NATIONAL ELEVATOR and ESCALATOR ASSOCIATION, Applicant v. CLR CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF SASKATCHEWAN INC, Respondent

LRB File No. 004-15; June 19, 2015
Chairperson, Kenneth G. Love, Q.C.; Members: Steven Seiferling and Bert Ottenson

For the Applicant: Patrick Moran
For the Respondent: No one appearing

> **Section 6-69 of *The Saskatchewan Employment Act* – Applicant applies to become the designated Representative Employer Organization for employers engaged in the Elevator Erector Trade Division displacing former Representative Employer Organization designated by Minister under the now repealed *Construction Industry Labour Relations Act* – Board considers application and credentials of Applicant – Finds Applicant would be a suitable entity to represent employers within the Elevator Erector Trade Division.**
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> **Section 6-71 of *The Saskatchewan Employment Act* – Board reviews constitution and bylaws for Applicant and finds that they are not suitable for representative capacity sought. – Applicant given 90 days to submit revised constitution and bylaws for approval by Board. Board withholds order pending approval of constitution and bylaws.**

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Chairperson:** The National Elevator and Escalator Association (the "Applicant") applied to the Board for an Order determining it to be the representative employer's organization ("REO") for the elevator erector trade division. By virtue of the Minister's Order made pursuant to Section 9 of the former *Construction Industry Labour Relations Act* ("*CILRA*"), CLR Construction Labour Relations Association for Saskatchewan ("CLR") was designated as the REO for the elevator erector trade division.

[2] This application was made pursuant to Section 6-69 of *The Saskatchewan Employment Act* (the "*SEA*"). The Applicant sought to be designated as the REO in place of CLR as the bargaining representative for all elevator erector employers in that trade division. CLR did not file a reply to the application and took no part in the proceedings before the Board.

[3] The International Union of Elevator Constructors, Local No. 102 (the "Union") filed a reply in respect of the application and sought party status to appear at the hearing, or, in the alternative, intervenor status to participate in the hearing.

[4] Mr. Lonnie MacKenzie of Abco Elevator also appeared at the hearing in opposition to the application. Neither Abco Elevator nor Mr. MacKenzie had filed a reply in respect of the application for REO status.

Preliminary Issue:

[5] At the outset of the hearing, the Union sought to be determined to be a party in respect of the matter, or, in the alternative, intervenor status in respect of the hearing. The Union argued that there were issues to be determined with respect to the status of other employers who had entered into voluntary recognition agreements with the Union insofar as the application was concerned and whether or not those employers would be "unionized employers" for the purposes of the SEA. For the reasons which follow, the application for party status or intervenor status for the Union was denied.

Facts:

[6] Pursuant to Section 9 of the *CILRA*, CLR was designated by the Minister as the REO for all employers within the elevator erector trade division. As a result of that designation, CLR is the body who must negotiate all collective agreements in the construction division insofar as the elevator erector trade division is concerned.

[7] The Applicant has been active in respect of collective bargaining across Canada. The Applicant bargains collectively with the Union in Newfoundland, the other Atlantic Provinces, Quebec, Ontario, Alberta and British Columbia. It has also entered into a collective agreement with the Union insofar as Manitoba and Saskatchewan is concerned, notwithstanding that it

holds no bargaining rights as the REO in Saskatchewan for the elevator erector trade division. The current collective agreement continues through until November of 2016.

[8] The Applicant is a body corporate, originally incorporated by Letters Patent issued federally. In late 2014, the Applicant was continued as a Not-for-Profit Corporation under the Canada Not-for Profit Corporations Act. Testimony from Mr. Andrew Reistetter, the National Director for the Applicant also established that the Applicant had filed an application with Information Services Corporation to be registered as an extra provincial not-for-profit Corporation in Saskatchewan.

[9] The Applicants filed its constating documents and its corporate bylaws which we have reviewed as a part of this application.

Relevant statutory provision:

[10] Relevant statutory provisions are as follows:

> ***6-69****(1) In this section,* ***"unionized employer"*** *means a unionized employer who is actively involved in the construction industry in Saskatchewan and who, in the one-year period before the date of an application pursuant to this section, employed one or more unionized employees in the trade division with respect to which the application is made.*
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> *(2) An employers' organization may apply to the board for an order determining it to be the representative employers' organization for all unionized employers in a trade division:*
>
> > *(a) if the minister has established a new trade division; or*
> >
> > *(b) for an existing trade division if the applicant employers' organization establishes that it has the support of the unionized employers in the trade division in accordance with subsection (4).*
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> *(3) When considering an application pursuant to clause (2)(a), the board may, in addition to exercising its other powers:*
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> > *(a) determine whether an employer is a unionized employer;*
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> > *(b) if there is more than one employers' organization that intends to be the representative employers' organization, order a vote; and*
> >
> > *(c) order that the employers' organization that received the most votes is the representative employers' organization for the trade division.*
>
> *(4) When considering an application pursuant to clause (2)(b), the board, on being satisfied that the applicant employers' organization has the support of 45% of unionized employers in the trade division, shall:*

(a) order a vote; and

(b) issue an order that the employers' organization that received a majority of the votes is the representative employers' organization for that trade division.

(5) For the purposes of a vote pursuant to this section, each unionized employer is entitled to only one vote.

(6) An application pursuant to clause (2)(b) may be made only during the month of January in any year.

(7) If a vote of unionized employers is required in accordance with subsection (3) or (4), Division 5 applies, with any necessary modification, to the board's role in the vote and in the manner of conducting the vote.

(8) If an employers' organization is determined to be the representative employers' organization in a trade division with an existing collective agreement, that collective agreement remains in force and shall be administered by the representative employers' organization.

6-70*(1) When an employers' organization is determined to be the representative employers' organization for a trade division:*

(a) the representative employers' organization is the exclusive agent to engage in collective bargaining on behalf of all unionized employers in the trade division;

(b) a union representing the unionized employees in the trade division shall engage in collective bargaining with the representative employers' organization with respect to the unionized employees in the trade division;

(c) a collective agreement between the representative employers' organization and a union or council of unions is binding on the unionized employers in the trade division;

(d) no other employers' organization has the right to interfere with the negotiation of a collective agreement or veto any proposed collective agreement negotiated by the representative employers' organization; and

(e) a collective agreement respecting the trade division that is made after the determination of the representative employers' organization with any person or organization other than the representative employers' organization is void.

(2) If an employers' organization is determined to be the representative employers' organization for more than one trade division, only the unionized employers in a trade division are entitled to make decisions with respect to negotiating and concluding a collective agreement on behalf of the unionized employers in that trade division.

(3) Subsection (1) applies to the following:

(a) an employer who subsequently becomes a unionized employer in a trade division;

(b) a unionized employer who subsequently becomes engaged in the construction industry in a trade division.

(4) A unionized employer mentioned in subsection (3) is bound by any collective agreement in force for a trade division at the time the employer:

> *(a) becomes a unionized employer in a trade division; or*
>
> *(b) becomes engaged in the construction industry in a trade division.*
>
> *(5) Notwithstanding subsection (1), a unionized employer is responsible for settling disputes mentioned in section 6-45.*
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> ***6-71****(1) Subject to this section, the constitution and bylaws of a representative employers' organization are in force only after they are approved or amended by the board pursuant to subsections (3) and (4).*
>
> *(2) A representative employers' organization shall file with the board a copy of its constitution and bylaws within 90 days after its determination as the representative employers' organization pursuant to section 6-69.*
>
> *(3) Within 120 days after the filing of the constitution and bylaws of a representative employers' organization pursuant to subsection (2), the board shall:*
>
> *(a) approve the constitution and bylaws; or*
>
> *(b) after conducting a hearing with respect to the matter, amend the constitution and bylaws to ensure that they comply with this Part.*
>
> *(4) A representative employers' organization shall file with the board a copy of any amendments that it makes to its constitution and bylaws, and no amendment to the constitution or bylaws of a representative employers' organization has any effect until it is approved by the board.*

Analysis and Decision:

[11] This application is the equivalent of a displacement application by a union of another union. CLR is currently the REO for the elevator erector employers as designated by the Minister under the *CILRA*. The Applicant seeks to displace CLR.

[12] Normally, this would be a simple matter of an application by one employer organization to displace another. However, the Applicant, as is the case with trade unions seeking to represent employees in Saskatchewan, must establish to the Board that it has the requisite credentials to act as the REO for a trade classification. As was the case in *Canadian Staff Union v. Canadian Union of Public Employees*[1], the primary issue to be determined by the Board is the status of the Applicant to bring this application and secondarily, if it should be designated as the REO for the elevator erector employers trade classification in place of CLR.

The Preliminary Issue:

[13] The Union sought to have party status in this matter, or alternatively to have intervenor status. Those applications were denied.

[14] The issue in this case is between CLR as the incumbent REO versus the Applicant who is seeking to displace them. The Union has no direct interest in the outcome of the determination other than who will be the person with whom they may bargain collectively. They can have no part in the choice of who will be the bargaining representative for the employers. That choice is the employers involved in the elevator erectors trade classification.

[15] Section 6-68 of the *SEA* provides for the right of a unionized employer to "organize, form and assist in and employers' organization. This right is similar to the right provided to employees to "organize in and to form, join or assist unions" as provided for in section 6-4 of the *SEA*. Section 6-68, like section 6-4 of the *SEA* provides the basic right of association to employers to join collectively and to bargain collectively through an REO of their choosing.

[16] As would be the case in respect of the choice of a trade union by employees, an employer has no right to assist or influence the choice of trade union by its employees. Similarly, a trade union has no right to assist or influence the choice of an REO by employers. By extension, the Union cannot, therefore, be a party to this application, which is solely between CLR and the Applicant.

[17] In support of its application for intervenor status, the Union cited our decision in *Construction Workers Union, Local 151 v. Tercon Industrial Works Ltd*[2]. That decision adopted the classifications for intervenor status framed by the Board in *J.V.D. Mills Services #1*[3]. The *J.V.D Mills* decision was the subject of a judicial review application and upheld by the Court of Queen's Bench.[4] In his decision, Mr. Justice Keene at paragraph [30] says:

> *Accordingly, I do not see this as a natural justice issue. I see it as a decision-making process by the Board. The SLRB can decide how it wishes to grant status to intervenors as long as the decision is reasonable as articulated in the above test. Even if I were to say that there was a procedural fairness issue*

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[1] [2011] CanLII 61200 (SKLRB)
[2] [2012] CanLII 2145 (SKLRB)
[3] [2010] 199 C.L.R.B.R. (2nd) 228, , LRB File No. 087-10
[4] *Saskatchewan Regional Council of Carpenters, Drywall, Millwrights and Allied Workers v. C.E.P.* [2012] SKQB 375 (SKQB)

> *arising out of how the SLRB set the terms of the intervenor status: I note from the transcript of the intervenor hearing that counsel for the applicants were given reasonable opportunity to argue their clients' point of view. In short the applicants were not denied a chance to state their case on this very point. I therefore hold (although not necessary here) that the procedural process so to speak was "correct" or "correctly done" by the SLRB.*

[18] J.V.D. Mills adopted three classifications of intervenor. These are:

1. "Direct" intervenors, that is, someone who has a direct interest in the answer to the legal question in dispute.
2. "Exceptional" intervenors, that is, someone who has a demonstrable interest in the answer to the legal question in dispute.
3. "Public Interest" intervenors, that is, someone who has no legal rights or obligations that may be affected by the answer to the legal question, but is someone who can satisfy the court that its perspective is different and its participation may assist the court in considering a public law issue.

[19] As noted above, the Union has no direct interest in the question to be determined, being who should be the REO for the elevator erector trade division. Nor, does the Union have any interest as an exceptional intervenor as its bargaining rights will be unaffected by any change in REO. That REO will still be required to bargain collectively on behalf of unionized employers within that trade division with any union or unions certified to bargain collectively on behalf of employees of those employers.

[20] Finally, the Union can provide no benefit to the Board as public interest intervenors in respect of this question. It is not a complex question that must be determined and it is essentially up to the Applicant to demonstrate that it is an appropriate entity to be designated in place of CLR. Unless the Union wished to challenge the *bona fides* of the Applicant by, for example, showing that the Applicant were a "Union Dominated" entity so as to disqualify it from being determined to be an appropriate employer representative, the Union has no part to play in this determination.

[21] For these reasons, the applications were denied.

Is the Applicant a Proper Entity to be Designated as the REO?

[22] In keeping with the Board's jurisprudence concerning trade unions seeking to represent employees in Saskatchewan, it is necessary for an entity unknown to the Board, who is seeking to represent employers within the construction sector in Saskatchewan to satisfy the Board that it is a proper entity to represent employers for the purposes of collective bargaining. As is the case with trade unions, a pre-requisite for that determination is that the entity must have collective bargaining as one of its objects. The Applicant provided the Board with its Articles of Continuance which provided as one of its purposes; "[T]o act on behalf of its members in collective bargaining matters". In addition, Mr. Reistetter testified that the Applicant was active across Canada in respect of collective bargaining on behalf of its members.

[23] Based upon the documentary evidence provided and the testimony of Mr. Reistetter, subject to our comments respecting the bylaws of the Applicant and its registration status in Saskatchewan, we are satisfied that the Applicant is a proper entity to be designated as an REO.

Should the Board Designate the Applicant as the REO for the Elevator Erectors Trade Division?

[24] The Applicant faces no opposition to its application to be named as the REO for the Elevator Erectors trade division. CLR, the incumbent, has filed no reply and did not appear with respect to the hearing of this matter. Being unopposed, but subject to our comments below, the application for REO status is sufficient.

The Applicant's Registration Status in Saskatchewan

[25] As of the hearing of this matter, the Applicant had not completed its registration as an extra-provincial not-for-profit corporation in Saskatchewan. It will be necessary for the Applicant to provide proof of completion of this registration prior to any order being issued by the Board.

The Applicant's Constitution and Bylaws?

[26] Pursuant to Section 6-71 of the *SEA*, the Board is required to, within one hundred and twenty (120) days of filing of the Constitution and Bylaws of an REO following designation of an entity as an REO, the Board must approve the Constitution and Bylaws of the REO, or after

conducting a hearing, amend the Constitution and Bylaws to ensure that they comply with Part VI of the *SEA*. Until approved or amended by the Board, the constitution and bylaws are not in effect. Accordingly, any designation by the Board is conditional upon approval of the Constitution and Bylaws of the REO.

[27] The Board had the benefit of reviewing both the constating documents of the Applicant and its current bylaws. As they currently exist, they cannot be approved by the Board.

[28] Both the Articles of the Applicant and its Bylaws provide for membership requirements which are not in keeping with the provisions of Part VI of the *SEA.* In Schedule 1 to the Articles, membership in the corporation must be approved by resolution of the Board of Directors. That Board of Directors is elected by voting members, who, by definition must be "national in scope", i.e.: they carry on business on a Canada wide basis. Such restrictions on membership would not be in accordance with the requirements that all unionized employers be permitted to "organize, form and assist in an employers' organization" as provided for in Section 6-68 of the *SEA*.

[29] A division of membership into voting and non-voting membership is also contrary to the provisions of Part VI of the *Act*. There must be equality in membership with each member having one vote in respect of matters related to collective bargaining.

[30] Membership fees are also of concern insofar as they are to be "fixed by the Board of Directors" and based upon considerations set out in the Bylaws. A more appropriate method of determining dues for membership would be to have those dues determined by a percentage of annual revenues or by some other objective test whereby the quantum of dues to be paid can be readily determined.

[31] Also of concern is a lack of any procedure whereby disputes related to a member's representation may be resolved. As an REO, the Applicant will have a duty of fair representation owed to its members. Additionally, there is also a provision for cancellation of a membership which would be contrary to the requirements for membership in the REO as contained in the *SEA.*

[32] The above are merely examples of some of the concerns noted upon a brief review of the Articles and Bylaws of the Applicant. In accordance with Section 6-71 of the *SEA,*

the Applicant shall have ninety (90) days from the date hereof to submit revised Articles and Bylaws to the Board for consideration and approval.

[33] Until approval or amendment of the Constitution and Bylaws of the Applicant, no Order will be made displacing CLR as the REO for the elevator erector trade division. This panel will remain seized of this matter.

DATED at Regina, Saskatchewan, this **19th** day of **June, 2015.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson