Labour Relations Board

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August 26, 2011

Mr. Kevin Wilson, Q.C.
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Mr. Gary Bainbridge
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Dear Mr. Wilson and Mr. Bainbridge:

RE: LRB File No. 112-11; Application to Extend the time for filing of an Objection to the Conduct of a Vote Section 34 of *The Regulations and forms, Labour Relations Board*

The International Union of Operating Engineers Hoisting and Portable & Stationary Union, Local 807 (the "Union") applied for certification in respect of a group of employees of The Rural Municipality of Blaine Lake No. 434 (the "Employer) on July 5th, 2011. In the application, the Union stated that there were 4 employees in the proposed unit.

On July 6th, 2011, the Executive Officer of the Board issued a Direction for the conduct of a vote in respect of the certification application. In that Direction for Vote, the Registrar of the Labour Relations Board, Mr. Bayer was named as the Agent of the Board for the purposes of the conduct of the vote.

On July 1 8th, 2011, a Reply to the Union's application was made by the Employer. No dispute was taken with respect to the statement in the application that 4 employees would be affected by the application.

In accordance with the Direction for vote, Mr. Bayer contacted the Employer and the Union to determine the names and the number of employees who were eligible to vote

with respect to the matter. As a result of those discussions, a voter's list was agreed to which named 4 persons as being eligible to vote.

It was also agreed between the parties that the vote would be conducted by registered mail. Ballots were mailed by the Board to those employees eligible to vote, which ballots were to be returned by mail to the Board on or before July 29, 2011.

3 ballots were received by the Board prior to the counting of the Ballots on August 2, 2011. The vote count was conducted by telephone conference call with scrutineers from the Union and Employer present by telephone. The results of that vote were that, of the 3 votes tabulated, all votes were in favour of representation by the Union.

A 4th ballot was received by mail on August 2, 2011. That ballot, having been returned after the counting of the ballots was set aside unopened. Because this ballot could not have influenced the vote, the Registrar, as Board Agent then provided a return listing 4 ballots as returned, 3 in favour and 1 spoiled.

On August 16, 2011, Mr. Wilson, on behalf of the Employer contacted the Board, by letter, challenging the conduct of the vote. In his application, he argued that the voter's list should have included 2 additional employees, one, a grader operator who was or had recently returned to work from a medical absence and the second person, an administrative assistant who had been off work for about 1 month. He argued that both of these persons should have been included on the voter's list.

Secondly, he argued that the 4th ballot which was received by the Board on the day of the vote counting should have been counted as it was received by the Board within the 21 day period set out for the return of the ballots since July 29th, 2011 was a day on which the Board's offices were closed and therefore, in accordance with section 32 of

the Board's Regulations and the provisions of *The Interpretation Act*, the time on which the 21 day period expired should have been August 2, 2011.

Following receipt of this application, the Registrar contacted Mr. Wilson to advise that his letter application objecting to the conduct of the vote was not filed within the 3 day period provided for in section 29(1) of the Board's Regulations and could not be considered by the Board unless an extension of the 3 day filing deadline was granted by the Chairperson of the Board pursuant to section 34 of the Regulations. Mr. Wilson made that request by letter to the Registrar dated August 17, 2011.

The Registrar provided a copy of that request to the Union. A hearing by conference call was held between the Chairperson of the Board and Mr. Wilson for the Employer and Mr. Bainbridge for the Union on August 23, 2011.

In that hearing, Mr. Wilson renewed his arguments set out above respecting the 2 persons which he felt should have been on the voter's list as well as the counting of the 4th ballot. He also argued that his client was a small rural municipality with little sophistication in matters of labour relations. He argued that if the vote were allowed to remain that the result would be labour relations chaos. He argued that there would be no prejudice to the Union if the Employer were permitted to contest the result of the vote.

Mr. Bainbridge took the view that there were no grounds offered by the applicant Employer to justify the Board exercising its discretion to enlarge the time in these circumstances. He noted that during the telephone conference call in which the ballots were counted that the Registrar had clearly advised the parties that they had only 3 days if they wished to dispute the conduct of the vote. However, notwithstanding that clear warning, the Employer did not seek to have the conduct of the vote questioned until August 16, 2011.

Mr. Bainbridge referred the Board to its decision in *Hill v. International Union of Operating Engineers Hoisting and Portable & Stationary, Local 870 and Rural Municipality of Blucher, No.* 343 [2007] CanLII 68755 (SKLRB) LRB File No. 012-06. He argued that the objection to the conduct of the vote was not in Form 15, as required by the Regulations, nor was it as timely as in that case, where objection had been taken to the inclusion of a certain employee and the exclusion of 2 other employees at the time the vote was taken.

He argued that contrary to Mr. Wilson's suggestion, that there would be too much uncertainty in the workplace if the application was allowed to proceed and the time extended by the Chairperson. He argued that once the list had been settled by the parties, the list of employees should be sacrosanct.

Analysis and Decision

There is limited jurisprudence from the Board with respect to the factors which I, as Chairperson, should consider in exercising my discretion granted pursuant to s. 34 of the Regulations. However, the Courts have often considered this issue and have outlined 4 elements which ought to be considered[1]. Those elements are that the applicant must persuade the Court that:

1. there is a reasonable explanation for the delay;
2. he or she possessed a *bona fide* intention to appeal within the time limited for appeal;
3. there is an arguable case to be made to a panel of the Court; and
4. there will be no prejudice to the respondent if leave is granted beyond what would be incurred in the usual appeal process.

Madam Justice Jackson went on to say that "[I]n any given case, one or more of the factors may be more important than others.

[1] See the reasons of Madam Justice Jackson in *Dutchak v. Dutchak* [2009] SKCA 89 @ paragraph 12.

The *Hill* decision reference by Mr. Bainbridge dealt only with the first point of this analysis. At paragraph [20], the Board says:

> [20] ...While the Board has the discretion to allow amendment to an application, accept an application not in the form specified in the Regulations and to extend time limits, and is cautious and circumspect with respect to the strict application of the Regulations and in considering applications for amendments and extension of time limits, the Union has provided no credible or indeed any explanation as to why the Board should exercise its discretion to do so in this case.

Rather than the cursory analysis provided in the *Hill* decision, I think that the criteria outlined by the Court of Appeal in *Dutchak* should be adopted as the standard by which I consider the exercise of its discretion to extend time limits pursuant to s. 34 of the Regulations.

Was there a reasonable explanation for the delay?

Mr. Wilson's explanation for the delay was that his client was a "small RM", unsophisticated in matters of labour relations who did not have the benefit of legal counsel in respect of the application for certification. Mr. Bainbridge counters that parties are often unrepresented in matters before the Board. He argues that this is not a sufficient reason.

It is interesting to note that in the *Hill* decision, the Union in that case, attempted to have names added to the list on the day on which the vote was being conducted by the Board on March 23, 2006. Thereafter, the Union filed an objection to the conduct of the vote on March 28, 2006. In the *Hill* decision, the Board found that the time should not be extended even where an objection was taken at the conduct of the vote, and that the application was only 1 day late in being filed by the Union.

While the argument made by Mr. Wilson is not a strong argument, nevertheless, it is a reasonable argument for the delay in filing the application, notwithstanding the parties were advised of the time limit at the time the vote was counted.

The application satisfies this criterion.

Was there a *bona fide* intention to appeal within the prescribed time limit?

Unlike the situation in *Hill,* there was no suggestion that the applicant formed any intention to appeal the conduct of the vote until after counsel had been consulted. No objection was taken at the conduct of the vote, nor was any objection raised with the registrar at the counting of the vote with scrutineers for the parties present.

The parties were clearly advised by the Registrar, at the time the vote was counted, that they had a 3 day window in which to make an objection to the conduct of the vote as set out in the regulations.

The application would fail to satisfy this criterion

Is there an arguable case?

Absent evidence having been provided, I can only reference the submissions of the parties and the records in the Board's file. However, especially with respect to the counting of the 4th ballot, it appears clear that there is an arguable case that that ballot should have been counted. However, since there was a clear majority in favour of the certification, the counting of that ballot is somewhat irrelevant unless the applicant can also satisfy the Board that the two additional names were improperly or inadvertently left off the voter's list.

Absent evidence, I am unable to make any determination with respect to the two individuals who the applicant alleges should have been included on the voter's list, however, it is clear that if they satisfy the Board's usual criteria for being eligible to vote, that their votes, in conjunction with the uncounted 4th ballot may have a significant impact on the final result.

The application satisfies this criterion.

Will there be additional prejudice to the Respondent Union?

Each party, of course, argues that they will be more prejudiced than the other. However, there was no suggestion that either party had acted in any way in reliance upon the voting result, In fact, the Board has issued no Order as yet regarding this application and hence the Union has had no Board Order to rely upon to date. This is because, notwithstanding the application by correspondence from the Applicant was not within the prescribed time set out in the regulations, it was sufficiently timely so that the Board's usual practice of reviewing such applications *in camera* was arrested.

Based upon the parties' submissions, the application does not, in my opinion, impose additional prejudice upon the respondent.

Notwithstanding the analysis above, as Madam Justice Jackson noted in *Dutchak,* one or more of the factors may be of greater importance than the others in any given case. I am therefore directed to consider all of the factors above and weigh them against the equitable principles of fairness and justice in the case before me. On balance, I am of the opinion that in this case, and on the facts as presented, the application should be allowed. Of principle importance is that that no additional prejudice will be placed upon the respondent union given the short period of delay and the arguable case presented. Of lesser importance is the fact that the applicant provided a somewhat weak reason for

filing the application within the time prescribed and the fact that it did not formulate the intention to appeal within the prescribed time limit.

For the above reasons, I hereby grant the application extend the time for filing an application to object to the conduct of the vote in accordance with s. 34 of the Regulations to August 16, 2011, and the electronic document advanced to the Board shall, for the purposes of filing on that date, be accepted when filed in triplicate with the Board's Office.

Yours truly,

eth G. Love, Q.C.
Chairperson