

September 2, 2015

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Attention: Mr. David A. de Groot

Attention: Mr. Hugh McPhail, Q.C

RE: LRB File No. 118-15; Objection to the Conduct of Vote

Dear Sirs:

Background:

1. On June 19, 2015, the Construction Workers Union (CLAC), Local No. 151 (the “Union”) filed an objection to the conduct of a certification vote between Golderado Civil Ltd. and CLAC, which had been conducted by the Board pursuant to a Direction for Vote issued on August 1, 2013. The vote was conducted by registered mail with votes to be returned no later than August 6, 2013.
2. Other related matters filed with the Board prevented the counting of the ballots submitted until June 17, 2015. When the votes were opened, two of three eligible voters had voted, but each of those employees that voted, had written their names on the ballots. The Board Agent, in accordance with Section 23(8)(a) of *The Saskatchewan Employment (Labour Relations Board) Regulations*¹ rejected the two ballots. The Board determined that the Union had not demonstrated the necessary support for its application and dismissed the application

¹ C. S-15.1 Reg. 1

for certification. The Union then filed this objection to the conduct of the vote. For the reasons which follow, that application is dismissed.

3. With the agreement of the parties, the application was considered by an *in camera* panel of the Board² (on August 6 and 25, 2015). During the Board's discussions on August 6, 2015, the Board considered a similar fact decision in *Re: Chauffeurs, Teamsters & Helpers, Local Union No. 395 and J & F Transport Ltd.*³. This decision had not been considered by the parties to this application. The Panel directed that the Registrar bring this case to the attention of the parties and request supplemental submissions. Those supplemental submissions were received from the parties and were subsequently reviewed by the Board panel on August 25, 2015.

Decision

4. For the reasons which follow, the objection to the conduct of the vote is dismissed. An appropriate Order dismissing the application will accompany these letter reasons.

Reasons for Decision

5. The underlying certification in this case was filed under the provisions of *The Trade Union Act*. The vote was counted and the Objection to the Conduct of the vote was filed under the provisions of *The Saskatchewan Employment Act*. There is no significant difference in either the substance or procedure under either of the statutes. The parties seemed to be of the view that the provisions of the *SEA* and the Board's Regulations thereunder were applicable. Due to the similarity of the provisions in both substance and form, we have referred to both provisions below.
6. A similar fact situation to this case occurred in *Re: Chauffeurs, Teamsters & Helpers, Local Union No. 395 and J & F Transport Ltd.* In that case, the Board conducted a representation vote. In that case, there were 19 eligible voters, 18 of which voted. The Board determined

² Kenneth G. Love, Q.C., Chairperson, Ms. Shawna Colpitts and Ms. Laura Somerville, Members

that there was an even split between support for the union and those opposed to being represented. However, on one of the ballots which had been cast, the name “Harvey” had been written on it.

7. The Union in that case argued that the ballot which was accepted by the Board as a “no” vote should not have been counted as it identified the voter and was, therefore, not a secret ballot. The Board disagreed and confirmed the split vote result.
8. The Union applied to the Court of Appeal for judicial review of the Board’s decision. The Court of Appeal confirmed that it was within the Board’s jurisdiction to determine what constitutes a majority. The Court dismissed the Union’s application.
9. Following on the heels of this decision, the Lieutenant Governor in Council passed Regulations under the then *Trade Union Act* which directed that a ballot should not be rejected if there was “no apparent intention of identification of the voter”⁴. While somewhat clumsy in its wording, this Regulation precluded the counting of any ballot which identified the voter.
10. When *The Saskatchewan Employment Act*⁵ (the “SEA”) was proclaimed on April 29, 2014, the Board promulgated new Regulations which also directed rejection of “every ballot on which anything is written or marked that identifies the person voting...”
11. The parties took no issue with respect to which regulatory provision came into play in this case. Regardless of which regulatory provision is effective, the result is the same, that is, that the Board Agent is directed by that Regulation not to count any ballot on which anything has been written that identifies the person voting. The parties are in agreement that the Board Agent was required by the Regulations to disregard those ballots and not to count them.

³ [1971] CanLII 935 (SKCA)

⁴ *Regulations and Forms, Labour Relations Board Sask Regulations 163/72*

⁵ SS.2013 C. S-15.1

12. The parties, however, argue that since the ballots cast voted for the certification of the Union that the provisions of *The Saskatchewan Employment Act*, regarding acquisition of bargaining rights⁶ and the freedom of choice by employees as to the selection of their bargaining agents requires the Board to certify the Union as the bargaining agent, if, after a vote is taken, the Board is “satisfied that a majority of votes that are cast, favour certification of the Union”. The parties argued that this statutory provision should prevail and the votes be counted.
13. The parties also argued that while the provisions in the Regulations do not create a conflict with the provisions of section 6-22 of the *SEA*⁷, the Board should respect the employee’s choice and certify the Union notwithstanding the regulatory provisions.
14. The parties relied upon section 30 of the Regulations⁸ to argue that the panel could be utilized to remedy any non-compliance with the Regulations.
15. The parties also argued that the voter instructions were unclear as to the consequences of improperly marking a ballot. They argued that there should be some degree of flexibility where a poll is conducted by mail in ballots. This, they argued, would be sufficient justification for the Board to override the Board Agent’s determination that the ballots should not be counted.
16. With respect, we do not agree with these submissions. Both the *Trade Union Act* Regulations and the Board’s Regulations made under the *SEA* have the force of law.⁹ These Regulations supplement the statutory provisions, and where there is no conflict (as is the case here), must be observed. The Board Agent acted in accordance with the Regulations in rejecting the ballots as spoiled.

⁶ Section 6-13(1)(a)

⁷ *The Trade Union Act* contains similar provisions in Sections 3 and 6

⁸ A similar provision is included in the *Trade Union Act Regulations* as Section 35

⁹ See *Kramer v. Sherwood (Rural Municipality No 159)* [2003] SKCA 121 (CanLII)

17. The regulatory provisions are in furtherance of the statutory requirement that votes conducted by the Board be done by secret ballot. Where a ballot is endorsed with the name of the voter, the requirement for secrecy is compromised and eluded. Both the *Trade Union Act* Regulations and the Board's Regulations are designed to insure that votes are by means of secret ballot. That is a fundamental requirement of both the Acts.
18. Nor do we think that Section 30¹⁰ of the Board's Regulations can be utilized by this panel to overturn the decision of the Board Agent to reject the ballots as being spoiled. Section 30 of the Regulations is in furtherance of the objective set forth in Section 6-112 of the *SEA*¹¹ which allows the Board to correct technical irregularities so as to insure that the real question or issue raised in pleadings is addressed.
19. There was no issue of "noncompliance" in this case. The Board Agent complied with the instructions contained in the Regulations and rejected the ballots as he/she was instructed by the Regulations. This was not a case where the Board Agent failed to comply with his statutory instructions which failure should be corrected to allow the proceedings to continue. It was not a technical breach of the Regulations such as the failure to properly identify a party in an application, the misspelling of a name, or the use of the wrong form, which may be fatal to the application.
20. Finally, the issue raised by this application could be considered to be moot insofar as the passage of time since the underlying application for certification was made is such that there is no bar to a subsequent application being filed by the Union for certification. If the Union maintains the support it claims was shown in this application, there should be little impediment for another application for certification to proceed. That seems to be the proper course for further proceedings here. Accordingly, we would decline to make any order respecting the making of a similar application under Section 6-111(m) of the *SEA*.

¹⁰ Or Section 35 of *The Trade Union Act* regulations

¹¹ Or Section 19 of *The Trade Union Act*

21. This is a unanimous decision of the Board.

Yours truly,

Kenneth G. Love, Q.C.
Chairperson