



FACULTY ASSOCIATION STAFF UNION, Applicant v SASKATCHEWAN POLYTECHNIC FACULTY ASSOCIATION, Respondent

LRB File No. 172-17; November 14, 2017

Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: Michael Wainwright and Aina Kagis

For the Applicant: Gary Nelson
For the Respondent, Employer: Warren White

Certification – Proposed Union seeks certification on behalf of three (3) individuals to represent them for purposes of collective bargaining with their Employer. Board reviews its jurisprudence and determines that Proposed Union satisfies criteria under *The Saskatchewan Employment Act* for recognition as a union in Saskatchewan.

Certification – Employer concedes that the proposed Union qualifies as a unit appropriate for collective bargaining for purposes of section 6-11 of *The Saskatchewan Employment Act*.

Certification – Board issues Order to Tabulate Vote.

REASONS FOR DECISION

OVERVIEW

[1] **Graeme G. Mitchell, Q.C., Vice-Chairperson:** The Faculty Association Staff Union [Applicant] applies pursuant to section 6-9 of *The Saskatchewan Employment Act*, SS 2013, c S 15-1 [SEA] to be certified as the bargaining agent for a bargaining unit comprised of three (3) employees. These individuals are employed by the Saskatchewan Polytechnic Faculty Association to assist it in providing services to its members. In the Applicant's formal application filed with this Board on August 21, 2017, the proposed unit is described as follows:

All employees of the Saskatchewan Polytechnic Faculty Association save and except those excluded by [the SEA].

[2] The Saskatchewan Polytechnic Faculty Association [Employer] does not contest this application. Its representative at the hearing held on November 10, 2017 advised the Board that provided the Applicant persuaded the Board that it qualified as a Union for purpose of the *SEA*, the Employer did not object to certification, provided that sufficient support from its employees was demonstrated.

[3] The hearing proceeded by way of oral submissions presented by representatives of the parties. Neither party called any witnesses, so the Board's final determination is made on the basis of the formal Application and Reply; documentary evidence introduced at the hearing, and those oral submissions.

[4] At the conclusion of the hearing, the Board reserved its decision. For reasons that follow, the Board has determined the Applicant has satisfied the standard under the *SEA* for demonstrating its *bona fides* as a Union. Accordingly, we direct that the mail-in ballots submitted by the employees be unsealed, and, in the event there is sufficient support, a certification Order in favour of the Applicant should issue.

FACTUAL BACKGROUND

[5] Mr. Gary Nelson made submissions on behalf of the Applicant. He advised the Board that he is employed by the Employer as a Labour Relations Officer, and works out of the Employer's Saskatoon office. Currently, Mr. Nelson serves as the President of the proposed bargaining unit.

[6] A copy of the Applicant's Constitution was attached to its formal application. It was approved by the membership on August 10, 2017.¹ Following that meeting, the only outstanding issue left to be determined was what the proposed unit should be named. A subsequent meeting of the membership was convened by teleconference on August 16, 2017, at which time it was decided to designate the unit as the "Faculty Association Staff Union".²

[7] The Applicant's Constitution resembles the constitutions of other unions certified by this Board, *albeit* somewhat more brief. For present purposes the following Articles are relevant. The Applicant's objectives are enumerated in Article 2 as follows:

¹ Exhibit A-1 – Minutes of Meeting held on August 10, 2017, at p. 1.

- 201 *To act as collective bargaining agent on behalf of all employees of the Saskatchewan Polytechnic Association, herein referred to as the Employer.*
- 202 *To negotiate and enter into a collective agreement with the Employer on behalf of its members.*
- 203 *To assist in the maintenance, interpretation and enforcement of the collective agreement.*
- 204 *To conduct such other business as are deemed appropriate by the members, without limiting the generality of the foregoing:*
- a) To establish and collect fees, dues, levies, premiums or other monies;*
 - b) To maintain a bank account(s);*
 - c) To borrow, invest and/or disburse funds;*
 - d) To purchase, lease, rent, or otherwise acquire office premises, equipment, supplies and/or services;*
 - e) To engage and employee counsel or consultant services[.]*

[8] Article 3 sets out monthly dues of \$5.00 payable by each member. Article 4 states that membership in the proposed unit is open to all persons employed by the Employer. Article 6³ creates the Officers of the proposed unit: the President, Vice-President, and Secretary Treasurer. Article 10 states that the Applicant's Annual General Meeting will be held each year in the month of May. Finally, Article 11 stipulates, among other things, that the Applicant's procedures will be conducted pursuant to the Roberts Rules of Order Newly Revised.

[9] Mr. Nelson advised the Board that at the Applicant's organization meeting on August 10, 2017 he was elected President. Ms. Doris Vandercooi, the Employer's Executive Assistant, was elected as Vice-President, and Mr. Tracy Gall, a Labour Relations Associate, was acclaimed as Secretary-Treasurer. Mr. Nelson indicated that at the time of the application, these were the only members of the proposed unit; however, he indicated that he fully expected the number of employees to increase.

[10] Mr. White, the full-time President of the Employer, indicated that the Employer did not oppose the application. However, in its formal Reply dated August 31, 2017, the Employer set out the following facts it relied upon in response to the Applicant's application:

- (a) The Saskatchewan Polytechnic Faculty Association has three employment positions known as Executive Assistant, Labour Relations Officer and Labour Relations Associate.*

² Addendum to Minutes dated August 10, 2017, *ibid.*, at p. 3

³ As an observation, there is no Article 5 in this document.

(b) *All the above positions require confidentiality and contribute to strategic planning of the Organization. The Executive Assistant position has financial access and accounting responsibilities.*

[11] When asked by the Board whether the Employer was, in actual fact, disputing the composition of the proposed unit, Mr. White indicated it was not. He stated that he included this information to assist the Board, and for purposes of transparency.

[12] It should also be noted that on August 31, 2017, this Board pursuant to section 6-12 of the *SEA*, directed that a certification vote by secret ballot should be conducted. This vote was to be completed by September 14, 2017. To date, the returned ballots remain sealed in the Board's Office.

ISSUE

[13] There are two (2) issues for decision:

1. Does the Applicant qualify as a "union" as defined in clause 6-1(1)(p) of the *SEA*?
2. If so, is the Applicant an appropriate unit for collective bargaining purposes?

RELEVANT STATUTORY PROVISIONS

[14] The provisions of the *SEA* most relevant on this application read as follows:

6-1(1) *In this Part:*

(a) **"bargaining unit"** means:

(i) *a unit that is determined by the board as a unit appropriate for collective bargaining; or*

(ii) *if authorized pursuant to this Part, a unit comprised of employees of two or more employers that is determined by the board as a unit appropriate for collective bargaining;*

...

(c) **"certification order"** means *a board order issued pursuant to section 6-13 or clause 6-18(4)(e) that certifies a union as the bargaining agent for a bargaining unit[.]*

...

(d) **"collective bargaining"** means:

- (i) *negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;*
- (ii) *putting the terms of an agreement in writing those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;*
- (iii) *executing a collective agreement by or on behalf of the parties; and*
- (iv) *negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union[.]*

...

(k) **“labour organization”** means an organization of employees who are not necessarily employees of one employer that has collective bargaining among its purposes[.]

...

(p) **“union”** means a labour organization or association of employees that:

- (i) *has a one of its purposes collective bargaining; and*
- (ii) *is not dominated by an employer[.]*

(q) **“unit”** means any group of employees of an employer or, if authorized pursuant to this Part, of two or more employers.

...

6-11(1) *If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of the one bargaining unit to another bargaining unit, the board shall determine:*

- (a) *if the unit of employees is appropriate for collective bargaining; or*
- (b) *in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.*

(2) *In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.*

(3) *Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.*

(4) *Subsection (3) does not apply if:*

- (a) *the employer and union make an irrevocable election to allow the supervisory employees to be in the bargaining unit; or*
- (b) *the bargaining unit determined by the board is a bargaining unit comprised of supervisory employees.*

(5) *An employee who is or may become a supervisory employee:*

(a) continues to be a member of a bargaining unit until excluded by the board or an agreement between the employer and the union; and

(b) is entitled to all the rights and shall fulfill all of the responsibilities of a member of the bargaining unit.

(6) Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.

ANALYSIS

A. Onus

[15] In applications such as this one, the Applicant bears the onus to demonstrate on a balance of probabilities that (a) it qualifies as a “union” for purposes of the *SEA*, and (b) it is an appropriate unit for purposes of collective bargaining with the Employer. To satisfy this onus, the Applicant must present evidence that is “sufficiently clear, convincing and cogent”⁴.

B. Does the Applicant Qualify as a Union for Purposes of the SEA?

1. Relevant Legal Principles

[16] The relevant jurisprudence on this issue is well-settled. It has been restated and applied in a number of very recent decisions of this Board. See: *North Battleford Community Safety Officers Police Association v City of North Battleford*⁵ [*North Battleford Community Safety Officers Police Association*]; *Canadian Union of Skilled Workers v Nakoda Industrial Ltd.*⁶ [*Nakoda Industrial*] and *Education, Service and Health Care Union, CLAC Local 306 v Town of Bienfait*⁷ [*Bienfait*].

[17] All of these cases were decided pursuant to the provisions of the *SEA*. Yet, in those decisions, this Board employed the statement of its previous jurisprudence under the former *Trade Union Act*, RSS 1978, c T-17 found in *Canadian Staff Union v Canadian Union of Public Employees*⁸ [*Canadian Staff Union*]. In that case, this Board stated at paragraph 11:

⁴ *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, at para. 46.

⁵ 2017 CanLII 68783, LRB File No. 007-17 (SK LRB)

⁶ 2017 CanLII 20061, 2017 CarswellSask 148, LRB File No. 017-17 (SK LRB)

⁷ 2017 CanLII 72975, LRB File No. 071-17 (SK LRB)

⁸ 2011 CanLII 612000, 2011 CarswellSask 651, LRB File No. 077-11 (SK LRB).

The jurisprudence of this Board is to compel an applicant seeking to represent a group of employees, that has not previously been certified in this Province, to establish its status and, in particular, its standing to be certified to represent employees for the purpose of collective bargaining...Simply put, an applicant organization must satisfy the Board that it is a trade union with [sic] the meaning of The Trade Union Act. In this regard, it should be noted that this is not an enquiry into the relative strength or tenacity of the applicant in the terms of achieving particular collective bargaining goals or its adherence to particular ideological beliefs. In this exercise, the Board is simply concerned with whether or not the organization is dedicated to advancing the interests of its members by means of collective bargaining and its internal structure possess [sic] certain hallmarks of organizational legitimacy associated with a trade union. [Emphasis added. Citations omitted.]

[18] In *Saskatchewan Institute of Applied Science and Technology Faculty Association v Saskatchewan Government and General Employees' Union*⁹ [SIASTFA], the Board identified certain factors that would support a certification application. At paragraph 22, the Board said:

[T]he Board reviews whether the organization has a suitable Constitution, which includes collective bargaining on behalf of employees among its purposes. It also reviews whether or not the Constitution has been ratified and adopted by members of the organization, whether the members have then obtained membership in accordance with the provisions of the Constitution and whether from those members it has elected officers with the authority to engage in collective bargaining and conduct the affairs of the organization.

2. Analysis and Decision

[19] It must be acknowledged at the outset that the test for establishing an applicant's status as a "union" is not onerous. That said, the Board has concluded that the Applicant has satisfied the requisite elements identified in the jurisprudence for demonstrating that it qualifies as a "union" as defined in clause 6-1(1)(p), for the following reasons.

[20] First, a central Article of the Applicant's Constitution clearly sets out that one of its principal objectives – if not the principal one – is to represent its members' interest and to bargain collectively with the Employer on their behalf. The Employer is an established union, itself, and is familiar with the collective bargaining process. There is nothing to suggest that it will be unable to bargain collectively and effectively with the proposed unit.

[21] Second, the Applicant's Constitution further demonstrates that it has organized itself in a way that is consistent with how other well-established unions organize their operations. In particular, the Constitution provides for an Executive Committee that will be

responsible for ensuring the proposed unit is able to represent its membership adequately. In the Board's view, these various factors demonstrate that the Applicant exhibits the essential indicia of all unions certified by this Board.

[22] Third, no evidence was presented to us that would indicate the Applicant is in any way dominated by the Employer.

[23] Accordingly, for these reasons, the Board is satisfied that the Applicant has met its burden to demonstrate that it qualifies as a "union" as defined in clause 6-1(1)(p) of the SEA.

C. Is the Proposed Union An Appropriate Bargaining Unit?

[24] In many certification applications, this issue is often the most contentious. The central inquiry is whether the proposed unit is an appropriate unit for collective bargaining purposes, and not the optimal one. See, for example: *Canadian Union of Public Employees v Northern Lakes School Division No. 64*¹⁰, at pages 116-117:

The basic question which arises for decision in this context is, in our view, the issue of whether an appropriate bargaining unit would be created if the application of the Union were to be granted. As we have often pointed out, this issue must be distinguished from the question of what would be the most appropriate bargaining unit.

The Board has always been reluctant to deny groups of employees access to collective bargaining on the grounds that there are bargaining units which might be created, other than the one which is proposed, which would be more ideal from the point of view of collective bargaining policy. The Board has generally been more interested in assessing whether the bargaining unit which is proposed stands a good chance of forming a sound basis for a collective bargaining relationship than in speculating about what might be an ideal configuration. [Emphasis in original.]

[25] In this case, our task has been lessened considerably because the Employer conceded that if this Board is satisfied that the Applicant qualifies a "union" for purposes of the SEA, it is an appropriate unit for collective bargaining purposes.

[26] Accordingly, based on the Employer's concession, the Board concludes that the Applicant is an appropriate unit for collective bargaining purposes, and so orders.

⁹ 2012 CarswellSask 722, 220 CLRBR (2d) 314, LRB File No. 106-12 (SK LRB)

D. Description of the Bargaining Unit

[27] As noted at the outset, the Applicant has provided a description of the bargaining unit, to which the Employer did not take exception. For ease of reference, this description is reproduced below:

All employees of the Saskatchewan Polytechnic Faculty Association save and except those excluded by [the SEA].

[28] It is well-settled that this Board has absolute discretion to determine the composition of an appropriate bargaining unit, regardless of the agreement of the parties.¹¹ As noted by the Board in *United Food and Commercial Workers, Local 1400 v Canadian National Institute for the Blind*,¹² we are statute barred from including supervisory employees in an all employee bargaining unit, absent an irrevocable election. As a consequence, the exception of supervisory employees from such a bargaining unit must be reflected in the certification Order, itself.

[29] Accordingly, the Board concludes that if majority support is obtained from the Applicant's members, the following bargaining unit qualifies as an appropriate one:

All employees of the Saskatchewan Polytechnic Faculty Association, except supervisory employees or employees carrying out managerial functions.

ORDERS OF THE BOARD

[30] The Board makes the follow Orders pursuant to clause 6-1(1)(p); subsections 6-11 and 6-12 of the SEA:

1. **That** the Applicant meets the statutory definition of "union", and is recognized as a union for collective bargaining purposes in Saskatchewan.
2. **That** the following unit qualifies as an appropriate bargaining unit:

All employees of the Saskatchewan Polytechnic Faculty Association, except supervisory employees or employees carrying out managerial functions.

¹⁰ [1996] SLRBR 115, [1996] SLRBD No. 7, LRB File No. 332-95 (SK LRB)

¹¹ See e.g.: *Saskatchewan Federation of Labour v Saskatchewan (Attorney General)*, 2010 SKQB 390, 192 CLRBR (2d) 47, at paras. 59-61; *Canada Post Corporation v Canadian Union of Postal Workers*, 2009 CIRB 438, at paras. 20-21, and *Re Laurentian Bank of Canada*, 2004 CIRB 295, at para. 18.

¹² 2017 CanLII 72968, LRB File 126-17 (SK LRB), at para. 14.

3. **That** the ballots held in the possession of the Board Registrar pursuant to the Direction for Vote issued on August 31, 2017 in the within proceedings, be unsealed and the ballots contained therein tabulated in accordance with section 23 of the *Saskatchewan Employment (Labour Relations Board) Regulations*.

4. **That** the results of the vote be placed into Form 21, and that form be advanced to an *in camera* panel of the Board for its review and consideration.

[31] An appropriate Board Order will accompany these Reasons for Decision.

[32] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this 14th day of **November, 2017**.

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson