Saskatchewan
Labour Relations Board

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. AFFINITY CREDIT UNION (ST. MARY'S BRANCH), Respondent

LRB File Nos. 032-14 & 033-14; June 25, 2014
Vice-Chairperson, Steven D. Schiefner; Members: Duane Siemens and Steven Seiferling

For the Applicant Union: Ms. Dawn McBride.
For the Respondent Employer: Mr. John R. Beckman, Q.C.

CERTIFICATION – Eligibility – Trade union files certification application with Board – Dispute arises over eligibility of employee who accepted a promotion into workplace and was scheduled to begin work prior to the date of application but was injured and on medical leave at time application was filed and at time of vote – Union argues disputed employee ineligible to participate in representational vote – Employer argues employee was eligible – Board concludes that employee's transfer to workplace was effective prior to trade union's application – Board satisfied that employee had tangible connection to workplace – Board concludes employee was eligible to participate in representational question.

CERTIFICATION – Practice and Procedure – Objection to Conduct of Representation Vote – Trade union files certification application with Board – Board reviews trade union's application and staff investigate size of bargaining unit – Based on Board's initial review of trade union's application, Board satisfied that at least 45% of employees in workplace support trade union's certification application - Board orders pre-hearing vote – Agent conducts vote and ballot box sealed pending hearing – At hearing, Board determines additional employee was eligible to vote – With additional employee, employer asks Board to review sufficiency of support filed with trade union's application - Board not satisfied that it is appropriate or desirable to retrospectively review Board's initial determinations as to sufficiency of support evidence filed with certification applications once a representational vote has been Ordered save in exceptional circumstances – Board concludes addition of one employee is not exceptional circumstances - Board dismisses objection to conduct of vote – Board directs tabulation of ballots from representational vote.

Trade Union Act, s. 6.

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** These proceedings involve an objection to the conduct of a representational vote conducted in a certification application pending before the Saskatchewan Labour Relations Board (the "Board"). The objection was filed by the respondent employer, Affinity Credit Union (the "Employer"). The applicant trade union is the United Food and Commercial Workers, Local 1400 (the "Union").

[2] On February 21, 2014, the Union filed a certification application[1] with the Board seeking to represent the employees of the Employer. In its application, the Union estimated that there were fifteen (15) employees in the unit. Upon receipt of the Union's application, staff of the Board conducted an investigation into the Union's application (the specifics of this investigation was unknown to the parties and was not disclosed at the hearing). Satisfied on the face of the Union's application that the Union enjoyed the support of at least 45% of the employees in the unit proposed by the Union, the Board's Executive Officer issued a direction for vote later that same day, February 21, 2014. A representational vote was conducted at the workplace on February 25, 2014.

[3] A dispute arose between the Union and the Employer as to eligibility to certain employees to vote. As a consequence, the Employer filed an Objection[2] to the Conduct of the Vote on February 27, 2014. The Employer's Objection to the Conduct of the Vote was heard by the Board on May 15, 2014. By the time of the hearing, the status of only one (1) employee was in dispute, namely Mr. Chad Jacobson.

[4] Prior to the Union filing its certification application, Mr. Jacobson was an employee of the Employer but did not work in the particular workplace the Union now seeks to organize; namely, the Employer's St. Mary's branch. Prior to the Union filing it's certification application, the Employer posted a notice for a temporary, full-time position in the St. Mary's branch to back-fill for an employee who was away (or scheduled to be away) on maternity leave; namely, Ms. Monica Ledoux. Mr. Jacobson applied for this position and was the successful candidate. Mr. Jacobson was awarded the position on or about January 24, 2014 and staff in the St. Mary's branch were informed that Mr. Jacobson would be joining the workplace. He was scheduled to commence work at the St. Mary's branch on February 3, 2014. The Employer

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1 Application bearing LRB File No. 032-14.
2 Application bearing LRB File No. 033-14.

made the requisite internal change to it personnel and payroll systems to reflect Mr. Jacobson's move to the St. Mary's branch. Mr. Jacobson contacted his new supervisor and made arrangements to begin work on February 3, 2014.

[5] Unfortunately, on February 2, 2014, Mr. Jacobson was injured while playing in a basketball game and was unable to commence work as originally scheduled. Mr. Jacobson apologetically notified Ms. Anita Kunz, his new supervisor at the St. Mary's branch, of his injury while sitting in the emergency room at the Royal University Hospital in Saskatoon. Mr. Jacobson's injury was serious enough to require surgery and Mr. Jacobson was on medical leave at the time the Union filed its certification application (February 21, 2014) and on the day the representation vote was conducted (February 25, 2014). Mr. Jacobson was fit to return to work on or about March 18, 2014, at which time, he began working at the St. Mary's branch.

[6] The parties agreed that, excluding Mr. Jacobson, there were seventeen (17) employees working in the bargaining unit at the time the Union filed its certification application and that all of those employees remained eligible to vote on the date of the vote. If Mr. Jacobson is also an employee, the size of the bargaining unit grows to eighteen (18).

[7] Because of Mr. Jacobson's injury, a temporary employee by the name of Ms. Sara Krienke remained working at the St. Mary's branch longer than she was originally scheduled. Ms. Krienke was working at the time of the Union's application and at the time of the representational vote. Ms. Krienke participated in the representational vote and the parties agreed she was entitled to do so. It is also noted that Ms. Ledoux also participated in the representational vote and the parties agreed that she was also entitled to do so.

[8] The Employer takes the position that Mr. Jacobson was properly an employee of the St. Mary's branch at the relevant times and thus was eligible to vote. In light of the growth in the size of the bargaining unit, the Employer also asks this Board to review the support evidence that was filed with the Union's certification application. The Employer takes the position that, if we now determine that the Union did not have support from at least 45% of a unit comprised of eighteen (18) employees, the Union's certification application ought to be dismissed and the ballots from the pre-hearing representational vote destroyed uncounted.

[9] The Union takes the position that Mr. Jacobson was not an employee of the bargaining unit at the relevant time. The Union notes that, although he was scheduled to commence work on February 3, 2014, he was unable to do so and was required to be on medical leave. The Union notes that Mr. Jacobson did not begin working at the St. Mary's branch until well after the representational vote was conducted. In any event, the Union argues that it would be inappropriate to include Mr. Jacobson within the bargaining unit, as the Union could not reasonably have known he was an employee and had no practicable opportunity to solicit his support prior to filing its certification application.

Relevant statutory provisions:

[10] Sections 6 of *The Trade Union Act*, R.S.S. 1978, c.T-17, read, in part, as follows:

> ***6****(1) Subject to subsections (1.1) and (2), in determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board must direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
> *(1.1) No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application.*

Analysis and Conclusion:

Implications of Proclamation of <u>The Saskatchewan Employment Act</u> on the Union's application:

[11] At the time the Union's certification application was filed and at the time the representational vote was conducted, *The Trade Union Act* was the relevant legislative authority. Although *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1, has since been proclaimed, the parties agreed that the provisions of *The Trade Union Act* are the relevant legislative authority for determining the Employer's objection to the conduct of the vote.

Eligibility of Mr. Jacobson to Participate in the Representational Vote:

[12] This Board's jurisprudence regarding eligibility to participate in a representational vote has been relatively consistent. As was noted by this Board in *Calvin Ennis v. Con-Force Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 1985, et.al.*, [1992] 2nd Quarter Sask. Labour Report 117, LRB File Nos. 185-92 & 188-92, the general standard for determining voter eligibility when a representational vote is ordered is that a person must be an

employee on the date of the application and on the date of the vote. As the Board noted in that case, everyone is well aware that this rule neither achieves perfect predictability nor perfect democracy. Rather, it represents a compromise intended to give effect to s. 3 of the *Act* (by ensuring that the representational question is left in the hands of the people who have a legitimate interest in the issue) while, at the same time, it provides a bright line from which the parties can plan their affairs with a reasonable degree of certainty and predictability.

[13] This Board's jurisprudence also acknowledges that there are exceptions to that general rule. For example, certain employees may be eligible to participate in the representational question, even if they were not working for the subject employer (or within the scope of the proposed bargaining unit), at the relevant time, if it can be established that they had a sufficient and tangible connection with the workplace. The common application of this exception involves casual employees who have an ongoing relationship with the workplace but may not have been present in the workplace at the relevant times. See: *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts, Local 295 v. The Globe Theatre Society*, [2012] 203 C.L.R.B.R. (2nd) 262, 2011 CanLII 75423 (SK LRB), LRB File No. 035-11. See also: *United Food and Commercial Workers, Local 1400 v. 303567 Saskatchewan Ltd. (Handy Special Event Centre)*, (unreported decision dated February 28, 2013), LRB File Nos. 064-12, 075-12 & 081-12. The accepted test for determining the inclusion of persons nominally identified as "*casual*" employees was reiterated by the Board in *Service Employees International Union, Local 333 v. Bethany Pioneer Village Inc.* [2007] Sask. L.R.B.R. 611, 2007 CanLII 68759 (SK LRB), LRB File No. 036-06:

> *[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:*
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> > *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.*
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> > *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 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.*
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> *[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:*
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> > *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.*

[14] There is no dispute that Mr. Jacobson was an employee of the Employer at the time the Union filed its certification application and at the time of the representational vote. The dispute is when his transfer became effective and whether or not he had established a tangible connection with the St. Mary's branch prior to the Union's application. In our opinion, Mr. Jacobson's transfer was effective prior to February 21, 2014 and he had a sufficient and tangible connection with the proposed bargaining unit to justify his participation in the representational question. Mr. Jacobson had accepted a position in the workplace and, but for his unfortunate injury, he would have been working and he would have been working at the St. Mary's branch.

He was scheduled to begin work on February 3, 2014 and both he and the Employer took all necessary steps to complete his transfer. Upon his return from medical leave, Mr. Jacobson began working at the St. Mary's branch. While his injury may well have frustrated his ability to work and delayed his start date, there can be little doubt that, at the relevant times, he had a tangible connection with the bargaining unit and had both a monetary and personal interest in the outcome of the representational question.

[15] In our opinion, Mr. Jacobson was an employee at the relevant time and was thus eligible to participate in the representational question.

Review of Executive Officer's Direction for Vote:

[16] With our determination that Mr. Jacobson was an employee at the relevant time, the size of the workplace grows to eighteen (18). The Employer asks that we review the support evidence filed by the Union with its certification application to determine if it was sufficient to satisfy the threshold of 45% required by statute for the conduct of a representational vote for a bargaining unit of eighteen (18).

[17] When the Union submitted its certification application, the Union estimated the size of the bargaining unit at fifteen (15) employees. The Union filed evidence demonstrative of support for its application sufficient for a unit that size (in fact, a little bigger). Although the Union and the Board are aware of the number and names of the employees who indicated their support for the Union's application, by long standing practice of this Board, the Employer is not entitled to this information (nor does it seek to have access to such information). Nonetheless, the Employer asks that we revisit the sufficiency of support evidence filed by the Union with its application. Even before we get into the substance of our decision, the Employer's request raises an interesting dilemma for the Board; namely, how do we explain our reasons without disclosing information about the evidence of support filed with the Union's application? In our opinion, we can't.

[18] While it is contrary to the long standing practice of this Board to disclose any information to an employer about the support evidence filed by trade union[3], we deem that it is appropriate to disclose certain limited information in the present application. The Union filed

[3] Just as it is contrary to the long standing practice of this Board to disclose information to either the affected trade union or the subject employer as to the support evidence filed by an employee in a rescission application.

evidence of support for its certification application from eight (8) employees. We disclose this information solely for the purpose of explaining the determinations we have made herein. The disclosure of this information should not be taken as a departure from this Board historic practice of not disclosing information as to the evidence of support filed by applicants in certification or rescission applications.

[19] With our conclusion that Mr. Jacobson was an employee at the relevant time, the support evidence filed by the Union becomes insufficient; representing only 44.44% of the eligible employees in the bargaining unit. In other words, with the addition of Mr. Jacobson to the workplace, together with Ms. Ledoux's maternity leave and the extended work term of Ms. Krienke, we now know that that bargaining unit was larger than originally thought.

[20] The question raised by the Employer's request is whether or not this determination undermines the Order issued by the Executive Officer to conduct a representational vote. In support of its position that the representational vote ought to be set aside, the Employer notes that s. 6(1.1) of *The Trade Union Act* directs that no representational vote shall be conducted unless the applicant tenders evidence of support sufficient to demonstrate that at least 45% of the employees in the appropriate unit support the application. The Employer argues that, without the requisite evidence of support, the Union's certification application is void *ab initio* and ought to be dismissed. With all due respect, we disagree with the Employer's position.

[21] In our opinion, it is both unnecessary and inappropriate to revisit the Executive Officer's decision to Order that a representational vote be conducted in the fashion suggested by the Employer. Simply put, we find that s. 6(1.1) was not intended by the Legislature to be applied retrospectively once a representational vote has been conducted.

[22] We find support for this conclusion in the express language of s. 6(1.1). This provision enjoins the Board from directing a representational vote if we are not satisfied that the subject application (i.e.: the application giving rise to the representational question) is accompanied by sufficient evidence of support. The operative time for this determination is when the application is filed with the Board. We note that the provision directs that the determination to conduct a representational vote is based on the applicant's application, together with any investigations conducted by the Board. While Board staff make reasonable attempts to

verify the size of the bargaining unit and the names of the individuals who are entitled to participate in the representational question (i.e.: establish a list of eligible voters), s.6(1.1) anticipates that, at the time the determination is made to direct that a representational vote be conducted, the Board will not have the full spectrum of information that would normally be available at a hearing. Furthermore, at that point in time, the information available to the Board is not tested. In our opinion, s. 6(1.1) enjoins the Board from directing a representational vote only if the Board's initial examination of the applicant's application reveals that it is not accompanied by the prescribed threshold of support; it was not intended to be applied retrospectively in the fashion suggested by the Employer.

[23] Furthermore, if the Legislature had intended that employers must be contacted prior to a decision being made to conduct a representational vote, it would not have used the language that it did. While s. 6(1.1) requires the Board to review any application giving rise to the representational question to ensure that it is accompanied with evidence of sufficient support, the determination to conduct a representational vote is basis of the applicant's evidence and such investigations as may be conducted by the Board. The provision does not require the Board to wait for the subject employer to file a Reply or prepare a statement of employment or otherwise participate in the Board's investigation. Although the practice of the Board is to involve the employers in its investigations, it should be noted that the provision does not require that we contact the subject employer in every case[4]. In fact, the provision does not even mention employers.

[24] In our opinion, once a representational vote has been conducted, little utility is served in disregarding the wishes of the employees through the retrospective application of s. 6(1.1) even if it is subsequently discovered that the requisite threshold of support was not filed with an application unless an obvious and overriding error is discovered[5]. The purpose of s. 6(1.1) is to prevent employees from being asked to decide the representational questions if an applicant can not demonstrate that a sufficient threshold of employees in the workplace support the applicant's initiative. The provision is a shield to the disruption to the workplace associated with conducting a representational vote if the application does not, at least, have a reasonable chance of success. However, once a representational vote has been conducted, no labour

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[4] For example, information as to the size of the bargaining unit could be (and often is) verified through contact with the employees in the workplace.

relations purpose is served by ruminating on whether or not that vote should have occurred in the first place. Doing so, does not spare employers from the disruptions, the cost, the loss of productive, and the inconvenience of accommodating a representational vote. Nor does it spare employees from the conflicts and campaigns that typically accompany a vote on the representational question. *The Trade Union Act* was intended to be an anvil upon which employees could forge a collective bargaining relationship with their employer. While all labour relations regimes include various restrictions and/or limitations on the right of employees to organize if they desire to do so, each restriction and each limitation on the fundamental right of employees to decide the representational question serves a recognized labour relations purpose. The retrospective application of s. 6(1.1) in the fashion proposed by the Employer would strip employees of the right to decide the representational question without serving any valid labour relations purpose. In our opinion, absent evidence of an obvious and overriding error in directing that a representational vote occur, once that vote has been conducted, the decision to conduct that vote is not reviewable.

[25] In the present application, there was no dispute that the unit applied for was appropriate for collective bargaining. Other than the status of Mr. Jacobson and the Employer's object to the conduct of the representational vote, the only issue is whether or not the majority of employees in the bargaining unit wish to be represented by the Union for the purpose of collective bargaining.

[26] Notwithstanding that we now know that the Union did not enjoy the requisite level of support, we are not satisfied that a significant and overriding error occurred in directing that a representational vote be conducted. Based on the information available at that time, the conclusion that the Union enjoyed the support of at least 45% of the employees in the bargaining unit would appear to have been reasonable. Under ordinary circumstances, the size of the bargaining unit at the St. Mary's branch would have been less than eighteen (18). It was only the occurrence of a maternity leave, together with a medical leave, that the denominator of the equation grew to eighteen (18). In our opinion, it is not patently obvious that the investigation of the Board staff (as to the size of the bargaining unit) and/or the Executive Officer's conclusion that the Union enjoyed the support of the requisite percentage of employees were seriously flawed. To the contrary, in light of the fact that two (2) employees; namely, Ms. Ledoux and Mr.

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[5] An example of such an error might be a situation where it was discovered or determined by the Board that the appropriate bargaining unit is so much larger than originally thought that it would have been statistically impossible

Jacobson; were essentially sharing the same position (potentially 3 employees, if you include Ms. Krienke), the assumption that the size of bargaining unit did not exceed seventeen (17) employees was both reasonable and understandable. In our opinion, there is nothing exceptional about these circumstances to justify revisiting the Executive Officer's decision directing that a representational vote take place. As we have indicated, absent evidence of an obvious and overriding error in directing that a representational vote occur, once that vote has been conducted, the decision to conduct that vote is not reviewable.

[27] For the foregoing reasons, the Employer's objection to the conduct of the representational vote is dismissed. The box containing the ballots from the within representational vote shall be unsealed and the ballots therein tabulated in the ordinary course.

[28] Board member Seimens concurs with these Reasons for Decision. However, it is noted that Board member Seiferling dissents.

DATED at Regina, Saskatchewan, this **25th** day of **June, 2014.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson

for the applicant trade union to have filed sufficient evidence of support.

Dissent (in part) - Board Member Seiferling

[29] I have reviewed the reasons of Vice-Chair Schiefner, and I concur with the majority's conclusion that Mr. Jacobsen was an employee at all material times, and thus eligible to participate in the representational question.

[30] However, with respect, the majority's conclusion that the vote should be tabulated cannot be maintained. The cards submitted do not meet the threshold of 45%, and therefore no vote should have been directed in this case. In addition, the Employer was not afforded an opportunity to participate in the investigation by the Board, violating the right to be heard.

The 45% Threshold Question – Board Lacks Jurisdiction

[31] When confronted with the issue of this Board's discretion regarding the 45% threshold, Ms. McBride, counsel for the Union, provided the following via email, copying Mr. Beckman, counsel for the Employer:

> *[T]his matter was before the Board on May 15th 2014. The Board allowed Mr. Beckman and myself to file further submissions on the issue of the 45% threshold in s.6(1.1) Trade Union Act (now SEA). The Union's position is that the Board does not have discretion with respect to this threshold. As such neither Mr. Beckman or I will be putting forward any case law or written submissions and the Board can proceed to decide the application.*
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> *[emphasis is mine]*

[32] The main issue with respect to tabulation of the vote is whether the Board has discretion to order the tabulation of a vote when the evidence presented at a hearing confirms that the threshold (45% in this case) is not met. On the issue of the threshold, the Alberta Labour Relations Board, considering very similar language in the Alberta legislation, has made it clear that there is no jurisdiction or discretion for the Board to order a vote where the threshold (40% in Alberta) is not met. In the *Calgary Stampede* case, the Board commented as follows:[6]

> *The fact remains that the Board cannot order a vote without the requisite 40% support. Nothing provided by the Employer satisfies us that the Board Officer's findings on the issue of 40% support should be altered.*
>
> *[emphasis is mine]*

[6] *Certain Employees of the Calgary Exhibition and Stampede v Calgary Exhibition and Stampede Limited*, 2013 CanLII 68713 (AB LRB) at para 13.

[33] It appears clear from Ms. McBride's email, and from the *Calgary Stampede* decision, that the Board does not have the discretion to order a vote where the threshold is not met. The parties' clear communication, and the case law, should have put an end to this matter, but the majority has concluded that the vote should be tabulated regardless of the case law and the parties' wishes.

[34] The Board does not have the discretion, or jurisdiction, to order a vote where the 45% threshold is not met, and therefore the vote directed by the Board in this case should never have been ordered, and should be declared void *ab initio*.

[35] On the issue of threshold, I would also note that the Board should not render a decision on an issue without fully putting the issue to the parties. I fully realize that the comments may be *obiter*. Based on Ms. McBride's email, the parties appeared to have a clear understanding between them that the Board lacked jurisdiction. Based on that understanding, the Board should not explore other options or perform legal research, without affording both parties the right to comment on the issue. The Saskatchewan Court of Queen's Bench commented on the issue of affording the parties a right to be heard on issues that the Board intends to address in its decision in the *Canadian Linen* case,[7] as follows:

> *[25] The Board owed a duty to both parties to adhere to the principles of fairness and natural justice. Whether a reasonable person test is applied, or whether one simply asks what would have been fair in this situation, or whether one inquires into the opportunity of each party to comment on, distinguish or contradict information before the Board, a breach occurred.*
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> *[…]*
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> *The actions of the Board appear clearly to have gone beyond those of a decision-maker whose own research identifies a number of additional legal authorities worthy of consideration and comment, but not necessarily crucial to a decision.* ***In this instance the research, not disclosed to the parties, influenced the Board's decision in a way prejudicial to the Applicant.*** *Given the substantial magnitude of the Board's research into legal and policy issues and the fact that the Board's work product was applied entirely to the disadvantage of the Applicant,* ***fairness and justice required that the Board "take the initiative in inviting the interested parties to submit representations to it****" (Halsbury's Laws of England, 4th ed. reissue, 1989, Vol. I(I), para. 96).*
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> *[emphasis is mine]*

[7] *Canadian Linen and Uniform Service Co. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2005 SKQB 264 (CanLII) at paras 25-26.

[36] At a minimum, the Board should have advised the parties that the Board was exploring the issue of discretion to order the vote to be counted, and afforded the parties the opportunity to make representations.

The Right to be Heard – Audi Alteram Partem

[37] In addition to the threshold issue, the timing of the Direction to Vote is problematic, as is the lack of opportunity afforded to the Employer to participate in the investigation.

[38] In the present case, Ms. Humm testified that she was the proper representative for labour relations matters for the Employer. The application was filed on Friday, February 21, 2014 and a vote directed that same day. The vote was scheduled for Tuesday, February 25, 2014. In the Board's Notice of Vote, the Appendix which would normally contain a voters list simply contained the line "**Voters list to be determined on site**". The Employer did not file a Reply until after the day of the vote, and the Reply included a list of employees in the proposed unit, showing eighteen (18) eligible employees. Based on Ms. Humm's testimony, there is no evidence that the Employer was afforded an opportunity to participate in the investigation of the evidence submitted in support of the application. I note here that the parties cannot compel Board members or agents to give evidence, and therefore the only evidence we have on this investigation is that of Ms. Humm, which is not contradicted. Based on Ms. Humm's evidence, this Board can only conclude that the employer was afforded the opportunity to participate in the Board's investigation, and in the creation of an eligible voter's list.

[39] I agree with the Vice Chair that the Board must consider the evidence submitted by the Applicant in support of the application. However, the requirement goes beyond simply considering the evidence in support – s. 6(1.1) of *The Trade Union Act* also requires an investigation of that evidence. I reproduce s. 6(1.1) here for ease of reference:

> *No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application* ***and the board's investigation in respect of that evidence****, that at the time of the application at least 45% of the employees in the appropriate unit support the application.*
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> *[bolded emphasis is mine]*

[40] I note that the requirement in s. 6(1.1) are conjunctive – the consideration of the application evidence, and the investigation into that evidence, are joined by the word "and" not

the word “or”. Effectively, there must be consideration of the evidence filed in support of an application, *and* an investigation of that evidence. Each party must be afforded the opportunity to participate in that investigation. In the present case, the opportunity to comment would necessarily have included a request to the Employer to provide the Board with the number of employees in the proposed unit, or an employee list, prior to the Board directing a vote. By contrast, the vote was ordered hastily, and the Employer did not submit a voters list until the day after the vote. The haste with which the vote was ordered is problematic, as the Employer had no meaningful opportunity to Reply to the application, or participate in the Board’s investigation.

[41] Failure to afford a Respondent the right to participate in an investigation is a violation of the right to be heard, or the *audi alteram partem* rule. In a 2012 decision of the Alberta Labour Relations Board, the right to be heard, and the fairness implications, were discussed as follows:[8]

> *[40] The requirement to provide sufficient particulars in support of a complaint was discussed by the Board in Plumbers, Local 488 v. Vikon Technical Services Ltd., [1985] Alta. L.R.B.R. 85-073 at page 2:*
> *[…]*
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> > *We insist on particulars in order to ensure fairness to all parties. We have broad powers given to us by the Legislature. The exercise of these powers may cause major inconvenience to the party complained against. Answers must be given, officer's investigations cooperated with, records that would otherwise be confidential disclosed, hearings attended, and lawyers sometimes retained. We will only enter into or continue this process where there is an allegation that, if true, would lead us to believe that the legislation may apply or have been violated. If an applicant cannot even allege facts that would, if proven, result in a Board order or remedy, then there is no justification for the process being started.*
> >
> > ***The other aspect of fairness, and the other major reason for requiring particulars, is that the parties on the other side of an application or complaint are entitled to know, in general terms, what is alleged against them. This is so they can reply to the complaint or application clearly, and so that they can prepare their defence or reply knowing what it is they have to defend or reply to.***
> >
> > *[bolded text is mine]*

[8] *Construction Labour Relations v Driver Iron Inc*, 2012 CanLII 35609 (AB LRB) at para 40

[42] The Alberta Board has also commented on the right of both sides to present evidence in an application. In the *ARAMARK* case,[9] the Alberta Board was reviewing the sufficiency of a certification application, and concluded that the application should fail, commenting as follows:

> [*41] *Even if we had found no breach of section 148(1)(b),* ***we would have dismissed CLAC's certification application based on a lack of the requisite 40% support.***
>
> *[42] In response to the Applicants' objection raising the build-up principle, the Respondents rely on exhibit 7. It contains a list of those employees the Employer now believes worked on the date of application based on its more careful review of its payroll records. The list includes the same 11 employees who the Board Officer found were included in the unit. It adds an additional nine people, most of whom started work on the date CLAC's certification application was filed.* ***The increase in the number of employees in the bargaining unit applied for from 11 to 20 is the result of the inaccurate information provided to the Board Officer for the purposes of his investigation and the Employer's provision of more complete information to us at the start of our hearing.***

[43] The importance of providing both sides with an opportunity to participate in an investigation cannot be stressed enough – failure to allow for participation is a violation of the principles of fairness, and a violation of the right to be heard.

[44] In the present case, based on the evidence of Ms. Humm, the Employer was not afforded the right to be heard with respect to the investigation into the sufficiency of the evidence in the application. To that end, the Board may want to revisit its practices to ensure that parties are afforded the right to be heard in all applications received by the Board. At a minimum, the responding party should be afforded a right to comment on an application prior to a vote being ordered. Parties may choose note to provide comment or evidence in any given application, but they must be afforded an opportunity to be heard.

[45] The violation of the right to be heard renders the vote in this matter void *ab initio*, since the evidence before the Board is that the employer was not afforded an opportunity to participate in the investigation.

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[9] *Health Care and Service Employees' Union No 301 (Christian Labour Association of Canada) v ARAMARK Remote Workplace Services Ltd*, 2012 CanLII 65858 (AB LRB) at paras 41-42

Conclusion

[46] In conclusion, I agree that Mr. Jacobsen should be included in the proposed unit for the purposes of representational issues, and would declare the vote ordered by the Board to be void *ab initio*, based on the failure to meet the threshold in s. 6(1.1) of *The Trade Union Act*, and based on the violation of procedural fairness and the right to be heard.

Steven Seiferling, Board Member