The Labour Relations Board
Saskatchewan

SEIU-WEST, Applicant v. SAMARITAN PLACE CORP., Respondent

LRB File No. 105-13; May 24, 2013
Chairperson, Kenneth G. Love, Q.C.; Members: Ken Ahl and Jim Holmes

For the Applicant:	Ms. Heather M. Jensen
For the Respondent:	Ms. Shannon G. Whyley

Application for Summary Dismissal – Board reviews recent restatement of the *Soles* test for summary dismissal – Board reviews application and finds arguable case that vote did not determine true wishes of employees – Application for summary dismissal dismissed.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** SEIU-WEST, (the "Union") applied to the Board to certify employees of Samaritan Place Corp. (the "Employer") by application dated April 12, 2013.[1] A pre-hearing vote was conducted by a Board Agent among the employees of the Employer on April 17 & 18, 2013.

[2] The Employer filed an Objection to the Conduct of the Vote[2] pursuant to Section 29 of the *Regulations and Forms, Labour Relations Board*[3] on April 23, 2013. The Union then filed an application for Summary Dismissal of the Employer's Section 29 application. These reasons relate to the application for summary dismissal.

[3] For the reasons that follow, the application for summary dismissal is dismissed. The Board issued its Order dismissing the application on May 10, 2013. These are the reasons for that dismissal.

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[1] LRB File No. 092-13.
[2] LRB File No. 103-13.
[3] *Saskatchewan Regulations* 163/72 as amended.

Facts:

[4] In applications for summary dismissal, the Board assumes that the Applicant is able to prove all of the facts outlined in its application.[4] In its Objection to the Conduct of the Vote, the Employer plead as follows:

> *The reason that the objecting Employer objects to the conduct of the said vote are:*
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> *(i) The Union filed an application for certification with the Board on Friday, April 12, 2013.*
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> *(ii) The Employer was notified of the certification application by the Board Registrar shortly before the close of business on Friday, April 12, 2013. The Employer advised the Board Registrar of its intention to retain legal counsel at that time.*
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> *(iii) The Board Registrar suggested that a vote may be held in the Employer's workplace on Wednesday, April 17 and Thursday, April 18, 2013. The Board Registrar also asked the Employer to provide a comprehensive list of all employees and their titles at the Employer's workplace in Saskatoon as of April 12, 2013.*
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> *(iv) On Monday, April 15, 2013, the Employer notified the Board Registrar that it had retained legal counsel, namely Kevin Wilson, Q.C. of MacPherson Leslie & Tyerman LLP.*
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> *(v) On the same day, being April 15, 2013, the Board issued a Notice of Vote, which was provided to the parties along with a Direction for Vote dated April 12, 2013. The Notice of Vote was issued prior to the Employer having any meaningful opportunity to seek legal counsel and advice in the process. It also occurred prior to the Employer having the opportunity to complete the list of employees and their titles as of April 12, 2013.*
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> *(vi) The Notice of Vote was deficient in that the Voters' List, being Appendix II to the Notice of Vote, did not include a list of employee names and classifications. Instead, it simply stated "Voters list to be finalized before or during vote."*
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> *(vii) The Employer states that the deficiency in the Notice of Vote, as described above, compromised the fairness of the voting process because the Voters' List was confusing to employees and did not provide adequate notice as to who was eligible to vote.*
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> *(viii) The Notice of Vote also set the times and dates for the vote without the Employer's input. The vote was scheduled for Wednesday, April 17, 2013 from 4:00 pm to 5:00 pm and 10:30 to 11:00 pm and Thursday, April 18, 2013 from 9:00 am to 10:00 am.*

[4] See *KBR Wabi et al v. International Union of Operating Engineers, Local 870 et al*, LRB File Nos. 188-12, 191-12, 192-12, 193-12, 198-12, 199-12, 200-12 & 201-12.

(ix) The Employer states that the times and dates for the vote were not appropriate, since they would not facilitate voting by a significant number of employees who were not scheduled to work on those dates.

(x) The Employer further states that the times and dates for the vote were inappropriate, because the Employer has a significant casual pool within the proposed bargaining unit, who would not be provided with ample time to be notified of the vote.

(xi) The Employer was also notified on Monday, April 15, 2013 that the union intended to provide transportation to the vote for employees without independent transportation. The Employer states that this was not appropriate, as it would call into question the objectivity of the entire voting process.

(xii) On the evening of Monday, April 15, 2013, the Employer advised the Board of its concerns regarding the vote and requested that the Board postpone the vote in order to address those concerns and amend the Notice of Vote as necessary. The Employer's request was refused.

(xiii) The Employer posted the Notice of Vote in its workplace, as instructed by the Board Registrar, on the morning of Tuesday, April 16, 2013.

(xiv) The vote proceeded on Wednesday, April 17 and Thursday, April 18, 2013 at the Employer's workplace at the times set out in the Notice of Vote.

(xv) The Employer objects to the conduct of the vote on the following grounds:

a. The Employer was not provided with sufficient opportunity to obtain legal counsel and advice in relation to the voting process;

b. The Board's agent did not determine the list of employees eligible to vote in accordance with Section 26(a) of the Regulations and Forms, Labour Relations Board;

c. The dates and hours for taking the vote were determined by the Board's agent without input from the Employer and were not appropriate given the Employer's shift schedules and the number of casual employees in the proposed bargaining unit;

d. The Notice of Vote was not prepared according to Form 13 in accordance with Section 26(e) of the Regulations and Forms, Labour Relations Board because it did not include a Voters' List of employees who were eligible to vote; and,

e. If the Union did in fact provide transportation to employees to attend the vote, such activities compromised the objectivity of the voting process.

(xvi) The Employer believes that employees who are included within the proposed bargaining unit did not have the opportunity to vote for the reasons described in paragraphs 3(vii), (ix) and (x) above and were therefore disenfranchised.

(xvii) The Employer therefore requests that the Board order that the ballots from the vote be destroyed, that the deficiencies above be corrected and that a new vote be conducted by secret ballot.

Relevant statutory provisions:

Section 18(p) of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*")

> *18. The board has, for any matter before it, the power:*
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> *. . .*
>
> *(p) to summarily dismiss a matter if there is a lack of evidence or no arguable case;*

Section 29 of the *Saskatchewan Regulations* 163/72

> *29(1) Any trade union or any person directly affected having any objection to the conduct of the vote or to the counting of the vote or to the report shall, within three days after the last date on which such voting took place, file with the secretary a written statement of objection in Form 15 and verified by statutory declaration together with two copies thereof, and no other objections may be argued before the board except by leave of the board.*
>
> *(2) The secretary shall cause all statements of objections and all copies thereof, when filed, to be stamped with the date on which they were received in the office of the board.*

Arguments of the Parties:

[5] Both counsel provided written briefs and case authorities which we have reviewed and found helpful.

[6] The Union argued that none of the grounds plead, and facts as set out in the application, that the Employer advanced with respect to the conduct of the vote, gives rise to an arguable case for a violation of the *Act* or a reason to set aside a representation vote. They argued that the Employer was required to show facts which supported an arguable case that the objection may be well founded.

[7] The Union argued that the test utilized by the Board with respect to challenges to the conduct of votes is whether the conduct complained of critically interferes "with the ability of employees to express their free wishes".[5]

[8] The Employer argued that the facts, as plead, raised an arguable case which would justify the Board's intervention in respect of the conduct of the vote.

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[5] *Reese v. Holiday Inn Ltd. and Retail, Wholesale and Department Store Union,* [1989] S.L.R.B.D. No. 33, LRB File Nos.: 207-88 & 003-89.

[9] Both parties acknowledged that the Board must accept the facts as plead in the application, which facts, if proven, would give rise to an arguable case.

Analysis and Decision:

[10] The Board, in its recent decision in *KBR Wabi et al. v. International Brotherhood of Electrical Workers, Local 529 et al.,*[6] refined the test formerly outlined in *Beverley Soles v. Canadian Union of Public Employees, Local 4777 and Parkland Health Region,*[7] (hereinafter "*Soles*"). That decision established the following as the test to be applied on applications for summary dismissal under Section 18(p) of the *Act*:

> 1. *In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant proves everything alleged in his claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
>
> 2. *In making its determination, the Board may consider only the application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his claim.*

[11] Also, in keeping with the comments of Mr. Justice Popescul (as he was then) in *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers (United Brotherhood of Carpenters and Joiners of America, Local 1985) v Saskatchewan Labour Relations Board,*[8] the Board acknowledged that the powers given to it in Sections 18(p) and (q) need not be utilized together, and could be utilized discreetly. Given Mr. Justice Popescul's comments, the Board concluded that the first determination to be made under the *Soles* process was whether or not the matter should be considered *in camera*. If not, then the application for summary dismissal would require an oral hearing.

[12] In determining whether or not the applicant has made out an arguable case, the Board looks to the pleadings to determine if those pleadings disclose all of the constituent elements necessary for a finding of the alleged violation. In this case, the Union properly sets out the requirements for a finding that the conduct of a vote was improper when it relied upon the

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[6] LRB File Nos. 188-12, 191-12, 192-12, 193-12, 198-12, 199-12, 200-12 & 201-12.
[7] [2006] Sask. L.R.B.R. 413, LRB File No. 085-06.
[8] [2011] S.J. No 671, 2011 CanLII SKQB 380, 378 Sask. R. 82, 210 C.L.R.B.R. (2d) 35 at para. 108.

Board's earlier decision in *Reese v. Holiday Inn Ltd. and Retail, Wholesale and Department Store Union.*[9]

[13] The *Reese* decision relied upon *Adams, Canadian Labour Law.*[10] In essence, the test, as stated above, is that "campaign methods and tactics that interfere critically with the ability of employees to express their free wishes" will not be condoned by the Board. Where such conduct is found, the results of that tainted vote will be set aside and a new vote taken.

[14] Given that we must accept the facts as plead, we have no difficulty reaching the conclusion that the application by the Union must be dismissed. The application makes numerous allegations which, if proven to be true, may have interfered with the proper conduct of the vote.

[15] The threshold of demonstrating that an arguable case exists is not a high threshold. Summary dismissal is something which should only be utilized only in the clearest cases, where it is plain and obvious that the application must fail. The term has been used, somewhat interchangeably with the concept of "no reasonable chance of success", "having a cause of action that might succeed" or "no *prima facie* case", or "no reasonable possibility or success at trial".

[16] In summary, the Employer alleges five (5) grounds to found its application. These are:

1. No opportunity to obtain legal advice;
2. The Board Agent's failure to determine the list of voters eligible to vote;
3. Failure to allow input by the employer into the times and dates for the conduct of the vote;
4. Failure to prepare the Notice to Vote in accordance with the Regulations; and
5. The Union providing transportation to its members to the polling place.

[9] [1989] S.L.R.B.D. No. 33, L.R.B. File Nos. 207-88 & 003-89.
[10] Canada Law Book Company, 1985, p. 376-9.

[17] It is conceivable that some of these allegations, if proven, could satisfy the Board that the conduct of the vote by the Board critically interfered "with the ability of employees to express their free wishes". Accordingly, we find that the application discloses an arguable case.

DATED at Regina, Saskatchewan, this **24th** day of **May**, 2013.

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson