Saskatchewan
Labour Relations Board

GFL ENVIRONMENTAL SFS INC., Applicant v UNIFOR LOCAL NO. 4050, Respondent

LRB File Nos. 161-21 and 139-21; March 22nd, 2022
Vice-Chairperson, Barbara Mysko; Board Members: Vince Engel and Jenna Moore

Counsel for the Applicant, GFL Environmental SFS Inc.: Chris Lane, Q.C.

For the Respondent, UNIFOR Local No. 4050: Bruce Fafard and Blake Scott

Certification Application – Objection to Conduct of Vote – Mail-in Ballot Vote – Late Notice to Employer of Representation Vote – Late Posting of Notice of Vote – Ballots Returned to Sender – No Extension Provided – No Reasonable Opportunity to Vote for Specific Employees – Late Notice Compromised Fairness – New Vote Ordered.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** On October 28, 2021, Unifor Local No. 4050 [Union] brought a certification application in relation to a bargaining unit of employees employed by GFL Environmental SFS Inc. [Employer]. The proposed unit is an all-employee bargaining unit subject to specified exceptions and geographically restricted to the employees north of the 51st parallel.

[2] The employee group subject to the certification application is a relatively new addition to this Employer's operations, having been acquired by the Employer from Waste Management of Canada on July 17, 2021. For a period of approximately 13 years prior to this acquisition, the Union had represented the employees through what has been described by the Employer as a voluntary recognition arrangement. Since that time and until present, the Employer has continued to recognize the Union as the exclusive bargaining agent of these employees.

[3] From November 22, 2021 until December 13, 2021, the Board conducted a vote to determine whether the Union should be certified as the bargaining agent for the proposed bargaining unit, pursuant to section 6-12 of *The Saskatchewan Employment Act* [Act]. The Employer has filed an Objection to Conduct of Vote, which is the subject of these Reasons for Decision. The Employer objects to the conduct of the vote on two bases: first, that the Board provided the Employer's representatives with late notice of the representation vote and late delivery of the Notice of Vote, thereby limiting its ability to communicate with the employees about the vote and limiting the available information about the vote; second, that the Board did not give

the employees a reasonable opportunity to vote, as demonstrated by the ballot packages that were returned to the Board undelivered.

[4] The Employer says that the Board's mistakes have undermined the integrity and fairness of the voting process. As a remedy, the Employer seeks that the vote be set aside and a new vote be ordered. In the alternative, it asks that the Board order that the voting parameters be extended by a reasonable period of time to account for the Employer's delayed posting of the Notice of Vote and the vote be tabulated at the end of that extension.

[5] In response, the Union says that the Employer has been aware of the certification application since October 28, 2021 and has had ample opportunity to communicate with its employees. Eligible voters were notified of the vote by registered mail and were provided with considerable time to consider their position by virtue of the 21-day return period. The Union asks that the Objection be dismissed.

Evidence:

[6] The parties filed an agreed statement of facts, for which the Board is grateful. In addition, the Employer called its Director of Human Resources, Jay Archibald, as a witness.

[7] The agreed statement of facts includes the following evidence:

. . .

> *4. On October 28, 2021, the Board notified the Employer of the Union's Application requesting the Employer provide a list of employees and a Reply.*
>
> *5. On November 19, 2021, a complete list of employees was provided by the Employer to the Board.*
>
> *6. On November 19, 2021, the Employer provided their Reply to the Union's Application. […]*
>
> *7. On November 22, 2021, the Board issued a Direction for Vote in respect of the Union's application.*
>
> *8. Pursuant to the Direction for Vote, on the same day a Board Officer:*
> *a. Prepared a Notice of Vote;*
> *b. Began mailing out ballots to fourteen employees, with a deadline of December 13, 2021 for return of the ballots; and*
> *c. Attempted to send the Notice of Vote and Direction for Vote by email to the Union and Employer (the "Notice Email").*
>
> *9. The Notice Email never reached the Employer because the Board [Officer] incorrectly typed the email address of the Employer's representative. As a result, the representative vote proceeded without the Employer being aware of it.*

> *10. On December 2, 2021, the Employer received the Board's Direction for Vote, along with an indication that votes would be tabulated on December 8, 2021.*
>
> *11. On December 8, 2021, the Board sent an email to the parties indicating that the votes would instead be tabulated on December 13, 2021.*
>
> *12. On December 8, 2021, the Employer's counsel sent an email to the Board Officer advising that the Employer had various concerns arising from the lack of proper, timely notification that the vote had been ordered and providing the terms and conditions set out in the Direction for Vote and Notice for Vote. The Employer requested that the Board set aside the current vote and order a new vote.*
>
> *13. The Board [Agent] responded on December 9, 2021, declining the Employer's request and rejecting the Employer's concerns about the lack of timely service of the Notice Email. At the same time, the [Agent] indicated that the Board had received eight ballots as of that date, and had one ballot package "returned to sender".*
>
> *14. The Employer asked the Board to provide the name of the individual whose ballot was returned unopened so that the employee could be asked if they have a new address. The Board has declined to provide this.*
>
> *15. On December 16, 2021, the Employer [filed] an Objection to Conduct of Vote.*
>
> *16. On December 23, 2021, the Union filed a Reply to the Employer's Objection.*
>
> [references to attached documents have been omitted]

[8] The Employer, based in Ontario, employs approximately 18,000 employees across North America, and approximately 3,000 in Western Canada. The recent acquisition was for three locations: the primary location being in Saskatoon, with about 10 employees, as well as two satellite properties in Prince Albert and Yorkton, with two employees at each of these locations. There is a manager, who came over from the seller's business, at the Saskatoon location but no manager at either of the other two sites.

[9] Mr. Archibald testified that he was not expecting a representation vote for this bargaining unit. He described a conversation with the Union representative in which he said he was led to believe that the certification application was just a matter of updating the file.

[10] On October 28, 2021, the Board provided the parties with notice of the certification application, with the following instruction to the Employer:

> *The Board Registrar requires the Employer to provide a list of employees employed within the scope of paragraph 3, with their home addresses, occupations and dates of hire (provided in an excel document in a reply email is fine) within three (3) business days.*
>
> *The Employer is also provided with ten (10) business days to file a Reply – Form 21 (attached) should they wish to comment or object to the application.*

[11] Mr. Archibald pulled the information needed to respond to this request from the Employer's human resource information system, which contained data collected from the seller. The Employer had reviewed the information for gaps that would cause a system set-up issue, returning to the seller a few times to address the many omissions. The employees have access to their profiles and are responsible for providing updates to their personal information. Access and familiarity with the system does require some training, which has been lacking due to the pandemic. Nonetheless, there was systems training in July, albeit rushed, and the employees were directed to double check the information that they had provided.

[12] The voting period began on the day that the ballots were mailed out, November 22, 2021, and ended 21 days later, on December 13, 2021. On November 22, 2021, the Board Agent's designate attempted to send an email, attaching the Direction for Vote and Notice of Vote, to both parties, along with an instruction to the Employer to post the Notice. Due to an error in typing the Employer's email address into the address field, the Employer did not receive the email.

[13] On December 2, 2021, the designate sent another email to the parties setting December 8 as the date for the tabulation of the vote. Mr. Archibald testified that, by receipt of the email dated December 2, 2021, it was obvious that a vote was underway. He was travelling at the time, so he nominated someone to act as a scrutineer. Mr. Archibald testified further that, on December 2, the Employer's representatives were under the impression that, due to the Board's email, the vote was going to close on December 8. December 2 was a Thursday. December 8 was a Wednesday. Given the timeline, he assumed that the ballots would have already been mailed.

[14] On December 8, the designate emailed the parties to cancel the tabulation, and set a new date, being December 13, acknowledging that the vote would not have closed by December 8.

[15] Later on December 8, the designate sent an email to the Employer forwarding the original email with the attached documents, the Direction for Vote and the Notice of Vote. The original email had the following instructions for the Employer:

> *Attached is the Notice of Vote and Direction for Vote for LRB File No. 139-21.*
>
> *The Board requires the Employer to print and post the Notice of Vote along with the Direction for Vote in the workplace for the employees to view.*
>
> *The Notice of Vote will accompany each ballot package and as you will note there is a 21 day turn around for return of ballot (November 22, 2021 date upon which it was mailed, and balloting will conclude on December 13, 2021).*

[16] Until the exchange with the Board on December 8, the Employer was not aware of the precise voting period, in particular, the date on which the vote was going to close (December 13). December 8 was a Wednesday. December 13 was a Monday.

[17] On December 8, counsel for the Employer wrote to the designate outlining his client's concerns, including that the Employer did not have the ability to communicate with the employees about the vote and that the Notice of Vote had not been posted in a timely manner.

[18] By the morning of December 9, the Employer ensured that the Notice of Vote was posted. The Notice of Vote includes a description of the ballot package and the following instructions:

> *It must reach this office no later than 21 days from the date upon which it was mailed to you (November 22, 2022) that being December 13, 2022. Should you have any questions regarding the mailing deadline, you may call the Saskatchewan Labour Relations Board at […]*

[19] Mr. Archibald testified that due to the pandemic the Employer has been limiting its travel. The human resources (HR) team has spent no time at any of the three new locations. There has been no "GFL-izing" of the employee group. The team has not informed the employees of the likely terms and conditions of employment in an alternate, non-union workplace.

[20] The Employer has a well-defined and established communication strategy for organizing drives. If given the opportunity, the Employer's HR team would have travelled to the Saskatoon location and communicated with the employees both verbally and in writing (the latter, once approved by legal). They would have spoken to the employees about the RRSP and benefit programs that are available to non-unionized employees. Mr. Archibald testified that the team has been involved in organizing drives elsewhere and is aware of the scope of permissible communications.

[21] Mr. Archibald also suggested that, had it received the Notice of Vote on November 22, the Employer would have collected and verified the mailing addresses more thoroughly. The Employer would have advised the employees to actively monitor their mail and double check their addresses. If an employee did not receive a ballot, and the Employer became aware, the Employer would have contacted this Board to request information on next steps.

[22] In the meantime, there has been no tabulation of the vote. On February 18, 2022, the Employer's counsel wrote to the Board to inquire as to the "total number of ballots received by

the Board and how many of those were returned by Canada Post with an indication that they weren't delivered to the employee". The Agent replied that the Board had "received 10 ballot envelopes and 3 vote packages returned to sender".

[23] Finally, there was some confusion in the evidence as to when the Employer received the Direction for Vote. Paragraph 10 of the agreed statement of facts states that on "December 2, 2021, the Employer received the Board's Direction for Vote, along with an indication that votes would be tabulated on December 8, 2021 (Exhibit 8)". "Exhibit 8" made no reference to the Direction for Vote, nor did it include the Direction for Vote as an attachment. The documents attached to the agreed statement of facts indicate that the Board forwarded the Direction for Vote to the Employer on December 8. As such, the statement in paragraph 8 of the agreed statement of facts appears to contain an error, and it is more likely that the Employer first received the Direction for Vote on December 8.

[24] Even so, nothing turns on whether the Employer received the Direction for Vote on December 2 or December 8. It is clear that the Employer was aware as of December 2 that the vote was taking place. The receipt or not of the Direction for Vote does not alter this finding. Furthermore, the Direction for Vote does not include the precise voting period. Therefore, no matter when the Direction for Vote was received, the Employer did not know the precise voting period until December 8.

Applicable Statutory Provisions:

[25] 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.*
>
> ***6-12****(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.*

…

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.

6-23 *On the application of the affected union or an affected employee or on its own motion, the board may:*

(a) require that a vote required pursuant to this Part, or directed to be taken by the board, be supervised, conducted or scrutinized by the board or a person appointed by the board;
(b) establish the manner and time in which the vote is required to be conducted and when and how notice of the vote must be provided to those entitled to vote;
(c) determine, by order, by board regulation or both, general eligibility requirements as to who is entitled to vote;
(d) determine whether a person:
(i) satisfies the eligibility requirements; and
(ii) is an employee or is an employee entitled to vote; and
(e) require that the employer and the union give all eligible employees an opportunity to vote.

6-62*(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*

(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;
…
(2) Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees.

[26] The following provisions of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* [Regulations] are applicable:

26*(1) On receipt of an application 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 of employees specified by the registrar in the written direction as at the date specified by the registrar in the written direction.
(3) An employer to whom a written direction pursuant to subsection (1) is issued shall also file with the registrar the following information:

(a) the location of any workplace at which the employees mentioned in subsection (1) are employed;
(b) any safety restrictions respecting access to the workplace mentioned in clause (a);
(c) the hours of work of the employees at the workplace 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 and the information mentioned in subsection (3) within 3 business days after being served with the written direction.

27*(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 by the Act to conduct a vote, 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 the registrar or any other person who the board is satisfied is independent from the parties to the application mentioned in subsection (2) as its agent 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 the registrar's powers, or the fulfilling of any of the registrar's duties, as agent 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 be 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;
(ii) using a mail-in balloting procedure; or
(iii) in any other manner;
(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 or in any other manner, determine the date by which completed ballots must be returned;
(h) prepare a notice of vote in the form and manner determined by the agent 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;
(j) if the vote is to be conducted at one or more polling places, invite the employer, the union and any other person named in the application mentioned in subsection (2) to appoint one scrutineer for each polling place established 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 or in any other manner, determine the place for counting of the ballots and invite the employer, the union and any other person named in the application mentioned in subsection (2) 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;
(b) interfere, or attempt to interfere, with a person who is voting;
(c) attempt to obtain information as to how a person has voted or is about to vote;

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

(e) 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, if there is no direction of the board to the contrary and if there is no impediment to doing so, the agent shall promptly count the ballots and complete Form 23 (Report of Agent of the Board - Polling Station Respecting the Conduct of Vote and Counting of Ballots) or Form 24 (Report of the Agent of the Board – Non-polling Station Respecting the Conduct of Vote and Counting of Ballots)

(10) Immediately after completing Form 23 or Form 24, the agent shall file a copy of the completed Form with the registrar and the registrar shall provide a copy of the completed Form to the employer, the union and any other person named in the application mentioned in subsection (2).

(11) An employer, a union or any other person named in the application mentioned in subsection (2) that intends to object to:

(a) the conduct of the vote shall file an application in Form 25 (Objection to Conduct of Vote or Counting of Ballots) within 3 business days after the conclusion of the voting period; or

(b) the results from the counting of the ballots shall file an application in Form 25 within 3 business days after the counting of the ballots.

Arguments:

Employer:

[27] The Union represented these employees through a voluntary recognition arrangement for a period of 13 years prior to the Employer's acquisition of the business in July 2021. The employees are very familiar with the representation provided by this Union. What the employees are not accustomed to is working for GFL in a non-unionized environment. Certainly, representation votes are time sensitive. But this maxim assumes that there is urgency for the conduct of a vote due to the presumed vulnerability of the union during an organizing drive. No such urgency exists in this case where the employees have long-standing experience with this Union.

[28] The Employer has two concerns arising from the conduct of the vote in this case.

[29] The Employer's first concern is that its ability to communicate with the employees has been compromised. By the time the Employer knew that there was a representation vote, 10 days had elapsed. Ballots would already have been in the mail. Compounding the problem was the Board's later communication that misstated the voting period, suggesting that the voting period

would have ended by December 8. If the Employer had received the correct information from the Board it would have had more time to communicate with the employees. Even then, many ballots would already have been mailed or received.

[30] An employer does have a right to communicate with its employees, including during an organizing drive. This right is not only granted through the governing statutory regime, it is protected by section 2(b) of *The Canadian Charter of Rights and Freedoms* [*Charter*]. The Employer relies on the following cases as confirmation of this right: *Klassen Pontiac v Teamsters, Local 213*, [1996] BCLRBD No 344, 1996 CarswellBC 3005 (BC LRB) [*Klassen*]; *C.E.P. v Boehmer Box LP*, [2010] OLRB Rep 237, 2010 CarswellOnt 7175 (Ont LRB) [*Boehmer*]; *K-Mart Canada Ltd. v S.E.I.U., Local 183*, [1981] 2 Can LRBR 5, 1981 CarswellOnt 838 (Ont LRB) [*K-Mart*]; *Button v UFCW, Local 1400 and Wal-Mart Canada*, [2011] SLRBD No 20, 2011 CarswellSask 430 (SK LRB) [*Button*]; *United Food and Commercial Workers, Local 1400 v Atco Structures and Logistics Ltd*., 2015 CanLII 80541 (SK LRB) [*ATCO 2015*]; and, *Universal Workers Union, Labourers' International Union of North America Local 183 v L.G.R. Tiles Ltd.*, 2001 CanLII 15797 (ON LRB) [*L.G.R. Tiles*].

[31] The case law makes clear that the voting process should be supervised by a neutral, and that the integrity of the process is compromised when the union is the only party informing the employees that the voting deadline has been extended.

[32] The Employer's second concern is that it had stale-dated employee address information and three ballots were returned to the Board undelivered. The Employer agrees that decisions of a Board Agent attract deference. However, the Board has also made clear that its processes should provide a reasonable opportunity to employees to vote. In this case, the Agent refused to provide the name of the first person whose ballot was returned undelivered. This meant that the Employer was unable to attempt to rectify any issues with the person's address. There is no evidence that the Agent took any other measures to provide a reasonable opportunity to this person, or to the other persons whose ballots were returned undelivered, to vote.

[33] The Employer asks the Board to order a new vote. In the meantime, the Employer continues to voluntarily recognize the Union as the exclusive bargaining agent, and therefore, submits that there is no prejudice to the Union by the delay that would be caused by ordering a new vote.

Union:

[34] The Union submits that the Employer's objection to the conduct of the vote should be dismissed.

[35] The central issue is whether the Board should override the Agent's exercise of discretion to reject the Employer's request for a new vote. The Board should apply a deferential approach to its review of the decisions of Board agents. If that discretion is exercised reasonably and consistent with the applicable statutory provisions and the objects and intentions sought to be achieved by them, the Board should refrain from interfering. Whether the Agent's conduct was reasonable should be assessed against the Board's expectation of expediency in the conduct of the vote.

[36] The object of Part VI of the Act is to facilitate the rights of employees, pursuant to section 6-4, to organize in and to form, join or assist unions and to engage in collective bargaining through a union. The Board should take that object into account when interpreting the Regulations and when assessing the Agent's exercise of discretion.

[37] Other than the timing of the posting direction, the vote proceeded properly. It cannot be said that this defect alone tainted the entire voting process. The Employer suggests that the employees have been deprived of the opportunity to receive timely notice of the vote. However, the employees would have received notice of the vote and their ballots by registered mail from the Board directly.

[38] The Board has confirmed that mail-in ballot procedures are acceptable for representation votes and that the safeguards of registered mail allow the agent to deal with issues arising with ballots on a case-by-case basis. The Employer's suggestion that employees will simply ignore or discard their mail-in ballots is an unrealistic hypothetical that, to be accepted, should be supported by clear and cogent evidence.

[39] In a representation vote, the Board needs to be able to capture the employees' wishes on a timely basis to avoid undue influences. The delay that has occurred has benefited only the Employer because no certification order has been issued. Another vote would prejudice the Union by exposing employees to Employer pressure. The Employer argues that it is entitled to communicate with employees about the certification application. This is a misstatement of the law. An employer is simply not prohibited from communicating facts and its opinions to its

employees for purposes of determining whether an unfair labour practice has occurred pursuant to clause 6-62(1)(a) of the Act.

[40] Ordering a second vote would cause other problems. It would create confusion among the employees who have already voted but who would then be receiving a second ballot. It could also result in a change to the employee list.

Analysis and Decision:

[41] In considering this application, the Board starts from the premise that 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, pursuant to subsection 6-4(1) of the Act.

[42] The Union brought the certification application pursuant to section 6-9 of the Act. Section 6-12 of the Act stipulates that, before issuing a certification order pursuant to section 6-9, the Board shall direct a vote of all employees eligible to vote to determine whether the Union should be certified as the bargaining agent. Section 6-13 indicates that if the Board is satisfied that a majority of votes that are cast favour certification of the Union, the Board shall issue a certification order.

[43] Sections 26 and 27 of the Regulations set out the requirements for the conduct of the vote. Pursuant to section 26, the Registrar may issue a written direction to an employer to file the employer's payroll records respecting the employees affected by the application. The payroll records must identify the names, positions and classifications of employees who are employed in the unit specified by the Registrar. The payroll records are required to be filed within three business days after being served with the written direction.

[44] The Board appoints agents to conduct representation votes. These agents have discretion as to how, when and where the votes are conducted: *International Association of Heat and Frost Insulators and Allied Workers, Local 119 v Northern Industrial Contracting Inc*, 2013 CanLII 67367 (SK LRB) [*Northern Industrial*] at paragraph 14; *United Food And Commercial Workers, Local 1400, v 303567 Saskatchewan Ltd*., 2013 CanLII 98138 (SK LRB) [*Handy*], at paragraph 101. They also have discretion to modify voting procedures if deemed necessary: *Inland Audio* at paragraph 24.

[45] Subsection 27(5) of the Regulations sets out the requirements of the Board agent in conducting a vote. Clause 27(5)(h) states that an agent shall "prepare a notice of vote in the form

and manner determined by the agent and issue directions to the employer respecting posting the notice of vote". Pursuant to subsection 27(6), an agent may issue any directions or instructions that the agent considers necessary respecting the conduct of the vote. Subsection 27(7) states that no person shall fail to comply with any directions or instructions given by an agent respecting the conduct of the vote.

[46] The Board takes a deferential approach to its review of the agent's discretion: *ATCO Structures & Logistics Ltd v Unite Here, Local 47*, 2014 CanLII 76053 (SK LRB) [*ATCO 2014*], at paragraph 43. The Board is reluctant to interfere in the agent's decisions unless there is evidence that said judgment was improperly exercised. The Board in *ATCO 2014* explained:

> *[41] A Board Agent must make a judgment call as to how the vote may best be conducted. Absent any proof or suggestion that that judgment was improperly exercised, we would be loath to interfere in the methodology adopted by the agent for the conduct of a vote. No matter what methodology is adopted by the agent, there remains the simple fact that individuals cannot be compelled to complete their ballot and vote.*

[47] There are sound reasons for the deferential approach, as the Board explained in *Inland Audio*:

> *[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.*

[48] The Court in *ATCO Structures & Logistics Ltd v Unite Here, Local 47*, 2015 SKQB 275 (CanLII) [*ATCO QB*] upheld the Board's deferential approach:

> *[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 [a] 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.*

[49] More recently, the Board applied the foregoing approach in *CWS Logistics Limited v United Food and Commercial Workers, Local 1400*, 2018 CanLII 68439 (SK LRB) [*CWS Logistics*] and *SCH Maintenance Services Ltd. v Teamsters Local Union No. 395*, 2020 CanLII 85155 (SK LRB).[1]

[50] The purpose of a representation vote is to ascertain whether the employees wish to be represented by a proposed or existing bargaining agent. The Board in *Handy*, at paragraph 100, set out three requirements for a representation vote, as follows:

> 1. *The voting process must be secret and conducted by a neutral third party.*
> 2. *All those eligible to vote must be given the opportunity to do so.*
> 3. *Eligible voters must be free from coercion, intimidation, threats, and other undue influence.*

[51] With respect to the first requirement, the Board is the neutral third party that conducts the vote. The Board's related functions are set out at section 6-23 of the Act.

[52] With respect to the second requirement, the relevant statutory provisions underscore the importance of providing employees with a reasonable opportunity to vote. Section 6-12 of the Act states that the Board shall direct a vote of "all employees eligible to vote". Clause 6-23(b) states that the Board may establish when and how notice of the vote must be provided to those entitled to vote. The Direction for Vote states that the Notice of Vote "shall be posted in a conspicuous place or places where the employees eligible to vote are engaged about their duties".[2] Clause 6-23(e) states that the Board may require that the employer and the union give all eligible employees an opportunity to vote. Clause 27(5)(h) of the Regulations states that the agent shall issue directions to the employer respecting the posting of the notice of vote.

[53] While a mail-in ballot vote offers certain advantages over a poll vote, such as increased efficiency and voter participation, employees must rely on the employer to provide the Board with accurate mailing addresses and on the Board to send the ballot to that address in a timely manner. To support the enfranchisement of the eligible employees, as early as possible following the receipt of a certification application the agent directs the employer to provide mailing addresses, and to provide those addresses within three business days of the request. Parties have an obligation to provide accurate information to the Board. A party who does not provide accurate

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[1] Decision on judicial review pending.
[2] It goes on to state, "shall be posted for a time agreed to by the parties, before the time fixed for the taking of the vote".

information should not be entitled to rely on its error or omission to obtain a benefit in the proceeding.

[54] With the use of the mail-in ballot vote, agents are expected to use reasonable efforts to attempt to ensure the enfranchisement of voters, as per *Inland Audio*:

> *[17] However, in doing so, the Board also expressed its expectation that, when a mail-in balloting process is used, our agent will use reasonable efforts to ensure that the list of eligible voters is accurate, as is the mailing addresses for eligible voters. In the Board's opinion, our primary goal, irrespective of the voting procedure utilized by our agents, is to ensure that all eligible voters have a reasonable opportunity to participate in the representation question. 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 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.*

[55] Agents are expected to be somewhat flexible in their pursuit of this objective, including by seeking to correct erroneous address information and to mitigate problems in mail delivery.[3] When agents learn of or discover errors in the voters list or the mailing addresses of eligible employees prior to the end of voting, then measures should be taken to rectify such errors.[4] Such measures may necessitate a modification of "the established procedures for voting as these are extenuating circumstances".[5] New deadlines, for example, may need to be established if new voting packages need to be sent out to allow employees a reasonable opportunity to vote.

[56] In considering whether and to what extent to modify the voting process, the agent must aim to protect the expediency of the vote, must bear in mind that it is a valid choice of an employee to abstain from voting and must accept that perfection in the democratic process cannot be guaranteed and is not expected. If the agent sees fit to modify the voting process, he or she should err on the side of modest modifications that do not cause a delay of the vote. Employees who are careless as to the exercise of their franchise need not be accommodated: *Inland Audio* at paragraph 25.

[57] Thus, the Board's primary objective, to provide a reasonable opportunity to vote, is tempered with the desire for expediency and finality in the conduct of a representation vote. A principal reason for the expediency which is sought is the very real potential for coercion and undue influence that increases with the onset of any excessive delay: *United Steelworkers v*

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[3] *Inland Audio*, at paras 22-25.
[4] See also, *Northern Industrial*, at para 16.
[5] *Inland Audio*, at para 24.

Buyaki, 2013 CanLII 29666 (SK LRB) [*Buyaki*], at paragraphs 17-19. To support the employees in expressing their wishes and to reduce the likelihood of undue influence, representation votes are to occur as soon as practicable upon receipt of the certification application, that is, "within days of receipt of such applications": *Inland Audio* at paragraph 15; *Handy,* at paragraph 102.

[58] As such, the Board's agents are expected to exercise their discretion in the conduct of a vote in a manner that respects two "conflicting objectives": first, the requirement to make reasonable efforts to ensure that all those who are eligible are able to vote and, second, the requirement to establish the voters list and conduct the vote within a few days of the receipt of the application: *Handy* at paragraph 103. When reviewing the agent's exercise of discretion, the Board should consider whether the agent's actions were reasonable given the circumstances of the workplace in question and the expectation of expediency in the conduct of a representation vote: *Inland Audio* at paragraph 21.

[59] The question before the Board is whether the Agent, and his delegate, exercised their discretion reasonably and consistent with the applicable statutory provisions and the objects and intentions sought to be achieved by them. In deciding this question, the Board considers whether the process was fair and permitted all eligible employees a reasonable opportunity to vote. In *Handy*, *Northern Industrial*, and *ATCO 2015*, the Board provided guidance for assessing these questions.

[60] First, in *Handy*, the Board found that a failure to communicate with the parties may impair the integrity of the vote. There, the Board had permitted two employees to vote at a place other than that specified in the Notice of Vote with no scrutineers present. Both the employer and the union only learned that the employees had voted after they had returned to work. The employer complained about the absence of notice to the change in the voting process and the missed opportunity for scrutineers. The Board considered these arguments and made the following remarks:

> *[107] The Employer also complained that it did not receive advance notice of the change to the voting process and that it was not permitted to have scrutineers present for the portion of the vote that occurred in Regina. In our opinion, these are valid criticism. While the time constraints imposed by our policy on representational votes may limit the capacity of the Board agent to consult with the affected parties on voting proceedings, in our opinion, communication with the parties is an essential ingredient of the voting process. It helps demonstrate independence and impartiality and instills confidence in our voting procedures. In our opinion, the Board agent should have contacted the parties and advised them of his intention to [permit] two (2) employees to vote in Regina. As indicated, it is unclear from the evidence whether or not the Board agent attempted to do so. However, the evidence in these proceedings indicated that the Employer did not receive advance*

> *notice of the change in voting procedures prior to opening the poll in Regina and allowing the two (2) stranded employees to vote.*

[61] Although the Board ordered that the two ballots be counted only if their inclusion would affect the outcome, it did not order a new vote. The Employer's concern about not receiving advance notice of the change in process was "valid but not sufficient to taint the entire process".[6] As well, the Board observed that "[t]he presence of scrutineers is not an immutable requirement".[7]

[62] In *Northern Industrial*, the Board was not persuaded that employers, generally, need more time than what is given prior to the conduct of a representation vote for the purpose of communicating with the employees. Six days had elapsed between the filing of the application and the issuance of the Direction for Vote. The Employer argued that, due to the quick commencement of the vote, it was denied the opportunity to express facts and its opinions. The Board acknowledged that there may be information that is of benefit to employees in deciding a representation question, however, the longer the delay "the greater the potential for undue influences and coercion to occur, intentional or otherwise". Optimizing information should not be the Board's goal. Instead, "it is far more important that employees be shielded from these influences and the inevitable pressures associated with a representational campaign in the workplace".[8] Employers have a modest opportunity prior to the conduct of the vote to communicate with employees and that opportunity is sufficient.

[63] In *ATCO 2015,* the Board found two defects in the voting process. First, the duration of the voting period was insufficient for the employment circumstances of the affected employees. Second, when an extension was granted, notice was not provided to all the affected employees. The Board reiterated the fundamental requirements that all those eligible to vote must have a reasonable opportunity to do so and that the voting process must be supervised and conducted by a neutral third party:

> *[90] While late ballots are not unusual when a mail-in balloting procedure is used, under the unique circumstances that occurred with this vote, they represented a particular problem. Firstly, the voting period was too short and it would have been difficult for many voters to obtain, complete and return their ballots within the period of time originally prescribed. Secondly, it would appear the Union and its organizers were the only ones informing employees that the voting period had been extended. While we can find no fault in the actions of the Union or in the efforts of Mr. Demarais and Mr. Foster to encourage voters to vote, the voting process must be supervised and conducted by a neutral third party. To maintain the integrity of the voting process, an official notice from our staff should have been provided directly to affected voters or, at least, posted in the workplace. In our*

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[6] *Handy*, at para 108.
[7] *Ibid*.
[8] *Northern Industrial*, at para 19.

> *opinion, the integrity of the voting process was compromised when the Union and its organizers were the only ones informing employees that the voting period had been extended.*

[64] The Board found that a new representation vote had to be conducted.

[65] The Employer also relies on the Ontario Board's decision in *L.G.R. Tiles* to suggest that this Board should order a new vote. There, the Board had notified the employer that if a vote were directed a notice of the time and place of the vote would be sent to the employer for posting in the workplace. The employer received that information only after the vote had taken place. As a result, the employer was unable to post the Notice prior to the vote. While the employer would otherwise have been entitled to appoint a scrutineer, that opportunity was lost.

[66] In *L.G.R. Tiles*, the union took the position that the employer was the author of its own misfortune because it knew to expect a vote and could have made inquiries of the Board. The union also took the position that the employer did not speak for the employees. There were no employee submissions on the matter. The Board, in its reasons, did not provide any analysis of the union's arguments, but proceeded to order a new vote, relying on *Ani-Wall Concrete Forming*, [1998] OLRD No 2332 [*Ani-Wall*] and *Corporation of the Municipality of Casimir*, [1979] OLRB Rep 205 [*Casimir*].

[67] In *Ani-Wall*, the Ontario Board validated the employer's concerns both with the lack of notice to the employees and with the lack of notice to the employer. First, the Board found that it was appropriate to order a new vote due to a failure to provide notice of the vote to the eligible voters. For the initial vote, the Board had arranged for only one poll, located at the only worksite listed in the application. The union had filed the application with the wrong fax number for the employer. As a result of the error in the fax number, the employer did not receive notice of the vote, nor did the employees.

[68] The Board observed that it would normally be of the view that the employer did not have status to raise the issue of lack of notice to the employees on behalf of the employees. However, it took a different view in this case because the employees could not have made representations about the lack of notice, not having known of the vote or of their right to make representations.

[69] Although it was not necessary to do so, the Board considered the issue of the employer's lack of notice of the vote. The applicant union was largely to blame because it had provided the Board with the incorrect fax number for the employer. At paragraph 28, the Board emphasized

the “heavy burden” on all applicants to correctly identify necessary contact information on applications filed with the Board. Granted, the employer’s materials were also deficient; the employer did not file a proper, timely response. Nonetheless, the Board noted, at paragraph 32, that the “Act does not permit the taking of such a representation vote without notice to the responding party”. The Board found that the employer did not receive formal notice from the Board of the date, place and time of the vote and was effectively deprived of its right to express its views on the issues related to the application.

[70] The Board in *Ani-Wall* relied on *Northstar Tile Ltd*., [1997] OLRD No 4412 [*Northstar*]. In *Northstar*, the Ontario Board again found it appropriate to order an additional representation vote. It found that it could not be certain that notice of the details of the vote had been provided to the eligible employees. The responding employer had failed to identify all the applicable worksites despite identifying the individuals at the worksites as potential voters. Proper notice of the vote was not provided to the employees who worked at the unidentified sites.

[71] Lastly, in *Casimir*, which was also cited in *L.G.R. Tiles*, the Ontario Board once again ordered a new representation vote. There had been an agreement with the parties to hold the poll vote on one of two dates, but the Board did not provide the employer with notice confirming which of those dates had been chosen. The employer argued that it missed its opportunity to “electioneer” and monitor the conduct of the election. The Board found that the employer was entitled to receive notice of all the arrangements fixed by the Registrar in respect of the vote. The fact that the employer was aware of two alternate dates was not sufficient notice.

[72] Next, the Board will consider the application of the relevant legal principles to the present matter.

[73] In a representation vote, the Board acts as a neutral third party. Pursuant to clause 6-23(b) of the Act, the Board establishes when and how notice of the vote must be provided to those entitled to vote. The notice serves at least three functions. It provides notice to the eligible employees of the vote, it provides information to those employees about how they can exercise their right to vote, and it informs those employees about how to contact the Board if they have questions about the deadline. In the absence of this notice, there is no guarantee that the employees will learn of the vote from a disinterested person. If they do learn of the vote, it will likely be from their coworkers, the Union, or the Employer.

[74] In a mail-in ballot vote, the Board provides notice to employees by two primary methods. First, the Board sends the Notice of Vote, as part of the voting package, directly to the mailing addresses it has for the employees. Second, it sends the Notice of Vote to the employer for posting in the workplace.

[75] The Board relies on the employer to provide accurate mailing addresses. In this case, the Employer has presented justifications for its failure to provide accurate mailing addresses. The Board does not accept the Employer's justifications. The Employer took an unusual amount of time to provide the Board with the relevant address information for a relatively small bargaining unit. It then suggested that, had it known that there was going to be a vote, it would have ensured that the addresses were accurate. It should go without saying that it is not the Employer's prerogative to choose when it is important to provide accurate information to the Board. Similarly, it is not for the Employer to choose to respond to a Board request with less care on one occasion and then with greater care on another.

[76] The Board also relies on the Employer to post the Notice of Vote in the workplace. The Employer complied with this obligation. The Board provided the Notice in the afternoon of December 8. The Employer ensured that the Notice was posted on the following day. Here, it was the Board who delivered the Notice late. The Employer bears no responsibility for this.

[77] The employees whose packages were "returned to sender" did not receive the Notice of Vote at their mailing addresses. The posting of the Notice of Vote was their only other opportunity to review information about the vote from a neutral third party. The employees might have had an opportunity to read the Notice of Vote for the short time that it was posted in the workplace and it was open to these employees to contact the Board to inquire about the deadline. However, the Board has no evidence to suggest that this occurred.

[78] However, even if these employees read the Notice of Vote after December 8, the time remaining in the voting period did not provide them with a reasonable opportunity to vote. By that point, the turnaround time was very short. Nor is there any reason why the employees would have known that the Board might consider extending the deadline.

[79] At least one of these ballot packages was returned to the Board before the end of the voting period. The Employer suggested a method by which the Agent could obtain the accurate address of that employee. The suggested method was problematic because it could have opened the employee up to undue pressure from one party, the Employer. However, there was not only

one option available to rectify the situation. The voting period could have been extended to permit the Notice of Vote to be posted in the workplace for a reasonable period of time. Providing an extension to the vote in those circumstances could have prevented a more significant delay. Instead, there is no evidence that any steps were taken to attempt to provide this employee, or the other two, with a reasonable opportunity to vote.

[80] This is not a case, like in *CWS Logistics*, where the error was committed by the employees. Granted, the employees were responsible for inputting and updating their address information in the system. However, the Employer was in possession and control of the information and provided it to the Board. The late posting of the Notice of Vote prevented the employees from learning of the vote in a timely manner.

[81] Nor is this a situation where the Employer is benefiting unfairly from its own error. The circumstances raise concerns about the employees' opportunity to vote. It is the employees who are impacted by not having their voices heard.

[82] The Union suggests that the use of registered mail cures the late delivery of the Notice of Vote. With the greatest respect, this argument is not logical. The packages were returned to sender. The Board has no information to suggest that the three employees whose packages were returned to sender were directly notified by the Board that the vote was occurring.

[83] In conclusion, the three employees whose ballots were returned to sender were not given a reasonable opportunity to vote. This issue can be cured by extending the vote for a reasonable period of time and issuing a direction to the Employer to post a new Notice of Vote to permit the affected employees a reasonable opportunity to vote.

[84] Lastly, *ATCO 2015* holds that an employer has standing in all applications involving the acquisition of bargaining rights.[9] Another view, often asserted before this Board, is that an employer's status to assert rights on behalf of employees is limited. However, as in *Ani-Wall*, the Board has determined that the three employees whose ballots were returned to sender may not have known of the vote. Therefore, on either of these premises, it is appropriate for the Board to address the impairment of their rights in the absence of their submissions and based on the submissions made by the Employer and the Union.

[9] *ATCO 2015* at para 7.

[85] The next issue is whether the late notice to the Employer necessitates a second representation vote.

[86] First, the Board is not required to create optimal conditions for Employer communications. There is no such requirement in the Act. Nor is there such a requirement in the *Charter*.

[87] The freedom of expression pursuant to section 2(b) of the *Charter* is only in exceptional cases treated as a positive right that places a burden on government to facilitate inclusion in rather than exclusion from a statutory regime.[10]

[88] Granted, the scope of the guarantee of freedom of expression, pursuant to section 2(b), is broad. It includes any activity conveying or attempting to convey meaning: *Irwin Toy Ltd. v Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927. It is so broad, in fact, that authors Guy Régimbald and Dwight Newman have observed that the case law is "significantly concerned with the justified application of section 1 limitations in this context".[11] Thus, the important information about whether the government action is upheld is often found in the *Oakes* analysis.

[89] As such, the *Charter* guarantee of freedom of expression does not effectively protect all manner of employer speech within the labour relations milieu. The statutory objective to ascertain whether the employees wish to be represented by a union as their exclusive bargaining agent may justify certain restrictions on expression, pursuant to section 1 of the *Charter*. Even statutory provisions that are interpreted as providing an express protection for employer speech do not provide immunity for statements that are coercive in nature: *Klassen* at paras 169, 212.

[90] Next, there is no provision in the Act explicitly requiring that notice of the vote be provided to the employer or the union. Instead, the emphasis in the Act and in the Regulations is to ensure that notice of the vote is provided to those employees who are eligible to vote. To this end, the Regulations make it mandatory for the agent to issue directions to the employer respecting the posting of the notice of vote. It follows that the directions are to be issued in a timely manner. What is timely may depend on whether the vote is conducted at a polling station or by mail-in ballot vote.

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[10] *Baier v Alberta*, [2007] 2 SCR 673.
[11] Guy Régimbald and Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed, (Toronto: LexisNexis Canada, 2017), at 631.

[91] The directions were not issued in a timely manner. However, the purpose of directions issued pursuant to clause 27(5)(h) of the Regulations is to ensure that notice is provided to eligible employees to ensure they have a reasonable opportunity to vote. It is not to ensure that the employer receives notice of the vote.

[92] The more relevant question, then, is whether the late notice compromised the fairness of the vote. While the Board's focus is on the eligible employees, both the Union and the Employer have an interest in the outcome of the vote. Of relevance, in this respect, is the following passage from *ATCO 2015*:

> *[7] With respect to the Employer's standing in these proceedings, we are not persuaded that employers are precluded from participating in applications seeking to obtain bargaining rights as suggested by the Union. To the contrary, we are satisfied that employers have a sufficient interest in the outcome of the representational question to justify both their participation in applications for bargaining rights and their right to object if they believe an error has occurred in the conduct of a representational vote or the tabulation of the ballots. While there are certain aspects of the representational question from which employers are appropriately excluded (including, for example, the representational choice), these exclusions do not bar employers from otherwise participating in certification applications. In our opinion, employers have standing in all applications involving the acquisition, alteration or revocation of bargaining rights. Furthermore, they have the right to expect that bargaining certifications are not [obtained] or altered without due process and compliance with all applicable laws.*

[93] In *ATCO 2015*, the Board observed that the integrity of the voting process is compromised when the Board has not provided an official notice to the employees and only one party is informing the employees that the voting period has been extended. It follows that the voting process may be compromised when notice has not been provided to the employees and only one party is aware that the vote has commenced and is underway.

[94] The focus in *ATCO 2015* was on whether the eligible employees had a reasonable opportunity to vote and on whether the Board had fulfilled its role as a neutral. Relatedly, the Board suggested that the problem could have been cured had an official notice been provided by the Board directly to the affected voters. In the current case, an official notice was sent to and received by the employees, except in the circumstances already described and addressed. While this could be taken to suggest that the late notice was cured, the Board in *ATCO 2015* did not directly address the question of fairness to the parties, which is an issue that this Board is required to consider.

[95] In *Handy*, the Board observed that the parties did not have an opportunity to have scrutineers observe the voting process in the case of two employees who participated in a poll

vote. This problem does not arise in the current case. For mail-in ballot votes, scrutineers are appointed only for tabulations. The Employer still has the opportunity to appoint a scrutineer for that purpose.

[96] More to the point, the Ontario cases suggest that a failure to provide notice to an employer of a representation vote may render the process unfair. To be sure, there are some important differences between the Ontario cases and the current matter.

[97] First, the Ontario cases involve poll votes. In the poll votes considered, as in *Handy*, the employers had lost the opportunity to appoint a scrutineer. As mentioned, that is not an issue in the current case.

[98] Second, in most of the Ontario cases the vote was expected to occur within a matter of days following the certification application. If there was to be any opportunity for either of the parties to communicate with the employees, it could only occur during that short timeframe. To be sure, *Casimir* does not follow this pattern. There, the delay prior to vote was comparable to the current case. However, *Casimir* was decided long before the Ontario Board changed its practice to ensure that votes were conducted within a matter of days and includes no discussion of the importance of timeliness of representation votes. By contrast, this Board's current case law makes clear that expediency is of crucial importance in the conduct of representation votes.

[99] Still, these observations do not address a theme of the Ontario cases, which is that a failure to provide notice is unfair.

[100] In this case, by the time the Employer was notified of the vote, the Union had been aware for a period of 10 days that the vote was ongoing. By the time the Employer was notified of the exact parameters of the vote, the Union had had this knowledge for 16 days. There were only three business days remaining. In a mail-in ballot vote, the first days of the voting period may be critical. The voting pattern in this case suggests that it was. By December 9, a majority of the votes had been submitted.

[101] The errors made, although innocent, mean that the Employer was effectively deprived of the information about the voting period. Communication with the parties enhances transparency and confidence in the Board's processes and ensures that the parties are on an equal footing. Both the parties should have been privy to the details about the vote. When they were not, they were not on an equal footing. It would be naïve to conclude that the considerably late notice did not provide an unfair advantage to the Union.

[102] Granted, the timeline in this case has provided the Employer with significantly more opportunity than usual to communicate with the employees. The delay between the date of the certification application and the vote was unusually long, due, in part, to the Employer's late submission of the list of employees.

[103] Further, the Employer is no stranger to organizing drives and representation votes. Perhaps it is less familiar with the certification regime in Saskatchewan, specifically, but it should have informed itself as to the legalities involved in voluntary recognition and the certification process, generally, in this province.

[104] Finally, the Employer should not have relied on the Union to provide it with information as to what to expect from the certification process. The Employer received notice of the certification application on October 28, 2021. It had plenty of time to inform itself as to the process.

[105] However, the Employer bears no responsibility for the late notice. Although it should have informed itself of the process, it could not have identified the voting period independently. During the delay in providing the employee list, it could not have predicted that it would not receive notice of the vote. As a result, it was almost entirely shut out of the information about the voting period.

Conclusion and Remedy:

[106] In conclusion, due to a series of innocent but unfortunate administrative errors, the process through which the vote was conducted was unfair. The entire voting process has been tainted. For this reason, the Board has decided to order a new representation vote.

[107] The Board is alert to the specific circumstances of this workplace. As compared to most certification applications, this Union has had significantly more contact with this bargaining unit (under a different employer) and the bargaining unit has had significantly more exposure to the Union. Although there is a risk of undue influence with any delay in voting, this Union is not as vulnerable as most unions that seek acquisition of bargaining rights. The present and continuing voluntary recognition of the Union also means that the Union-employee relationship will remain intact, at least for the time being. These facts lessen the Board's concern with delay in ordering a second representation vote.

[108] However, the Board is also alert to the potential for confusion among the employees who have already voted but who would then be receiving a second ballot and for the potential for a

change to the employee list. For these reasons, the Union shall be entitled to provide an information package to each of the employees.[12] Should they decide to do so, the information package may be delivered to the employees at their home addresses (if the Union is already in possession of that information) and/or their workplaces. If the latter occurs, the Employer shall facilitate access to the employees for that purpose.

[109] An appropriate order will accompany these Reasons.

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

DATED at Regina, Saskatchewan, this **22nd** day of **March, 2022.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson

[12] See, *ATCO 2015*, at para 95.