SEIU-WEST, Applicant v SASKATOON TWIN CHARITIES INC. operating CITY CENTRE BINGO, Respondent

LRB File No. 229-19; November 15, 2019
Vice-Chairperson, Barbara Mysko; Board Members: Laura Sommervill and Phil Polsom

Counsel for the Applicant Union: Michael A. MacDonald
Counsel for the Respondent
Saskatoon Twin Charities Inc.: Steve Seiferling and Jared M. McRorie

Interim Application – Application for interim certification order – Two preconditions met – Appropriate test on interim application – Two-stage test – Arguable case and balance of convenience.

Interim Application – Arguable case established – Certification Application is underlying application – Objection to Conduct of Vote outstanding.

Interim Application – Balance of convenience – Application equivalent to request for final relief – Pre-determining Objection to Conduct of Vote – Application dismissed.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an application for interim relief filed by SEIU-West [the "Union"] against Saskatoon Twin Charities Inc. operating City Centre Bingo [the "Employer"]. This Application was filed on October 28, 2019.

[2] On May 3, 2019, the Union filed an application for bargaining rights in relation to an all-employee bargaining unit of employees, along with two other related applications for bargaining rights. On May 10, 2019, the Board issued a Direction for Vote in relation to those applications. The resulting Notice of Vote set a deadline for the return of the ballots, being May 24, 2019.

[3] On October 15, 2019, the Board found, on the Union's application for bargaining rights, that the bargaining unit described in LRB File No 113-19 qualifies as an appropriate bargaining

unit for collective bargaining.[1] Further to that determination, the Board ordered that the ballots be tabulated. On October 18, 2019, the Board Agent reported that 21 of the 32 eligible voters cast ballots and 14 of those ballots were cast in favour of Union representation, while seven were cast against. After the tabulation, on October 21, 2019, the Employer filed an objection to conduct of vote, in which it outlined the reasons for its objections, as follows:

> *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.*
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> *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.*
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> *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.*
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> *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.*

[4] The hearing on the Employer's objection to conduct of vote was set over to the December Motions' Day for the scheduling of a hearing. In the meantime, the Union filed this Application for interim relief. In this Application, the Union seeks an order requiring the Employer, pending final order of the Board, to recognize the Union as the exclusive bargaining agent of employees in the bargaining unit described in the order of the Board in LRB File No 113-19. In essence, the Union seeks an interim certification order.

Argument on Behalf of the Parties:

[5] The Union argues that an interim certification order is urgently needed due to harm caused to the employees and to the Union, in the context of a six-month delay between the filing of the application for a certification order and the within hearing. The Union states that further delay erodes employees' confidence in the Union and the administrative processes of the Board, obstructs access to statutory and Charter rights, delays collective bargaining, and leaves employees without access to arbitration. By contrast, there is no real harm to the employer. Any concerns theoretically harbored by the Employer, for example, being required to collectively bargain, are not real harms. Furthermore, the Union draws the Board's attention to what it

[1] *SEIU-West v Saskatoon Twin Charities Inc. (City Centre Bingo)*, 2019 CanLII 98487 (SK LRB).

perceives as significant weaknesses in the Employer's objections to the conduct of the vote. On these bases, the balance of labour relations harm favours granting the interim relief sought.

[6] The Employer states that the test to be applied on this application is not the typical two-stage test on an interim application, but instead, is the "plain and obvious" test arising out of an application for summary dismissal. The Employer's reasoning is this: the Union's Application is not an application for interim relief, but a disguised application for summary dismissal of the Employer's objection to the conduct of the vote. On this basis, the Employer says that the Board is charged with asking whether the "claim" should be struck as disclosing no arguable case. The Board should exercise its discretion to strike on this ground only in a plain and obvious case.

[7] The Employer says that this is not a plain and obvious case. If the Board were to grant the Union's request, it would be forcing the Employer to collectively bargain, thereby circumventing the process of assessing the full merits of the Employer's objection.

Relevant Statutory Provisions:

[8] The following provisions of the Act are applicable:

> ***6-4****(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
> *(2) No employee shall unreasonably be denied membership in a union.*
>
> *. . .*
>
> ***6-9****(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.*
> *(2) When applying pursuant to subsection (1), a union shall:*
> *(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and*
> *(b) file with the board evidence of each employee's support that meets the prescribed requirements.*
>
> *. . .*
>
> ***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 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 fulfil 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.

(7) In making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:

(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and

(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:

(i) the geographical jurisdiction of the union making the application; and

(ii) whether the certification order should be confined to a particular project.

. . .

6‑12*(1) Before issuing a certification order on an application made in accordance with section 6‑9 or amending an existing certification order on an application made in accordance with section 6‑10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.*

(2) Notwithstanding that a union has not established the level of support required by subsection 6‑9(2) or 6‑10(2), the board shall make an order directing a vote to be taken to determine whether a certification order should be issued or amended if:

(a) the board finds that the employer or a person acting on behalf of the employer has committed an unfair labour practice or has otherwise contravened this Part;

(b) there is insufficient evidence before the board to establish that 45% or more of the employees in the proposed bargaining unit support the application; and

(c) the board finds that sufficient evidence of support mentioned in clause (b) would have been obtained but for the unfair labour practice or contravention of this Part.

(3) Notwithstanding subsection (1), the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same union.

6‑13*(1) If, after a vote is taken in accordance with section 6‑12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:*

(a) certifying the union as the bargaining agent for that unit; and

(b) if the application is made pursuant to subclause 6‑10(1)(b)(ii), moving a portion of one bargaining unit into another bargaining unit.

(2) If a union is certified as the bargaining agent for a bargaining unit:

(a) the union has exclusive authority to engage in collective bargaining for the employees in the bargaining unit and to bind it by a collective agreement until the order certifying the union is cancelled; and

(b) if a collective agreement binding on the employees in the bargaining unit is in force at the date of certification, the agreement remains in force and shall be administered by the union that has been certified as the bargaining agent for the bargaining unit.

. . .

***6-103**(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*

. . .

(d) make an interim order or decision pending the making of a final order or decision.

[9] The following section of the Regulations is also applicable:

***15**(1) An employer, other person or union that intends to obtain an interim order pursuant to clause 6-103(2)(d) of the Act shall file:*

(a) an application in Form 12 (Application for Interim Relief) with the registrar;

(b) an affidavit of the applicant or other witness in which the applicant or witness identifies with reasonable particularity:

(i) the facts on which the alleged contraventions of the Act are based, including referring to the provision or provisions of the Act, if any, that are alleged to have been contravened;

(ii) the party against whom the relief is requested; and

(iii) any exigent circumstances associated with the application or the granting of the interim relief;

(c) a draft of the order sought by the applicant; and

(d) any other materials that the applicant considers necessary for the purposes of the application.

(2) Subject to subsection (3), every affidavit filed pursuant to clause (1)(b) must be confined to those facts that the applicant or witness is able of the applicant's or witness's own knowledge to prove.

(3) If the board is satisfied that it is appropriate to do so because of special circumstances, the board may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.

(4) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subsection (3), the source of the information must be disclosed in the affidavit.

(5) Before filing an application pursuant to this section, the applicant shall contact the registrar and, on being contacted, the registrar shall set a date, time and place on which the application is returnable.

(6) On being notified pursuant to subsection (5) of the date, time and place of the hearing, the applicant shall serve a copy of the application, along with the materials referred to in the application, on the party against whom the interim relief is claimed within:

(a) subject to clause (b), at least three business days before the date set for the hearing; or

(b) any shorter period that the executive officer may permit.

(7) Before the hearing, the applicant shall file proof of service of the application for interim relief mentioned in clause (1)(a).

Analysis:

[10] At the outset, it is necessary for the Board to address the Employer's argument about the appropriate test to be applied on the within application. The Union has brought an Application for interim relief pursuant to clause 6-103(2)(d) of the Act. The Union, in its argument, has relied on the two-stage test which is well-established and commonly applied in interim relief applications. The Union has made clear that the Board should consider and determine the Employer's objection on its merits, separate from the within Application.

[11] The interim application test is appropriate. It provides the Board with the tools necessary to assess the merits of the interim request, including by addressing whether the request is an attempt to obtain indirectly what cannot be obtained directly, or to obtain final relief. For the foregoing reasons, the test to be applied is that which applies on interim applications, as that is what is before the Board.

[12] The Board's power to grant interim relief is discretionary.[2] In granting interim relief and exercising its discretionary power, the Board must be careful to ensure that there are solid labour relations purposes for doing so.

[13] The onus on an interim application rests with the applicant, the Union.

[14] There are two primary preconditions to an application for interim relief, both of which are satisfied in the current case.[3] First, there must be an underlying application to which the grant of interim relief is ancillary. Second, there must be a formal application along with affidavit evidence.

[15] As for the first precondition, the Union has filed an application for bargaining rights, which has not been finally disposed of, due to the Employer's pending objection application. The final step in the process of acquiring bargaining rights is set out at subsection 6-13(1), which requires that the Board issue a certification order if, after a vote is taken in accordance with section 6-12, the majority of votes that are cast favour certification of the union. The Employer's objection has prevented the Board from issuing a certification order pursuant to subsection 6-13(1), and therefore the certification application remains open.

[16] As for the second precondition, the Union filed an affidavit of Shane Ellis ["Ellis"], the Director of Organizing employed by the Union. Ellis is one of the individuals who assisted the

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[2] *UFCW v Verdient Foods Inc.,* 2019 CanLII 57377 (SK LRB) ["*Verdient*"] at para 21.
[3] *Ibid* at para 20.

employees with the application for bargaining rights, and instructed legal counsel on behalf of the Union in that application.

[17] On the issue of evidence on an interim application, the Board in *SGEU v Saskatchewan (Government)*, 2010 CanLII 81339 (SK LRB) stated,

> *[30] … Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. […]*

[18] Finally, the Union suggests that there are two underlying applications, being the application for bargaining rights and the Employer's application objecting to the conduct of the vote. It seems logical that the relevant, underlying application is the Union's application for bargaining rights, not the Employer's objection. The substantive test on an interim application supports this conclusion.

[19] The substantive test is two-fold. The first stage of the test asks whether the underlying, or main, application raises an arguable case. This is not a rigorous standard. The Board considers whether the underlying application discloses facts that, if established at the full hearing, would prove the alleged claim. The Union is not required to demonstrate a probable contravention of the Act. The Union bears the onus to satisfy the Board that the underlying application raises an arguable case.

[20] The underlying application for bargaining rights raises an arguable case. In fact, many of the issues on that application have already been decided. The Board has determined that the bargaining unit applied for pursuant to LRB File No 113-19 is appropriate for collective bargaining, and has therefore ordered a tabulation of the vote. The Board's agent has conducted the tabulation, thereafter reporting that a majority (of those voting) voted in favour of certification. Of the issues raised in the Employer's objection, the Employer bears the onus to prove those allegations, in a hearing before the Board. The Employer's objection does not displace the Board's finding that there is an arguable case on the main application.

[21] The second stage of the substantive test is whether the balance of convenience favours granting the interim relief pending a hearing on the merits of the underlying application.[4] For this

[4] Or, in this case, pending its final resolution.

stage, the applicant is required to provide a description of the harm that will ensue if the order is not granted, with a view to demonstrating a meaningful risk of irreparable harm.[5] Irreparable harm is generally considered harm that cannot be compensated through an award of damages.

[22] In assessing the balance of convenience, the Board is charged with considering a variety of factors, including: whether there is a sufficient sense of urgency to justify the remedy sought; and whether, by granting the relief requested, the Board is in effect, granting all of the relief requested in the underlying application.[6] In determining whether to exercise its discretion to grant interim relief, the Board must be satisfied that there is a solid labour relations purpose in doing so.

[23] On the issue of urgency, the Board notes that the Union initially filed its application for bargaining rights on May 3, 2019, and now six months have passed without certification, despite the Board's determination with respect to the appropriate bargaining unit. Furthermore, two months have elapsed from the completion of the certification hearing until the hearing of the interim application. There is necessarily no guarantee as to the timeline for the disposition of the Employer's objection. Given these circumstances, the Union raises concerns with the impact of the delay on the exercise of the employees' rights pursuant to section 6-4 of the Act and section 2(d) of the Charter.

[24] The Board is careful to prioritize certification applications to ensure that employees are not unduly delayed in the exercise of their rights. Taking these concerns into account, at the hearing of the interim Application, the Board set the Employer's objection down for a hearing on December 2, 2019, to ensure that this aspect of the proceedings is heard in a timely fashion.

[25] The Union has not directly addressed the issue of harm through its affidavit evidence, other than to outline the procedural history, thereby disclosing aspects of the timeline, alleged delays occasioned by the Employer, and alleged conditions created by the Employer resulting in voting irregularities. The Union cited additional, alleged harms in its submissions to this Board, describing, for example, the process by which the Union maintains its relationship and reputation with employees in the ordinary course. This latter aspect of the Union's submissions was not reflected in the affidavit evidence, and therefore the Board is required to disregard it.

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[5] *Ibid* at para 41.
[6] See, for example, *Service Employees International Union, Local 299 v Saskatchewan Association of Health Organizations*, 2006 CanLII 62950 (SK LRB) at para 73.

[26] The Union also relied on the statutory benefits accruing to employees who are represented by a Union, including those that arise outside of a collective bargaining relationship. One such benefit arises from section 6-48 of the Act, which provides:

> ***6-48****(1) Whether there is just cause for the termination or suspension of an employee may be determined by arbitration if:*
> *(a) No collective agreement is in force;*
> *(b) The board has issued a certification order;*
> *(c) The employee is terminated or suspended for a cause other than shortage of work; and*
> *(d) The termination or suspension is not, and has not been, the subject of an application to the board respecting a matter mentioned in clause 6-62(1)(g).*
> *(2) If an arbitration is conducted pursuant to subsection 91), it is to be conducted in accordance with section 6-46.*
> *(3) The arbitrator shall determine any dispute respecting the application of this section.*

[27] With respect to collective bargaining, the Board observes that it is unlikely that the parties could make significant progress in collective bargaining between the current date and the release of a decision in relation to the Employer's objections. On the issue of statutory benefits, the Board agrees that these benefits are important, and that there is a risk of harm to the employees, should the employer choose to terminate or suspend an employee during the interim period of time. However, this is an issue on every application for bargaining rights which, to be sure, may be aggravated with the passage of time. Furthermore, in the appropriate case, a party may take advantage of the relevant unfair labour practice provisions of the Act.

[28] The Board must also be careful to pay proper respect to the wishes of the employees whether to be represented by a union. For this reason, the Board is reluctant to make an interim certification order where, for example, the vote has not been conducted or tabulated, or the results of the vote are in question. When an employer has filed an objection to the conduct of the vote, it is not for the Board to carefully weigh the merits of that particular application in assessing whether an interim certification order is appropriate.

[29] In arriving at its reasons, the Board has reviewed and considered the case law cited by both parties. Evidently, there is limited consideration of interim certification orders in Saskatchewan. Therefore, the Union relies primarily on case law arising from the Canada Industrial Relations Board [CIRB], which issues interim certification orders pursuant to section 19.1 of *The Canada Labour Code*, which reads:

> *The Board may, on application by a trade union, an employer or an affected employee, make an interim order that the Board considers appropriate for the purpose of ensuring the fulfilment of the objectives of this Part.*

[30] In *Canadian Helicopters Limited v Office and Professional Employees International Union*, 2010 CIRB 532, that same Board outlines the purpose of such an order:

> *[16] The primary reason that the Board issues interim certification orders is so that collective bargaining can commence for those employees who are clearly within the scope of a unit that the Board has found to be appropriate for collective bargaining. This ensures that the bulk of the employees in the unit can benefit from collective bargaining while the Board takes the time necessary to hear the parties with respect to positions that they believe should be included or excluded from the unit. The purpose of issuing such interim certification orders would be effectively defeated if the Board were to excuse the parties from the obligation to bargain on behalf of the employees covered by the certification order for the length of time required to decide the secondary issues.*

[31] This Board notes that, in none of the CIRB cases filed with the Board, was there an interim certification order issued in the context of an outstanding objection to conduct of vote or an outstanding vote.[7] The Union also relies on *Communications, Energy and Paperworkers Union of Canada v Native Child and Family Services of Toronto*, 2009 CanLII 9047, a decision of the Ontario Labour Relations Board. There, despite an outstanding jurisdictional issue, the Ontario Board saw fit to order an interim certification of the applicant union in relation to the employees in question. In arriving at said order, the Ontario Board observed:

> *17. As noted, the Board has determined that the applicant's right to certification cannot be affected by the Board's ultimate decision as to the inclusion or exclusion of the dispute classifications. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant, regardless of the outcome of the dispute over the bargaining unit.*

[32] It is worth noting that the Ontario Board derives its authority to issue such interim certification orders pursuant to the specific language at section 9(2) of the *Labour Relations Act, 1995*, SO 1995, c 1:

> *(2) Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.*

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[7] *Canadian Helicopters Limited v Office and Professional Employees International Union*, 2010 CIRB 532 (CanLII); *Syndicat des employées et employés de MusiquePlus v INTERACTIONS Inc. and MusiquePlus Inc.*, 2017 CIRB 851 (CanLII).

[33] The Union also relies on the Saskatchewan Board's decision in *United Cabs Ltd. (Re)*, [2017] SLRBD No 22, which was decided further to a union successorship application. The Board, in awarding the interim certification, chose to adopt and maintain one version of the "status quo", as described by one of the parties. On the main application, perhaps with the benefit of hindsight, the Board revisited the status quo by finding that the predecessor's rights had been abandoned. The Board does not find these circumstances sufficiently similar to the current case or the reasoning particularly relevant to the question of whether this Board should grant the order in the face of an objection to the conduct of the vote.

[34] Therefore, the Union's cited case law does not persuade the Board that it should disregard the outstanding objection to the conduct of the vote and award the interim certification, as requested, despite that pending application.

[35] The Board also notes the Union's objection to evidence of events that occurred after the date of the certification application. The Union states that the Employer has attempted or will attempt, in the objection hearing, to lead the very type of evidence that the Board has discretion to reject, and should reject. The Union relies on section 6-107 of the Act, which reads:

> ***6-107*** *If an application is made to the board for a certification order, the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring or occurring after the date on which that application is filed with the board in accordance with the regulations of the board.*

[36] The Union suggests that the affidavit of Gordy Ouellette, filed in support of the Employer's objection, and relied upon in relation to the within Application, contains such impugned evidence. However, it has not been necessary for the Board to consider the contents of that affidavit in arriving at its determination on the within Application.

[37] For the foregoing reasons, the Application is dismissed.

[38] The Board thanks the parties for their oral arguments, written submissions, and accompanying authorities, all of which have been reviewed and considered.

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

DATED at Regina, Saskatchewan, this **15th** day of **November, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson