The Labour Relations Board
Saskatchewan

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5146, Applicant v. THE TOWN OF REGINA BEACH, Respondent

LRB File No. 206-12; March 22, 2013
Chairperson, Kenneth G. Love Q.C.; Members: Ken Ahl and John McCormick

For the Applicant: Lori Sutherland & Elaine Ehman
For the Respondent: Richard W. Elson, Q.C.

Application for Certification – Section 5 (a), (b) and (c) – Eligibility to vote of representational vote under Section 6 – Board reviews facts and previous jurisprudence related to three employees with respect to their eligibility to vote of representational vote. – Board finds that 2 employees entitled to vote on representational question.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** The Canadian Union of Public Employees, Local 5146, (the "Union") applied on November 26, 2012 to be certified as the bargaining agent for a unit of employees of The Town of Regina Beach (the "Town") comprised of:

> *All employees of the public works department employed by the Town of Regina Beach, except the Manager of Public Works and Utilities.*

[2] The Parties filed an Agreed Statement of Facts. At issue in these proceedings was whether or not three (3) persons met the statutory definition of "employee" in Section 2(f) of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*") By extension, the issue was whether or not those three (3) persons should be included within the unit of employees certified by the Board as appropriate for collective bargaining and whether or not the votes of those employees should be included in the list of eligible voters for the purposes of the representational vote conducted by the Board with respect to the certification application.

[3] The Union took the position that the following persons should be entitled to vote on the representational issue. The Employer took the position that these persons should not be included:

Zoria Moen
Jeff Simpson

[4] The Union took the position that Barry Wasnik should be entitled to vote on the representational issue. The Employer took the position that he should not be included.

[5] The Board heard evidence from each of these persons at its hearing held on February 19, 2013.

Facts:

Zoria Moen

[6] Ms. Moen commenced work with the Town on September 24, 2012, as a part-time employee working 2 days (17 hours) per week. She was employed as a labourer, picking up trash, doing recycling, and reading meters as needed.

[7] On October 11, 2012, Ms. Moen became very ill and was placed on medical leave by the Town. For the period October 1, 2012 to October 11, 2012, Ms. Moen worked a total of 68 hours. She did not work again until early December of 2012 when she was asked by the then Chief Administrative Officer for the Town to prepare Christmas decorations for the Town.

[8] During December 1, 2012 to December 15, 2012, Ms. Moen testified that she worked (16) sixteen hours, but owed the Town (8) eight hours, so she was paid for only (8) eight hours during that period. She did not work for the Town after that date.

[9] She testified that she hoped to return to work when permitted by her doctor, but acknowledged that she had made no contact with the Town concerning a return to work. She also testified that she was not eligible to be placed on long term disability because she had not completed her probationary period.

Jeffrey Simpson

[10] Mr. Simpson was hired in July, 2009 as a worker in the Public Works Department of the Town. He was engaged to operate the Town's water treatment plant. In February of 2012, he was approached by the Chief Administrative Officer for the Town to become the Manager of Maintenance and Utilities. This position was ostensibly to assist the then Manager of Public Works and Utilities with his duties.

[11] Mr. Simpson accepted the offered position on a contract basis for (6) six months, concluding on October 31, 2012. Shortly after he accepted this position, the Manager of Public Works became ill and was placed on disability. He assumed responsibility as acting Manager of Public Works. However, upon the expiry of the contract term, he advised the Chief Administrative Officer that he did not wish to continue in the position. He then reverted to his present position.

[12] His resignation was not without controversy. His resignation was communicated to members of the Town's council by email on November 5, 2012. In that email, the Chief Administrative Officer advised that she would be advertising for a replacement on a (6) six month term.

[13] However, on November 19, 2012, Mr. Simpson met with other employees of the Public Works Department, the Town's Mayor, and one of the councillors, Doug Romphf. At that meeting, Mr. Simpson was asked to stay on as acting Manager of Public Works, but he declined to do so. Other employees were also asked if they would assume the position, but they all declined. At the end of the meeting, however, Mr. Simpson and the other employees agreed that they "wouldn't let things blow up".

