SASKATOON TWIN CHARITIES INC, o/a CITY CENTRE BINGO, Applicant v SEIU-WEST, Respondent

LRB File No. 227-19; December 12, 2019
Vice-Chairperson, Barbara Mysko; Board Members: Shelley Boutin-Gervais, Laura Sommervill

For Saskatoon Twin Charities Inc, o/a City Centre Bingo:	Steve Seiferling, Jared M. McRorie
For SEIU-West:	Heather Jensen

Objection to Conduct of Vote – Mail-in Ballot – Employer objection – Addresses provided by Employer – Inaccurate address information – Alleged non-receipt of voting packages.

Objection to Conduct of Vote – Board Agent reasonably exercised discretion – Voting process fair – Reasonable opportunity to vote – Not appropriate for Board to override discretion.

Alleged intimidation – Allegation employees wanted to change vote – Change of mind not basis to order a re-vote – Evidence frail, susceptible to Employer influence.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to the Objections to Conduct of the Vote ["Application"] brought by Saskatoon Twin Charities Inc. operating as City Centre Bingo ["Employer"]. The hearing on the Employer's Application was held on December 2, 2019.

[2] On May 3, 2019, SEIU-West ["Union"] filed three certification applications in relation to the employees of the Employer. On May 10, 2019, the Board issued a Direction for Vote in relation to those applications. The Notice of Vote, which was to be conducted by mail-in ballot, set a deadline for the return of the ballots, being May 24, 2019. The Employer objected to the certification applications, and a hearing was held in relation to those applications on August 23 and September 6, 2019. On October 15, 2019, the Board issued its decision finding that the unit

of employees, applied for in LRB File No. 113-19, is appropriate for purposes of collective bargaining.

[3] On October 21, 2019, the Employer filed its Application, asserting the following:

The Employer, and specifically the Gaming Manager, Mr. Gordy Ouellette, has been approached by a number of employees who indicated that they did not receive the opportunity to vote, as they did not receive a voting package by mail.

The Employer has confirmed that some employees did not receive a voting package, as their address on file with the employer at the time of the mail out ballot was not accurate.

The Employer has general concerns with the use of a mail out ballot for a workplace which is not decentralized, for which an in-person ballot would have allowed both the Union and the Employer to provide a scrutineer to observe the votes. Neither the Employer nor the Union had the ability to provide a scrutineer for the voting process in the case of City Centre Bingo.

The Employer therefore requests that the Board order an in-person vote of the employees of City Centre Bingo who would fall within the bargaining unit certified by the Board in its Order dated October 15, 2019.

In the alternative, City Centre Bingo requests that the Board conduct a vote of the employees falling within the certified unit by mail out ballot, with the updated addresses to be provided by City Centre Bingo.

[4] The Union filed a reply which outlined the following assertions, among others:

…

On May 3, 2019, the Board Agent contacted Saskatoon Twin Charities Inc. operating the City Centre Bingo and advised the Board required a list of all employees currently employed, with home addresses, occupations and dates of hire within 3 business days.

The Saskatoon Twin Charities Inc. operating the City Centre Bingo failed to provide the required employee information within the deadline imposed.

When the Employer provided the Board a list of employees, the Employer specifically requested "the home addresses of the employees only be used for internal Board processes, and not be shared with the applicant at this point in time, unless and until the representation question is decided."

The Board did not forward the employee addresses to the Union, and therefore, the Union did not have information regarding the addresses provided by the Employer, and did not have full opportunity to verify the accuracy of such addresses before or during the voting period.

On May 10, 2019, the Board required the Employer post a notice of the vote, advising employees of the list of employees:

> *"This package includes a coloured ballot (Blue Ballot). You may mark your ballot, fold it and it must be placed in the small envelope provided. Then*

> > *the small envelope must be placed in the larger white envelope containing your name and occupation, which is then to be placed into the third self addressed postage paid envelope for deposit into a postal box. It must reach this office no later than 14 days from the date upon which it was mailed to you (May 10, 2019) that being May 24, 2019. Should you have any questions regarding the mailing deadline, you may call the Saskatchewan Labour Relations Board at (306) 787-7210."*
>
> *The employees of the appropriate bargaining unit participated in a representation vote, conducted by the Board Agent by mail-in ballot from May 10-24, 2019.*
>
> *During the voting period, employees had the opportunity to contact the Saskatchewan Labour Relations Board if any employees did not receive a ballot package or if they had questions about the voting process.*
>
> *The results of the vote were tallied. According to the Report of the Board Agent, dated 18 October 2019, 21 of the 32 eligible voters cast ballots. 14 voters voted in favour of union representation. 7 voters voted against union representation.*
> *…*

[5] In support of its Application, the Employer filed an affidavit on behalf of Gordy Ouellette ["Ouellette"], the Employer's Gaming Manager. During the hearing, the following statement, which fell within the same theme as Ouellette's sworn allegations, was added to the pleadings:

> *Employees approached Ouellette and indicated that they were scared, intimidated, and coerced.*

[6] Following the filing of this Application, the Union filed an interim application seeking an interim certification order. The Board dismissed that interim application on November 15, 2019.[1]

Argument on Behalf of the Parties:

Employer:

[7] The Employer is asking that the Board order a re-vote to occur in person at the premises of City Centre Bingo. A mail-in ballot should not be used in a centralized workplace, such as City Centre Bingo, where there is no concern with the employees' ability to attend at the worksite to cast their vote. The Employer acknowledges that it provided inaccurate address information to the Board upon request, but says that it made reasonable efforts in the context of a poorly maintained records management system. These issues would not have occurred if the Board had held an in-person vote. Instead, some individuals were not provided the opportunity to vote. In another vein, other employees, who did exercise their right to vote, advised that they had been

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[1] *SEIU-West v Saskatoon Twin Charities Inc. (City Centre Bingo)*, 2019 CanLII 98487 (SK LRB); LRB File No 229-19; November 15, 2019.

intimidated into voting in one direction or another. The likely effect of said intimidation provides further support for the requested new vote.

Union:

[8] The Union argues that the Application is based on the Employer's own misconduct, and should be dismissed. The voting process provided an adequate opportunity for participation on the part of all employees belonging to the bargaining unit. The Board is not held to a standard of perfection in the conduct of a representational vote. The mail-in ballot process is an acceptable method of capturing the wishes of employees in a particular bargaining unit. It is contemplated by the Regulations. The Union urges the Board to be mindful of the proper limits of the Employer's interests in this matter, taking into account the prohibition against interference with the formation of a union or against questioning employees in the exercise of their rights under Part VI. Finally, the Board should be mindful of the problems created by a new representational vote, including by exposing employees to the undue influences that the Board properly attempts to avoid through timely representation votes.

Evidence:

[9] The Board heard evidence from two witnesses: Ouellette and Stacey Lolacher ["Lolacher"], the Union's lead organizer in the certification campaign. The following is a summary of that evidence.

[10] Ouellette testified that he began working for the Employer on January 2, 2019, and over time came to recognize serious deficiencies with the state of the existing records in the office. Of significance for the current Application is that, as a result of these deficiencies, there were inaccuracies with the employee addresses held by the Employer.

[11] After the Union filed the certification application, the Board contacted the Employer to request a list of employees and employee addresses. According to Ouellette, he first saw the Board's request at the end of the work day on a Friday. Given the short timeframe imposed, he considered this an immediate concern. Ouellette was not aware that the addresses were not provided in the required timeframe.

[12] According to his testimony, Ouellette was approached by individuals with complaints about their voting experience. Three or four individuals approached Ouellette claiming that they could not vote because they did not receive a voting package. Four or five individuals approached

Ouellette claiming that they had felt pressured or intimidated into voting a certain way. Ouellette's affidavit cited different numbers, ranging, depending on one's interpretation, from two to three and three to six, respectively. Ultimately he indicated that, on the voting package issue, he could not specify how many people approached him but that it was "around three" or a "minimum of three". On the intimidation issue, he could not give a precise answer, and indicated that his previous answers were just approximations. Ouellette advised the employees that they were to contact the Union or the Board to follow up in either case, if they felt it necessary to do so. He provided the Board's contact information for this purpose.

[13] According to Ouellette, the conversations about the voting packages occurred after the voting process closed and before the certification hearing. The conversations about coercion occurred sometime before the certification hearing, but Ouellette could not recall if they occurred after the vote.

[14] On the coercion issue, employees approached Ouellette and asked "how can we change our vote?" They spoke to some apparent intimidation that occurred in the context of garage meetings that had been held. Ouellette stated that he did not know how those employees voted. He had been encouraging "every person to vote", both prior to and during the voting period.

[15] The employee list was provided to the Board, through counsel, on May 10, 2019. Accompanying the list was this request:

> *We hereby request that the home addresses of the employees only be used for internal Board processes, and not be shared with the applicant at this point in time, unless and until the representation question is decided.*

[16] The Board did not provide employee addresses to the Union.

[17] Lolacher testified that she has been involved with at least fifteen certification drives in her time as a lead organizer with SEIU-West, and each one involved a mail-in ballot. These drives covered workplaces in the service industry, retirement homes, group homes, and charities.

[18] Lolacher was contacted by one worker indicating that he or she did not receive a ballot. Lolacher provided the phone number for the Board. When the Union realized that there were issues with employee addresses, it distributed a notice to those employees for whom it had addresses (from support cards), providing information on how to obtain a voting package. The notice read as follows:

URGENT NOTICE

By now you should have received your confidential voting package from the Saskatchewan Labour Relations Board so you can cast a secret ballot about forming a union at City Centre Bingo. Please follow the instructions included in the voting package closely to avoid potentially spoiling your ballot. You are entitled to cast your vote in secret.

You have until May 24th to mail your ballot! Please ensure that your ballot is mailed with time to arrive at the Labour Relations Board by the 24th.

If you have not received a ballot:

- *Call the Labour Relations Board immediately at (306) 787-2406*
- *This call is confidential*
- *Take note of the date and time of your call and the resolve for your records.*

If you have any questions about the vote or your union, don't hesitate to give Stacey a call at: …

[19] Lolacher testified that, in addition to those employees for whom it had support cards, there were two people who also would have received this notice.

[20] The Union also contacted the Board about the issue and the Board agent replied:

In this matter, there are seven packages with addresses that differ from the Union's list of addresses. Two packages have addresses from the Employer's list that were used as they contained the apartment numbers when the Union's list did not. There are five other occasions where the addresses differ from the Union's list of addresses. Of these five, four of the voting packages have already been received and at least one of those voters has returned a ballot.

The only remaining eligible employee whose address differed from the Union's list is ______. I have been unable thus far to speak with ______, however, ______ is welcome, same as any employee, to contact the Board regarding the location of voting package or to confirm address. In such cases, the Board is able to send a voting package to the eligible voter once we have spoken to the employee and they have confirmed their wish that a ballot be sent to a different address.

Given that there is a single voting package that may have to be sent to a new address, I am surprised to hear of the Unions disappointment with regards to this vote….

[names and pronouns redacted]

[21] Lolacher testified that she was concerned that the individual with whom she had spoken might find it intimidating to call and follow up with "the government".

[22] Although Lolacher did not attend all of the "garage meetings" at which the intimidation was alleged to have taken place, she attended one in March, and did not observe anything of the sort.

Relevant Statutory Provisions:

[23] The following provisions of *The Saskatchewan Employment Act* ["Act"] are applicable:

> ***6-22****(1) All votes required pursuant to this Part or directed to be taken by the board must be by secret ballot.*
>
> *(2) A vote by secret ballot is not required among employees in a bargaining unit consisting of two employees or fewer.*
>
> *(3) An employee who has voted at a vote taken pursuant to this Part is not competent or compellable to give evidence before the board or in any court proceedings as to how the vote was cast.*
>
> *(4) The results of the vote mentioned in subsection (1), including the number of ballots cast and the votes for, against or spoiled, must be made available to the employees who were entitled to vote.*
>
> *. . .*
>
> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *. . .*
>
> *(v) to order, at any time before the hearing or proceeding has been finally disposed of by the board, that:*
>
> *(i) a vote or an additional vote be taken among employees affected by the hearing or proceeding if the board considers that the taking of that vote would assist the board to decide any question that has arisen or is likely to arise in the hearing or proceeding, whether or not that vote is provided for elsewhere; and*
>
> *. . .*
>
> ***6-121****(1) Notwithstanding any other Act or law, information obtained for the purposes of this Part is not open to inspection by any person or by any court if the information is acquired by any of the following persons and was acquired in the course of the person's duties pursuant to the Part:*
>
> *(a) a member of the board;*
>
> *(b) a labour relations officer;*
>
> *(c) the director of labour relations;*
>
> *(d) a special mediator;*
>
> *(e) an arbitrator with respect to an arbitration of a matter governed by this Part;*
>
> *(f) a member of a conciliation board appointed pursuant to this Part;*
>
> *(g) a member of an arbitration board appointed pursuant to this Part.*
>
> *(2) None of the persons mentioned in subsection (1) shall be required by any court or the board to give evidence about information obtained for the purposes of this Part in the course of his or her duties.*

[24] The following provisions of *The Saskatchewan Employment (Labour Relations Board) Regulations* ["Regulations"] are applicable:

22*(1) On filing an application pursuant to the Act and these regulations respecting a matter for which the board is authorized or required by the Act to conduct a vote, the registrar may issue a written direction to an employer of employees whom the registrar considers affected by the application requiring the employer to file with the registrar the employer's payroll records respecting those employees.*

(2) The payroll records mentioned in subsection (1) must identify the names, positions and classifications of employees who are employed in the unit or units of employees specified by the registrar in the written direction as at the date specified by the registrar in the written direction.

(3) In addition to the payroll records, an employer to whom a written direction pursuant to subsection (1) is issued shall also file with the registrar the following additional information:

> *(a) the location of any workplaces at which the employees mentioned in subsection (1) are employed;*
>
> *(b) any safety restrictions respecting access to the workplaces mentioned in clause (a);*
>
> *(c) the hours of work of the employees at the workplaces mentioned in clause (a).*

(4) An employer to whom a written direction pursuant to subsection (1) is issued shall file the payroll records required by this section within three business days after being served with the written direction.

23*(1) In this section, "agent" means a person appointed pursuant to subsection (3).*

(2) On the filing of an application respecting a matter for which the board is authorized or required to conduct a vote pursuant to the Act or these regulations, the board may:

> *(a) if the board considers it to be appropriate, direct that a vote of employees be conducted by secret ballot before the application is heard by the board; and*
>
> *(b) provide any directions respecting the conduct of the vote that the board considers appropriate.*

(3) The board may appoint as its agent the registrar or any other person who the board is satisfied is independent from the parties to the application to conduct a vote required or authorized by the Act.

(4) If the registrar is appointed by the board as its agent:

> *(a) the registrar may delegate to one or more other persons the exercise of any of his or her powers, or the fulfilling of any of his or her duties, as agent pursuant to this section and impose any terms and conditions on the delegation that the registrar considers appropriate; and*
>
> *(b) the exercise of any powers or the fulfilling of any duties by a delegate mentioned in clause (a) is deemed to the exercise of those powers or the fulfilling of those duties by the registrar.*

(5) An agent shall:

> *(a) act as the returning officer for the vote;*

(b) comply with any directions given by the board respecting the vote;

(c) establish a list of employees who are eligible to vote;

(d) determine the form of the ballot to be used in the vote;

(e) determine whether the vote is to be conducted:

(i) at one or more polling places; or

(ii) using a mail-in balloting procedure;

(f) if the vote is to be conducted at one or more polling places, determine the place or places where the vote is to be conducted, together with the dates and hours for conducting the vote;

(g) if the vote is to be conducted using a mail-in balloting procedure, determine the date by which completed ballots must be returned to the returning officer; (h) prepare a notice of vote in accordance with Form 20 (notice of vote) and issue directions to the employer respecting posting the notice of vote;

(h) prepare a notice of vote in accordance with Form 20 (notice of vote) and issue directions to the employer respecting posting the notice of vote;

(i) appoint any persons whom the agent considers necessary as deputy returning officers and poll clerks; and

(j) if the vote is to be conducted at one or more polling places, invite the employer, any other person and the union named in the application to appoint one scrutineer for each polling place establish pursuant to clause (f) and allow those scrutineers to be present at the polling place during the hours the vote is conducted;

(k) if the vote is to be conducted using a mail-in balloting procedure, determine the place for counting of the ballots and invite the employer, any other person and the union named in the application to appoint one scrutineer to be present while the ballots are counted.

(6) An agent may issue any directions or instructions that the agent considers necessary respecting the conduct of the vote.

(7) No person shall:

(a) fail to comply with any directions or instructions given by an agent respecting the conduct of the vote; or

(b) if the vote is to be conducted at one or more polling places:

(i) interfere, or attempt to interfere, with a person who is voting;

(ii) attempt to obtain information at a polling place as to how a person has voted or is about to vote;

(iii) canvass or solicit votes within 20 metres of a polling place while the vote is being conducted; or

(iv) display, distribute or post a campaign sign, button or other similar material

within 20 metres of a polling place while the vote is being conducted.

(8) In counting ballots, the agent:

(a) shall reject every ballot on which anything is written or marked that identifies the person voting or on which no vote is marked; and

(b) shall accept a ballot if the employee has marked the ballot in a manner that clearly indicates the choice of the employee and notwithstanding that the employee may have marked his or her vote out of, or partly out of, its proper space or with a mark other than an "X".

(9) On completion of the vote, the agent shall:

(a) if there is no direction of the board to the contrary and if there is no impediment to doing so, promptly count the ballots and complete Form 21 (Report of Agent of the Board Respecting the Conduct of Vote and Counting of Ballots); or

(b) if the agent does not count the ballots promptly after the vote, complete Form 22 (Report of Agent of the Board Respecting the Conduct of Vote).

(10) Immediately after completing Form 21 or 22 as required by subsection (9), the agent shall file a copy of the completed Form with the registrar and the registrar shall give a copy of the completed Form to an employer, to a union directly affected by the vote and, if the applicant who filed the application is not an employer or union, to the applicant.

(11) An employer, other person or union directly affected by the vote that intends to object to the conduct of the vote or the results from the counting of the ballots shall file an application in Form 23 (Objection to Conduct of the Vote) within three business days after the conduct of the vote or the counting of the ballots, as the case may be.

Analysis:

[25] In the current case, the Board agent chose to proceed with the representational vote by way of a mail-in balloting procedure. To grant the order requested by the Employer, the Board would have to override the discretion of the agent in opting for the mail-in voting process. In deciding whether to override the agent's discretion, the Board looks to the previous case law, through which the Board has outlined the circumstances in which it is appropriate to so override.

[26] In *CWS Logistics Ltd. v UFCW Local 1400*, [2018] SLRBD No 26, 23 CLRBR (3d) 290 ["*CWS Logistics*"], the Board reviewed the relevant case law,[2] disclosing certain principles that the Board should take into account. As a starting point, the Board agent has discretion in establishing the parameters for representational votes. The agent's exercise of discretion attracts an element of deference. In the conduct of representational votes, there is no guarantee or expectation of perfect democracy. In some cases, employees may not be able to exercise their

[2] At paras 19 to 22.

democratic rights. As long as the agent identifies a voting process that is fair and consistent with the legislation, and permits all eligible employees a reasonable opportunity to vote, the Board should refrain from interfering with the agent's discretion.

[27] As the Board explained in *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of United States, its Territories and Canada, Local 300 v Inland Audio Visual Limited*, 2014 CanLII 5454, 240 CLRBR (2d) 284 (SK LRB) ["*Inland Audio*"], at paragraph 21:

> *For the same reason that our agents require discretion in establishing the parameters for representational votes depending on the circumstances of each particular workplace, the decisions they make deserve an element of deference. Our proceedings would become highly pedantic and pressure would mount for our agents to testify if this Board was to adopt an approach of routinely reviewing the minutia of each and every decision made by our agents in the conduct of representational votes. In our opinion, neither of these results are desirable. As we have noted, our agents are called upon to make difficult decisions and they often must do so within short time constraints. While this does not mean that errors will not occur, in our opinion, the lens through which the conduct of a representational vote must be viewed are whether or not the actions of our agents were reasonable in light of circumstances of the particular workplace and the Board's expectation of expediency in the conduct of those votes.*[3]

[28] The Employer argues that the mail-in voting process is inappropriate in a centralized workplace such as City Centre Bingo. As a result of the mail-in vote, voting packages were not effectively distributed, and employees were denied their right to vote. However, the mail-in process is the current, standard process used by the Board in representational questions. Arguing in support of the mail-in process in this case, the Union relies on the Court's reasoning in *Atco Structures & Logistics Ltd. v Unite Here, Local 47*, 2015 SKQB 275 ["*Atco QB*"], citing paragraph 31:

> *In its Decision, the Board recognized that so long as its Agent identified a vote process that was fair and permitted all eligible employees reasonable opportunity to vote it should not interfere with the exercise of the Agent's discretion. I have come to a similar conclusion upon this judicial review application. It is not for the court, any more than it is for the Board, to second-guess the discretion exercised by the Board's statutorily appointed Agent in the exercise of those discretions which the Act and the Regulations grant to the Agent. So long as that discretion is exercised fairly and reasonably and consistent with the statutory provisions and the object and intentions sought to be achieved by them, as the Board, in its Decision, found to be the case, the court should not and will not interfere.*

[29] The Board's reliance on the mail-in process is supported by the legislative framework and confirmed by the relevant case law. In *Northern Industrial Contracting Inc v International Association of Heat and Frost Insulators*, 2015 SKQB 204 (CanLII) ["*Northern Industrial*"], the

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[3] As cited in *CWS Logistics* at para 19.

Court considered the Board's decision, in which the Board had held that the mail-in ballot process was a legitimate option available to the agent. The Board relied on clause 26(h) of *The Saskatchewan Regulations*,163/72 (now repealed), which allowed the agent to "give special directions or instruction as he may deem necessary for the proper conduct of the vote". The Board found that clause 26(h) could "reasonably be interpreted as permitting the agent to adopt a voting procedure other than one that involves designated polling stations and in-person voting".[4] Section 35 was determinative, given its express provision that non-compliance with the Regulations did not render proceedings void unless the Board so directed.[5] Accordingly, the Board had the "right to decide what is and is not proper procedure in the vote proceedings over which it has jurisdiction".[6]

[30] It is worth noting that *Northern Industrial* was decided in the absence of the current provision expressly allowing the agent to choose a mail-in process for a representational vote. The addition of this provision confirms and reinforces the availability to the agent of the mail-in process as an option. In the current Regulations, this provision exists at subsection 23(5), which states:

> ***23**… (5) An agent shall:*
>
> *(a) act as the returning officer for the vote;*
>
> *(b) comply with any directions given by the board respecting the vote;*
>
> *(c) establish a list of employees who are eligible to vote;*
>
> *(d) determine the form of the ballot to be used in the vote;*
>
> *(e) determine whether the vote is to be conducted:*
>
> *(i) at one or more polling places; or*
>
> *(ii) using a mail-in balloting procedure;*
>
> *(f) if the vote is to be conducted at one or more polling places, determine the place or places where the vote is to be conducted, together with the dates and hours for conducting the vote;*
>
> *(g) if the vote is to be conducted using a mail-in balloting procedure, determine the date by which completed ballots must be returned to the returning officer;*

[4] At para 23.
[5] At para 25.
[6] At para 25.

[31] There are no restrictions in the Regulations as to when the agent may exercise his or her discretion to opt for the mail-in process. In the absence of any restrictions, the question for the Board is whether it should override the exercise of that discretion, on the facts of this case.

[32] While the Employer insists that the reliance on the mail-in process in a workplace such as City Centre Bingo is inherently flawed, no voting process is perfect. The mail-in process has its own benefits, recognized by the Board in *Inland Audio*, such as efficiency and increased voter participation.[7] However, in order to facilitate voter participation, the agent is expected to make reasonable efforts to ensure that the list of voters and the list of mailing addresses for eligible voters are accurate.[8] The Board has described the balance between efficiency and voter participation in this way:

> *17 … While this goal is tempered by the desire for efficiency and the need for finality in determining the representational question, there can be no doubt of this Board's primary concern is* [sic] *that employees are afforded an adequate opportunity to vote on the fundamental question of whether or not they wish to be represented by a trade union in their future dealings with their employer.*

[33] In this case, the Board finds that the agent has identified a voting process that was fair, was consistent with the legislation, and permitted all eligible employees a reasonable opportunity to vote. What follows is the Board's reasoning in arriving at that conclusion.

[34] Here, the agent requested a list of employees and a list of mailing addresses from the Employer. The Employer was responsible for providing those lists and for making reasonable efforts to ensure the accuracy of those lists when providing them to the Board. The agent should have been entitled to rely on that list.

[35] After the voting packages were mailed out, the Union raised concerns with the Board. The agent responded that, in his view, only one of the employees was a concern. Four of the packages concerned had been picked up and two of the packages had been sent to addresses that included more specific details provided by the Employer. The remaining lone employee was welcome to contact the Board to request the package be mailed to an alternative address. The Board had provided a Notice to the Employer to post in the workplace, a Notice that provided the Board's phone number.

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[7] *Inland Audio* at para 16.
[8] *Ibid* at para 17.

[36] The Employer argues that, based on its evidence, there is a statistically significant discrepancy, or potential discrepancy, in the results of the representational vote, justifying a new vote. Fourteen people voted in favour of the Union and seven voted against. An additional seven individuals is statistically significant. The Employer argues that, based on Ouellette's evidence, combined with the email exchange with the Board agent, the missing votes are at least seven.

[37] However, even if the Board were to accept the "truth of the contents" of the conversations as described, the conversations reveal very little about the actual conduct of the vote.

[38] A note is warranted about hearsay evidence. The Board decided that, in the unusual circumstances of this case, it would hear the evidence despite its marginal threshold necessity and threshold reliability. The Board did so as an exercise of its discretion pursuant to clause 6-111(1)(e) of the Act. Due to this decision, counsel for the Union, in vigorously representing the Union, provided the Board with a basic primer on hearsay evidence. This Board wishes to reassure the parties that it is familiar with the function of the rules of evidence and the purpose of the rule against the admission of hearsay, including the well-established principled exception to the hearsay exclusion.

[39] The Board's decision is not intended to set a precedent for the admission of hearsay evidence in similar proceedings. The rules of evidence exist for a reason. Evidence rules provide a degree of predictability in proceedings such that the parties have a measure of control over the conduct of their case, including by having a reasonable appreciation of the case they have to meet. The Board made clear that in admitting Ouellette's testimony about these events, it would assign to the evidence its appropriate weight. In reviewing the evidence in detail, the Board finds that the appropriate weight is low. Furthermore, and perhaps as an aside, counsel suggested that the evidence was not being led for the truth of its contents, which raises questions as to what value the testimony had, if any at all.

[40] Theoretically, Ouellette's testimony was not the best evidence available. The Employer suggested that the employees could not be compelled to testify about their votes. Employees cannot be compelled to testify about how they have voted or about whether they support the Union. Section 6-22 is clear on this point:

> ***6-22****(1) All votes required pursuant to this Part or directed to be taken by the board must be by secret ballot.*

(2) A vote by secret ballot is not required among employees in a bargaining unit consisting of two employees or fewer.

(3) An employee who has voted at a vote taken pursuant to this Part is not competent or compellable to give evidence before the board or in any court proceedings as to how the vote was cast.

(4) The results of the vote mentioned in subsection (1), including the number of ballots cast and the votes for, against or spoiled, must be made available to the employees who were entitled to vote.

[41] Employees are not competent or compellable to give evidence as to how the vote was cast. That does not mean that they are not competent to testify about whether they received their voting packages or whether they were intimidated. Granted, further to clause 6-62(1)(p), an Employer can be found guilty of an unfair labour practice for questioning employees as to whether they have exercised their rights pursuant to Part VI. However, it seems incongruous that the Board would provide for an objection to conduct proceeding, without a process by which the most basic, relevant evidence could be presented.

[42] Even if the Board assumes that the Employer could not have called employees to testify, Ouellette's evidence remains frail. The content of his testimony is vague at times, and overall, skeletal. The details remain unclear. His testimony is, at best, evidence of conversations about missing voting packages and conversations about intimidation (or, conversations about employees asking "how to change their vote)". Ouellette did not have the opportunity to observe or experience the actual events about which he was testifying (the missing packages or the intimidation). Lolacher attended a garage meeting and reported no signs of intimidation. Ouellette's testimony does not amount to proof that any, let alone all, of an uncertain number of employees did not receive their voting packages. Nor does it amount to evidence that any, let alone all, of an uncertain number of employees were intimidated.

[43] In addition, there were enough discrepancies in Ouellette's evidence to raise questions about its credibility. It should be remembered that a credibility assessment is not necessarily an indictment of a witness' truthfulness any more than it is an observation about a witness' recollection of events. The starting point for the Board is to assume truthfulness. However, the Board observed that, even though Ouellette's testimony was not particularly detailed, certain key details seemed to evolve and develop. The evidence overall was at times so general, and the substantive details so lacking, that its reliability is questionable.

[44] In particular, Ouellette shared few details around the context of the conversations. While Ouellette was careful to specify that the employees approached him rather than the other way around, he did not provide details as to how it came to be that multiple employees proceeded to approach him directly about the conduct of the vote. Ouellette suggested only that, after being asked “how to change their vote”, he “didn’t press the issue”. He said that he did not know how these employees had voted, or even: “if they voted – any of my staff”. The Board notes that, if it is the case that some employees simply changed their minds, independent of any coercion or intimidation, this is not a basis for ordering a new representational vote.

[45] Furthermore, the Board is acutely aware of the potential frailty of this type of evidence - testimony provided by an employer, speaking to rights supposedly exercised or not exercised by the employees. Employees are particularly vulnerable to the influence of an Employer who may be perceived as disinterested in, or even resistant to, unionization. Even absent such a dynamic, employees are at times properly distrustful of an employer’s support for a union, and so their communications with their employer should be considered in this context.

[46] Further to the organizing drive and the Board’s required Notice, it should have been apparent that employees could exercise their right to vote by first contacting the Union or the Board. If the employees then chose not to pursue the necessary steps to exercise their right to vote, then the failure (or the choice) belongs to the employees. Unlike section 8 of *The Trade Union Act*, there is no minimum voting requirement, or quorum, contained in the current Act. The Board cannot compel employees to vote if they choose not to. Even Ouellette admits, rather *insists*, that “we encouraged every person to vote” both prior to and during the voting period. He suggested that, in his mind, it “did not matter how they voted”. He supposedly made his neutrality clear when he told the employees to “exercise your right to vote”. As in any democratic system, while the Board appreciates the concern with employees being unwilling to contact the Board directly, the Board has to place some responsibility with the eligible voters to take initiative in exercising their right to vote.

[47] Lastly, the Employer’s objection is, to some extent, based on its own failure to comply with its obligations. In this vein, the Union relies on clause 2-38(1)(c) of the Act to argue that the Employer brings this Application without clean hands, failing as it did to keep accurate mailing addresses for its employees. Clause 2-38(1)(c) provides:

> ***2-38****(1) No employer shall fail to keep:*

> *(c) records showing the following with respect to each employee: (i) the full name, sex, date of birth and residential address of the employee;*

[48] The Employer took great exception to this argument. Given the Board's conclusions in this case, it is not necessary to consider the impact of this provision, or the impact of employment standards obligations generally, on the acceptability of the Employer's conduct. It is, however, a given that an Employer should use reasonable efforts to ensure the accuracy of the information that it provides to the Board. Certainly, the Board does not expect perfection. But it is unclear why Ouellette did not proceed to act with more vigilance in gathering the employee records. By that point, he had been in the position for four months. While he suggests that the records management issues revealed themselves over time, it is unlikely, given his use of the word "shambles" to describe the office records, that he was not by that point alive to the necessity of taking extra caution when providing employee records.

[49] Apart from the foregoing comments as to the frailty of the evidence, a few additional comments are warranted in relation to the intimidation issue. The Union makes the point that,

> *In the context of exchanges and activity between employees in a proposed bargaining unit, the Board has shown reluctance to interfere in the debate between employees about union representation, recognizing that the Board could stifle the debate the Board attempts to encourage and protect.*

[50] It is unnecessary for the Board to comment on any distinctions in the tests as between clauses 6-62(1)(a) and 6-63(1)(a) of the Act, as urged by the Union. In this case, there is insufficient evidence to allow the Board to find that any intimidation took place. Furthermore, given the paucity of evidence, there is no basis upon which the Board could conclude on an objective standard, that an employee of reasonable or average intelligence and fortitude would have been intimidated or coerced by some elusive conduct taken at a garage meeting or otherwise.

[51] Lastly, the Union makes the point that ordering another vote has an impact on the *Charter*-protected right to freedom of association, as described in the Court's decision in *Saskatchewan v Saskatchewan Federation of Labour*, 2013 SKCA 43, 414 SaskR 70 (SK CA) ["*SFL*"]. In *SFL*, the Court observed at paragraph 114, relying on *Slaight Communications Inc v Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038, that "discretionary statutory powers must be exercised consistently with the demands of the *Charter*." This imposes an imperative on the agent to take potential delay into account in establishing a voting process; it likewise imposes an imperative on the Board to take delay into account in assessing whether it is appropriate to order a new vote.

[52] The time lapse between the original vote and a re-vote can cause problems of its own. The Board has previously listed the problems that can arise on a new representational vote:

> *[108] …While the conduct of a new representational vote could cure the irregularity, it would also change the list of eligible voters; would cause confusion among affected employees who have already voted; could potentially result in a representational campaign occurring in the workplace; and it may expose employees to the very undue influences that we seek to avoid through timely representational votes….*[9]

[53] For the foregoing reasons, the Board finds that the existing circumstances are not such that it would be appropriate for the Board to override the discretion of the agent in opting for the mail-in voting process. In this case, the Board finds that the agent identified a voting process that was fair, was consistent with the legislation, and permitted all eligible employees a reasonable opportunity to vote. Having concluded as such, the relief that the Employer has sought is denied.

[54] The Board hereby orders that the Employer's Application, being the Objections to Conduct of Vote, is dismissed. An appropriate order will accompany these Reasons.

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

DATED at Regina, Saskatchewan, this **12th** day of **December, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson

[9] *United Food and Commercial Workers, Local 1400, v 303567 Saskatchewan Ltd*, 2013 CanLII 98138 (SK LRB).