB File No. 087-10; and

3. The participation of the intervenors shall be limited to presentation of argument to the Board. They shall not be permitted to lead evidence or cross-examine witnesses to the proceedings.

DATED at Regina, Saskatchewan, this **27th** day of **September, 2010.**

LABOUR RELATIONS BOARD

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Kenneth G. Love, Q.C.
Chairperson