[14] Council for the Town met on November 27, 2012. At that meeting Motion 285/12 was passed as follows:

> *285/12 Hugg/Brian* *That Jeff Simpson be appointed as interim Public Works Manager from November 19, 2012 to February 1, 2013 inclusive, at the rate of $29.00/hour to reflect additional duties as required. Carried.*

[15] Councilor Romphf testified that this resolution was passed based upon his understanding from the November 19, 2012 meeting that Jeff Simpson would stay on, in an interim capacity, as Manager of Public Works until a new interim Manager could be hired. Mr. Simpson, in his testimony, denied that he had agreed to stay on as interim Manager at the meeting on November 19, 2012. Having heard the testimony of both witnesses, it is clear to us that Mr. Simpson's evidence should be preferred. Mr. Romphf's testimony was that Mr. Simpson had "agreed to keep the plane flying". While utilizing a different analogy, there was clearly only an intention not to put the citizens of Regina Beach in harm or have major disruption of services during the interim. There was clearly no commitment on the part of Mr. Simpson to resume his former role.

[16] Another issue arose over payments made by the Town to Mr. Simpson in December of 2012. Those payments were explained by Mr. Simpson as being made for payments in lieu of holidays and for banked overtime for which he was being paid out. However, the payments on his payroll records did not reflect this attribution. When he approached the payroll officer for the Town, he testified that he was told that the payroll administrator had been directed to make payment in the manner shown on his payroll record. That explanation was consistent with the flawed understanding of Mr. Romphf and the Motion made by council on November 27, 2012.

Barry Wasnik

[17] Mr. Wasnik was engaged by the Town to manage its solid waste disposal facility under a contract dated May 9, 2012. The basic terms of the contract were as follows:

1. *The contractor (Barry Wasnik), was to be paid a fixed hourly rate, based upon approved time sheets.*

2. *The contract specified the times and dates that the waste management site was to be open and staffed.*

3. *The contract specified tasks which were required to be performed by the contractor.*

4. *The contract provided that the contractor could employ others the perform duties at the waste disposal site. A list of such employed personnel was to be provided to the Town.*

[18] Mr. Wasnik testified that he answers to the Town Foreman on a non regular schedule. He testified that he could profit from the operation of the waste management site by hiring others to perform the specified duties at the site. He testified that he did not have much interaction with the other Town employees and that he was not economically dependent upon the Town, insofar as he also operated a successful farm nearby.

[19] He testified that the hourly rate paid to him under the contract had been adjusted on August 15, 2012 by the Chief Administrative Officer for the Town. He also testified that even though he had employed others to work at the Waste Management Site, he had never submitted a list of such persons to the Town.

[20] The Town made no CPP, EI, or tax remittances on behalf of Mr. Wasnik. Nor was he eligible to be covered by other benefit plans provided by the Town for its employees.

Relevant statutory provision:

[21] Relevant statutory provisions are as follows:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character; or*
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer;*
>
> *(i.1) a person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining.*

Union's arguments:

[22] The Union provided a book of authorities which we have reviewed and found helpful.

Zoria Moen

[23] The Union argued that Ms. Moen should be included as an employee for the purposes of the representational vote. They argued that she had a reasonable connection to the workplace as well as a continuing interest in the outcome of the certification vote. In support of that position, they provided several case authorities.[1]

Jeffrey Simpson

[24] The Union argued that at the time of the application for certification and at the time of the vote conducted by the Board, Mr. Simpson was not in a management position, but rather had reverted to his position as a labourer. He had resigned his (6) six month term appointment as Manager of Public Works and Utilities and acting Manager of Public Works. Accordingly, they argued that he should be considered an employee for the purposes of the representational vote.

Barry Wasnik

[25] The Union argued that Mr. Wasnik was not an employee, but was an independent contractor. They argued that he had the ability to make a profit by engaging others to perform the assigned duties. It also noted that the contract provided for higher than normal pay for working on statutory holidays. In support of its position, the Union cited several cases in support.[2]

Employer's arguments:

Zoria Moen

[26] The Employer argued that Ms. Moen had no tangible connection to the workplace. They argued that she was a short term, part time employee. They argued that she had not worked sufficient time for the employer prior to her disability and had not worked for any

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[1] *See Hotel Employees and Restaurant Employees* Union [1999] Sask. L.R.B.R. 184, LRB File No. 056-99, Local 206 *v 621692 Saskatchewan Ltd. o/a Country Inn and Suites; SGEU v. Rural Municipality of Paddockwood No.* 520 [1999] Sask. L.R.B.R. 470, LRB File Nos. 059-99 and 093-99

[2] *See SGEU v. Saskatoon Open Door Society* [2001] Sask. LR.B.R. 210, LRB File No. 177-99*; SGEU v. Rural Municipality of Meadow Lake, No. 588* [2001] Sask. L.R.B.R. 782, LRB File No. 140-01; *United Food and Commercial Workers, Local 1400 v. Barrich Farms Ltd. and True North Seed Potato Co. Ltd* [2008] CanLII 57253 (SK LRB), LRB File No. 043-07.; *and Lora Lovatt v. SGEU and Town of* Raymore [2006] CanLII 63201 (SK LRB), LRB File Nos. 306-04 & 310-04.

sufficient time prior to the filing of the application and did not work a sufficient period of time between the time of the application and the conduct of the representational vote by the Board

Jeffrey Simpson

[27] The Employer argued that Mr. Simpson should be considered to still be in an out of scope position because even after his resignation from the position as Manager of Public Works and Utilities and acting Manager of Public Works he continued as the *de facto* Manager notwithstanding that he was not the *de jure* Manager.

[28] The Employer also argued that there was it was more than co-incidental that he was placed in his role as Manager of Public Works and Utilities over the protest of the then Manager of Public Works and that he resigned shortly before the application for certification was filed. They argued that he and the then Chief Administrative Officer were engaged in manipulation of support for the application for certification. As a result, the Employer argued that the Board should exercise its discretion to exclude Mr. Simpson from those employees entitled to vote on the representational vote.

Barry Wasnik

[29] The Employer argued that Mr. Wasnik was an employee in everything but form. It argued that there was a community of interest between the Waste Management Site employees and the other employees of the Town to have Mr. Wasnik declared to be an employee for the purposes of the representational vote.

[30] The Employer argued that the Board should undertake the economic control analysis which it undertook in *SGEU v. Rural Municipality of Meadow Lake, No. 588,*[3] which, the Employer argued, would show Mr. Wasnik to be an employee, not an independent contractor.

Analysis and Decision:

[31] The Board has recently reviewed the issues presented here. In *Saskatchewan Institute of Applied Science and Technology v. Saskatchewan Government and General Employees' Union*[4] (the "SIAST" decision) and *United Food and Commercial Workers, Local*

[3] *Supra* Note 2
[4] [2009] 173 C.L.R.B.R. (2d) 1, 2009 CanLII 72366 (SK LRB), LRB File No. 079-06

1400 v. 303567 Saskatchewan Ltd.. (c.o.b. as Handy Special Events Centre)[5] (The "Handy Special Events Centre" decision). In the Handy Special Events Centre case, Vice-Chairperson Schiefner[6] quoted from the SIAST decision as follows:

> ***[55]*** *The Board has on many occasions articulated helpful criterion for the making of such determinations but has also concluded that there is no definitive test for determining which side of the line a position falls (i.e.: within or outside the scope of the bargaining unit). Simply put, the Board's practice has been to be sensitive to both the factual context in which the determination arises and the purpose for which the exclusion have been prescribed in the Act. The Board tends to look beyond titles and position descriptions in an effort to ascertain the true role which a position plays in the organization. See: Grain Service Union (ILWU Canadian Area) v. AgPro Grain Inc., [1995] 1st Quarter Sask. Labour Rep. 243, LRB File No. 257-94; Saskatchewan Joint Board, Retail, Wholesale an Department Store Union v. Remai Investments Corporation, [1997] Sask. L.R.B.R. 335, LRB File Nos. 014-97 & 019-97; and University of Saskatchewan vs. Administrative and Supervisory Personnel Association [2008] Sask. L.R.B.R. 154, LRB File No. 057-05.*
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> ***[56]*** *The purpose of the statutory exclusion from the bargaining unit for positions whose primary responsibilities are to exercise authority and perform functions that are of a managerial character is to promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining (and to avoid muddying or blurring the lines between management and the bargaining unit). See: Hillcrest Farms Ltd. v. Grain Services Union (ILWU – Canadian Area), [1997] Sask. L.R.B.R. 591, LRB File No. 145-97.*
>
> ***[57]*** *The purpose of the statutory exclusion for positions that regularly act in a confidential capacity with respect to industrial relations is to assist the collective bargaining process by ensuring that the employer has sufficient internal resources (including administrative and clerical resources) to permit it to make informed and rational decisions regarding labour relations and, in particular, with respect to collective bargaining in the work place, and to permit it to do so in an atmosphere of candour and confidence. See: Canadian Union of Public Employees, Local 21 v. City of Regina and Regina Civic Middle Management Association, [2005] Sask. L.R.B.R. 274, LRB Files Nos. 103-04 & 222-04.*
>
> ***[58]*** *The Board has noted that, unlike the managerial exclusion, the duties performed in a confidential capacity need not be the primary focus of the position, provided they are regularly performed and genuine. In either case, the question for the Board to decide is whether or not the authority attached to a position and the duties performed by the incumbent are of a kind (and extent) which would create an insoluble conflict between the responsibilities which that person owes to his/her employer and the interests of that person and his/her colleagues as members of the bargaining unit. However, in doing so, the Board must be alert to the concern that exclusion from the bargaining unit of persons who do not genuinely meet the criteria prescribed in the Act may deny them access to the benefits of collective bargaining and may potentially weaken the bargaining unit. As a consequence, exclusions are generally made on as narrow*

[5] LRB File Nos. 064-12, 075-12, & 081-12, decision dated February 28, 2013 (not yet reported)
[6] *Supra* note 5 at para. [84]

> *a basis as possible, particularly so for exclusions made because of managerial responsibilities. See: City of Regina, supra.*
>
> ***[59]*** *Finally, the Board recognizes that employers and trade unions often negotiate scope issues and come to resolutions that may not be immediately apparent to the Board. In accepting these determinations, the Board acknowledges that the parties are in a better position to determine the nature of their relationship. The determinations that have been made by the parties can be of great assistance to the Board in understanding the maturity of the collective bargaining relationship and kinds of lines that the parties have drawn between management and its staff. However, in the Board's opinion, when it is called upon to make determinations as to scope, the benchmark for our determinations must be s. 2(f)(i) of the Act (the definition of an "employee") and our understanding of the purposes for which the statutory exemptions were included. While we are mindful of the agreements of the parties as to the scope, the genesis for our determinations must be The Trade Union Act and the jurisprudence of the Board in interpreting that statute.*

[32] In *Service Employees International Union, Local 333 v. Bethany Pioneer Village Inc.,*[7] the Board identified the test to be applied with respect to casual employees as follows:

> *[52] The test, and basis for the test, as to whether a person nominally identified as a "casual" worker has a sufficiently substantial employment relationship to be considered an "employee" for the purposes of determining the issue of the level of support for an application for certification was outlined by the Board in Lakeland Regional Library Board, supra, as follows, at 74:*
>
> > *It has long been established that larger bargaining units are preferred over smaller ones, and that in an industrial setting all employee units are usually considered ideal. As a general rule the Board has not excluded casual, temporary or part-time employees from the bargaining unit.*
> >
> > *However, the Board has also applied the principle that before anyone will be considered to be an "employee", that person must have a reasonably tangible employment relationship with the employer. If it were otherwise, regular full-time employees would have their legitimate aspirations with respect to collective bargaining unfairly affected by persons with little real connection to the employer and little, if any, monetary interest in the matter.*
>
> *[53] Accordingly, the Board has looked particularly at two aspects: real employment connection and monetary interest in the outcome. This dictum has been applied since by the Board in numerous decisions including, to name a few, Retail, Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd., [1996] Sask. L.R.B.R. 337, LRB File No. 115-96, Vision Security and Investigation Inc., March 2000, supra, and Aramark Canada Ltd., supra, where the standard was referred to as a "sufficiently tangible employment relationship."*
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> *[54] In Aramark Canada Ltd. and Vision Security and Investigation Inc., March 2000, both supra, as in many other cases of this kind, the Board engaged in an analysis of the number of hours worked by the persons in dispute over a particular – but not necessarily the same in every case – period of time, as a*

[7] [2007] Sask. L.R.B.R. 611, 2007 CanLII 68759 (SK LRB), LRB File No. 036-06:

> *significant measure of connection with the workplace in order to determine the tangibility of the employment relationship. In each case the Board determined what it deemed to be a reasonable ratio of hours worked over the period of time as evidence that a sufficiently tangible employment relationship existed and that the particular individual had a sufficiently reasonable monetary interest in the matter but recognized that, while this might be the best way to determine the issue, it may appear to be somewhat arbitrary. In Service Employees International Union, Local 299 v. Vision Security and Investigation Inc., [2000] Sask. L.R.B.R. 121, LRB File No. 228-99 (February 21, 2000), the Board stated as follows at 125:*
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> > *In Retail, Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd., [1996] Sask. L.R.B.R. 337, LRB File No. 115-96, the Board acknowledged that the process for determining "employee" status for casual or on-call staff may be decided by criteria that appear somewhat arbitrary. Nevertheless, the Board is required to make the decision using some criteria that captures the majority of persons who have a tangible employment relationship with the employer.*
>
> *[55] In Vision Security and Investigation Inc., March 2000, supra, at 155, the Board observed that different criteria may pertain in different cases depending on the facts, as follows:*
>
> > *The criteria adopted by the Board in each case must be responsive to the facts of each situation and the Board is not bound to adopt identical criteria in every case dealing with casual employees. Because of this uncertainty regarding employee status, parties are encouraged to seek a determination of employment criteria early in the process of a certification through a request for a preliminary determination.*

Zoria Moen

[33] When these tests are applied to the fact surrounding Ms. Moen's employment relationship, that relationship is insufficient for her to participate in the representational vote with respect to certification.

[34] Ms. Moen's connection to the workplace was not of long standing. She worked only 68 hours in the (2) two weeks after she was hired. Thereafter, her only involvement in the workplace was to spend 16 hours preparing Christmas decorations for the Town in December, for which she was paid only 8 hours. There is no definite plan for her to return to work upon her being declared medically fit to work. While Ms. Moen testified that she would like to return to work, Ms. Gaetz testified that there had been no discussion concerning any return to work.

[35] For these reasons, the ballot of Zoria Moen shall be set aside and no counted in respect of the representational question.

Jeffrey Simpson

[36] The arguments concerning Mr. Simpson were whether he was, for the purposes of the application, an out-of-scope employee pursuant to section 2(f)(i)(A). We have no difficulty in determining that he was not.

[37] The facts make it clear that he resigned not later than November 5, 2012. Thereafter, he reverted to his former labourer position. While Mr. Romphf may have thought he would continue on, it is clear from his testimony and our findings of fact above that all he agreed to do, along with the other employees of the Town, was to ensure that they "wouldn't let things blow up". It was clear from his testimony and that of Mr. Romphf that he declined any express invitation to continue in his former position.

[38] At the time of the application, and at the time of the vote with respect to this matter, Mr. Simpson was not an out-of-scope employee and is, therefore, qualified to vote on the representational question. His ballot shall be counted.

Barry Wasnik

[39] The Board considered a similar situation in *SGEU v. Rural Municipality of Meadow Lake, No. 588.*[8] In that case, the Board reviewed its jurisprudence and the "economic control" test which was adopted by the Board in *SGEU v. Saskatoon Open Door Society.*[9]

[40] The position under consideration in the *R.M of Meadow Lake* case was, like here, a landfill custodian. The major difference in the *R.M. of Meadow Lake* case was that in addition to a monthly salary, the landfill custodian was also permitted to salvage rights in the landfill.

[41] In *Retail, Wholesale and Department Store Union, Locals 539 & 540 v. Federated Co-operatives Limited*[10], the Board said:

> *… An independent contractor is essentially a business person, an entrepreneur, a risk taker, who takes chances in the marketplace with a view to making a profit. Success or failure of his enterprise depends upon how well he utilizes the capital*

[8] *Supra* Note 2
[9] *Supra* Note 2 at para. 57
[10] [1989] Fall Sask. Labour Rep. 60, LRB File No. 256-88

> *and labour that he controls and how well he assesses the marketplace. Regardless of how inferior a businessman's bargaining power may be or how poor his bargain, he is not an employee within the meaning of the Act.*

[42] The Board has also looked to criteria developed by the Ontario Labour Relations Board in *Algonquin Tavern c. Canada Labour Congress.*[11] Those criteria are:

1. The use of, or right to use substitutes…

2. Ownership of instruments, tools, equipment, appliances, or the supply of materials…

3. Evidence of entrepreneurial activity…

4. The selling of one's services to the market generally…

5. Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes…

6. Evidence of some variation in the fees charged for the services rendered…

7. Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit…

8. The degree of specialization, skill, expertise or creativity involved…

9. Control of the manner and means of performing the work – especially if there is active interference in the activity…

10. The magnitude of the contract amount, terms, and manner of payment…

11. Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.

[43] In the *R.M. of Meadow Lake* case, the Board concluded that the Landfill custodians in that case were not employees, but were independent contractors. It based its conclusion on a number of facts. These were:

1. The Landfill custodians were paid on a monthly basis not on an hourly rate as other municipal employees.

2. The contact also provided that the landfill custodians would have salvage rights at the landfill which could supplement their income considerably.

3. The Landfill custodian's hours of work and methods used by the Landfill custodians was not regulated.

4. The Landfill custodians had an unrestricted right to hire replacements.

5. The Landfill custodians did not have frequent contact with the other municipal employees.

6. There was no lateral movement between the landfill custodians and other positions with the Municipality.

[44] Based upon these factors, the Board in the *R.M. of Meadow Lake* case found that there was "no sufficient community of interest with the Employer's other employees". It then found the Landfill custodians to be independent contractors.

[45] The evidence in this case did not address all of the criteria set out above. However, from the evidence which was presented, including the testimony of Mr. Wasnik and a review of his contract with the Town that he should be considered to be an employee for the purposes of the representational vote.

[46] Mr. Wasnik's contract does not allow him the independence which seemed to be afforded the Landfill custodians in the R.M. of Meadow Lake case. He is paid an hourly rate, which rate was amended, without negotiation by the Chief Administrative Officer of the Town. He does not enjoy any salvage rights. He has fixed days and times that he (or his replacement) must have the landfill open.

[47] Conversely, he does have the authority to engage others provided a list of those persons is provided to the Town. He does not have frequent contact with other employees apart from contact resultant from the performance of the other employees duties in depositing material at the landfill. There was no evidence that he socialized with other employees, attended staff

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[11] [1981] 3 Can. LRBR 337 at 360

meetings, or that he was considered by the other employees to be “one of them”. Nor was there any evidence that he performed other duties in substitution for other town employees or that other town employees conversely performed his duties at the landfill.

[48] If we consider the criteria in *Algonquin Tavern, supra,* the relationship looks even less like that of an independent contractor.

> *1.* *Mr. Wasnik has the right to engage others in substitution for him.*
>
> *2.* *All of the necessary materials are provided by the Town. The only evidence that Mr. Wasnik provided any materials on his own was that he installed an air conditioner in the entrance booth and brought his own generator to power it.*
>
> *3.* *We had no evidence of entrepreneurial activity on the part of Mr. Wasnik.*
>
> *4.* *There was no evidence that Mr. Wasnik’s services were provided exclusively to the Town. He did, however, engage in farming activity apart from his employment with the Town.*
>
> *5.* *Mr. Wasnik was not constrained in what jobs he might accept. He was not required to work exclusively for the Town.*
>
> *6.* *There was no evidence that any additional fees, other than the stipulated hourly rate were charged or paid.*
>
> *7.* *There was no independent business being carried on. Mr. Wasnik was responsible for the waste management site and was required by his contract to perform certain tasks. There was no evidence, apart from his farming operation, that he was engaged in a similar enterprise elsewhere.*
>
> *8.* *The evidence was that little training was required to perform the task assigned by the Town. There was no evidence that any special training, professional qualification or skill was required.*
>
> *9.* *Mr. Wasnik had control of the waste management site and the evidence was that he directed both users of the site and Town employees as to where they should deposit waste. However, there was nothing to suggest that there was anything unique in what he did or in the manner or means of performing the work that indicated complete control.*
>
> *10.* *The magnitude of the contract was not great, nor were the payments thereunder.*
>
> *11.* The times and dates for which the waste management site was to be opened and the specific tasks which were to be performed were similar to tasks that might be assigned to any other municipal employee. However, there were major differences with respect to payment for statutory holidays, payment of CPP, EI and

> *Income Tax remittances, pension contributions and availability of other employee benefits.*

[49] Even if we had concluded that Mr. Wasnik was an independent contractor, we would still have to consider section 2(f)(i.1). For ease of reference, that provision provides:

> *2(f) "employee" means:*
>
> *(i.1) a person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining.*

[50] In our opinion, the terms of employment of the manager of the waste management site and the relationship between Mr. Wasnik and the Town can be the subject of collective bargaining. The current agreement specifies wages, hours of work, job requirements and description, all of which are normal in collective bargaining. Arguably, the ability to hire replacement workers would not normally be a part of a collective agreement, but the Board is aware of situations where the collective agreement provides for employees to trade shifts or provide replacements.

[51] For these reasons, we find that Mr. Wasnik's vote shall be considered in respect of the representational question.

Decision and Order

[52] The following (7) seven employees are hereby declared eligible to vote on the representational question:

1. Brian Brass
2. Frank Varsanyi
3. Neil Marvin
4. Lawrie Wilkie
5. John Briere
6. Jeffrey Simpson
7. Barry Wasnik

[53] The Board Agent authorized to conduct the vote shall remove any ballots other than those specified above, shall open and tally the votes cast, and provide an *in camera* panel of the Board with his report, with respect to the voting results forthwith.

DATED at Regina, Saskatchewan, this **22nd** day of **March, 2013.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

Dissent by Member John McCormick

[54] For the reasons which follow, I, JOHN McCORMICK respectfully dissent from the majority decision in this matter. I would have included Zoria Moen on the list of employees eligible to participate in the representation vote, and would have excluded Barry Wasnik from participation in the representation vote.

[55] Unlike the majority, I am of the opinion that the evidence established that Zoria Moen had a sufficient interest in the outcome of the representation vote such that her ballot should be counted. Admittedly, she was not an employee of long standing. She testified that she would like to be and intended to return to work with the Town when her illness permitted that to occur. The evidence from the Town was that they had taken no steps which would have prevented her return to work when possible.

[56] Furthermore, she did work for (16) sixteen hours when getting the Christmas decorations ready. This shows willingness on her part to accept alternate forms of employment if necessary to return to work.

[57] With respect to Mr. Wasnik, I do not believe that the Town can have it both ways. He was described in argument by the Town's counsel as being "an employee in everything but form". There should be some consistency in how he is dealt with by the Town. He should not be a contractor for some purposes and an employee for others. He had the ability to hire and fire employees whom he engaged independently to replace him from time to time. While it was not

argued, presumably, he could, for those reasons, if he is an employee, be considered to be within the exclusion for management employees within the *Act.*

[58] In the *Meadow Lake* case, the Board found the landfill attendants not to be employees. I see little distinction in the factual situation here and the factual situation in the *Meadow Lake* case and would have reached the same conclusion the Board reached in that case.

John McCormick