Saskatchewan
Labour Relations Board

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v THE TOWN OF PREECEVILLE, Respondent

LRB File No. 057-24, 065-24 and 076-24; August 6, 2024
Chairperson, Kyle McCreary; Board Members: Brian Barber and Maurice Werezak

For the Applicant, Canadian Union of Public Employees: Dawid M. Werminski

For the Respondent, The Town of Preeceville: Steve Seiferling

Disclosure of Support Numbers – Question of Whether Union Had 45 Percent Support Required to Trigger a Vote is not to be Considered Retrospectively – Whether Individuals Support a Union Is Privileged

REASONS FOR DECISION

Background:

[1] **Kyle McCreary, Chairperson:** The Employer, the Town of Preeceville ("the Town"), requests that the Board disclose the total number of supporters provided by the Canadian Union of Public Employees ("CUPE") in its application for certification. The Union opposes this disclosure. For the reasons below, the Board is denying the Town's request for disclosure from the Board.

[2] CUPE filed an Application for Bargaining Rights in relation to the Town on March 11, 2024.

[3] The Town provided an employee list on March 14, 2024.

[4] The Former Chair of the Board on behalf of the Board directed a vote on March 19, 2024.

[5] The Town filed an Objection to the Conduct of the Vote in LRB File No. 065-24 on March 19, 2024.

[6] The Town filed a reply in the Application for Certification in LRB File No. 057-24 on April 3, 2024, which were filed as of April 5, 2024, pursuant to an order of the Board.

[7] CUPE filed a reply in LRB File No. 065-24 on April 3, 2024.

[8] The Town filed an Objection to the Conduct of the Vote on April 9, 2024 in LRB File No. 076-24.

Argument on behalf of the Town:

[9] The Town argues that it is entitled to the support numbers the Union had when filing its application as a matter of procedural fairness and also related to the operation of s. 6-9 of *The Saskatchewan Employment Act* ("the SEA").[1]

[10] The procedural fairness argument rests on an application of the Baker factors and arguing that as this is part of the case to meet that the Town is entitled to know what is necessary to meet the case.

[11] In response to the issue of whether s. 6-121 of the SEA applies to this matter, the Town asserts that s. 6-121 does not apply to the information at issue as it is aggregated and is not the information of individual Board members.

Argument on behalf of CUPE:

[12] CUPE opposes the Town's request on the basis that it is contrary to the intention of s. 6-9 of the SEA, and that it endangers the confidentiality of union organizing activities and individual employees. Further, concerns were raised about whether this could imperil the expeditious hearing of certification applications.

Relevant Statutory Provisions:

[13] The first application at issue is pursuant to s. 6-9 of the SEA:

> ***Acquisition of bargaining rights***
> *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.*

[1] *The Saskatchewan Employment Act*, SS 2013, c S-15.1.

[14] The Board's Direction to Vote was pursuant to s. 6-12 of the SEA:

> ***Representation vote***
> *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.*

[15] Relevant to the issue of whether this is privileged information is s. 6-121 of the SEA:

> ***Certain information privileged***
> *6-121(1) Notwithstanding any other Act or law, information obtained for the purposes of this Part is not open to inspection by any person or by any court if the information is acquired by any of the following persons and was acquired in the course of the person's duties pursuant to the Part:*
>
> > *(a) a member of the board;*
> >
> > *(b) a labour relations officer;*
> >
> > *(c) the director of labour relations;*
> >
> > *(d) a special mediator;*
> >
> > *(e) an arbitrator with respect to an arbitration of a matter governed by this Part;*
> >
> > *(f) a member of a conciliation board appointed pursuant to this Part;*
> >
> > *(g) a member of an arbitration board appointed pursuant to this Part.*
>
> *(2) None of the persons mentioned in subsection (1) shall be required by any court or the board to give evidence about information obtained for the purposes of this Part in the course of his or her duties.*

[16] The predecessor provisions to ss. 6-9 and 6-12 of the SEA are ss. 6(1) and 6(1.1) of *The Trade Union Act ("the TUA")*:[2]

> ***Representation votes***
> *6(1) Subject to subsections (1.1) and (2), in determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board must direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
>
> *(1.1) No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application. (1.2) The board must require as evidence of each employee's support mentioned in subsection (1.1) written support of the application, as prescribed in the regulations made by the Lieutenant Governor in Council, made within 90 days of the filing of the application.*

Analysis and Decision:

Is the Information Sought Part of the Case to Meet?

[17] The Town bases the argument for disclosure on procedural fairness, that disclosure is necessary for the case to meet. The level of support prior to the vote is not part of the case to meet at a full hearing, the level of support is only an issue to be considered prior to the issue of a direction to vote, once that direction is issued, the vote of individuals properly within a bargaining unit is what is determinative, and the level of support is not to be considered retrospectively.

[18] Procedural fairness requires disclosure sufficient to enable a person to understand and meet the case against them.[3] The Town has received the CUPE's Application for Bargaining Rights, and the Board's Direction for Vote. These are the pleadings and the Board's order at issue. The question of whether the 45 percent threshold under s 6-9 was met to direct the vote is not in issue at this point.

[19] This was discussed by the Court of Appeal in *United Food and Commercial Workers, Local 1400 v Affinity Credit Union*, 2015 SKCA 14 (CanLII) ("*Affinity Credit Union*"). That case specifically addressed the question of whether the 45 percent threshold was to be revisited at a full hearing, the Court of Appeal specifically rejected the finding of the Court of Queen's Bench that there must be a determination of what 100 percent is before it can be determined whether the 45 percent threshold was reached. The Court accepted the Board's interpretation that the 45

---

[2] *The Trade Union Act*, RSS 1978, c T-17.
[3] Total Oilfield Rentals Limited Partnership v R, 2017 SKQB 317 (CanLII) at para 64*; Construction Workers Union, CLAC Local 151 v Saskatchewan Labour Relations Board*, 2020 SKQB 137 (CanLII) at para 111.

percent threshold was not to be considered retrospectively once a vote was directed. The Court's analysis of the issue was at paras 8-26:

> *III. The Board's Decision*
>
> *[8] As a result of Mr. Jacobson's inclusion in the bargaining unit, Affinity suggested to the Board that its direction to vote should be rescinded. The Board, in majority reasons (dissenting reasons were also filed), determined it should not. It found the Legislature did not intend s. 6(1.1) to apply retrospectively once a representational vote had been conducted. Accordingly, it ordered the vote to be counted.*
>
> *[9] Affinity appealed to the Court of Queen's Bench requesting the Board's decision be quashed. It also applied for, and was granted, an interim order staying the Board's direction to tabulate the vote pending a determination of its application.*
>
> *IV. The Chambers Judge's Decision*
>
> *[10] The Chambers judge determined the appropriate standard of review with respect to the Board's decision was reasonableness. He found the Board's decision was not "reasonable" because the 45% threshold set out in s. 6(1.1) of the Act had not been met. He held the Board's investigation of the application for certification was "done in haste and without adequate information." He determined that the Board should not have directed a vote without knowing exactly how many employees were in the bargaining unit. The primary grounds for his decision are set out in para. 37 which reads as follows:*
>
> > *The court does not accept that it is reasonable to calculate 45 percent without a prior determination of what 100 percent is. Upon a request to the employer for and receipt by the Board staff completing the investigation of a list of employees would have resulted in an appropriate voters list. This would have established the 100 percent number. To suggest that an appropriate investigation could be conducted within 50 minutes and without a voters list sufficient to establish that the 45 percent threshold had been achieved is unreasonable.*
>
> *…*
> *[13] In the matter under appeal, the Chambers judge correctly identified the applicable standard but, in my opinion, erred in his application of that standard. He did not accord proper deference to the Board's decision. As stated in Dunsmuir at para. 54, "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity." In this case the Board interpreted a provision of its own statute and determined that once a representational vote was conducted, absent "an obvious and overriding error," there is little utility "in disregarding the wishes of the employees through the retrospective application of s. 6(1.1) even if it is subsequently discovered that the requisite threshold of support was not filed with an application."*
>
> *[14] In reaching its decision, the Board took into account the purpose of s. 6(1.1) which it found was "to prevent employees from being asked to decide the representational question if an applicant can not [sic] demonstrate that a sufficient threshold of employees in the workplace support the applicant's initiative" (para. 24). The Board described the provision as a "shield" to protect the workplace from the disruption associated with applications for certification. Consequently s. 6(1.1) enjoins the Board from directing a representational vote unless it is satisfied the Union's application is accompanied by "sufficient evidence of support", that is 45% of the employees in the bargaining unit. The operative time for making that determination is when the application is filed with the Board. The majority found s. 6(1.1) directs the decision to order a vote be based "on the applicant's application, together with any investigations [sic] conducted by the Board" (para. 22). Based on its interpretation,*

s. 6(1.1) anticipates that, at the time that determination is made, the Board will not have the full spectrum of information that would normally be available after a hearing, nor will that information have been tested. In other words, s. 6(1.1) is a preliminary step in the certification process which does not require exact numbers.

[15] In my view the Board's interpretation of s. 6(1.1) is reasonable and within the range of possible acceptable outcomes which are defensible in respect to both the facts and the law.

[16] First, subsection 6(1.1) read in its grammatical and ordinary sense supports the Board's interpretation.

[17] The subsection requires the Board to be satisfied that at least 45% of the employees in the appropriate union support an application for certification before a vote can be ordered. The relevant point in time for the Board to make that determination is "the time of the application". The subsection also provides the basis upon which that determination is to be made, namely: "… the evidence submitted in support of the application and the Board's investigation in respect of that evidence".

[18] The application form for certification is prescribed by the Regulations and Forms, Labour Relations Board, Sask Reg 163/72 (repealed by Sask Reg 27/2014). That Form is consistent with the Board's interpretation of s. 6(1.1) as it requires the union to set out the "approximate" number of employees in the proposed bargaining unit as opposed to the exact number of such employees. Indeed, depending on the nature and size of the bargaining unit, the exact number of employees may be very difficult, if not impossible, to determine without a hearing. ***Subsection 6(1.1) does not provide for such a hearing. It refers only to the Board's investigation of the evidence filed in support of the application****.*

[19] In this case, the evidence submitted in support of the application consisted of UFCW's estimate of the number of employees in the bargaining unit, and the names of the employees who supported its application for certification accompanied by their consent. On its face UFCW's evidence of support exceeded the 45% threshold set out in s. 6(1.1). The Board did not conduct an indepth investigation of that evidence, but s. 6(1.1) does not require it to do so.

[20] Second, the Board's interpretation of s. 6(1.1) is in keeping with the purpose and tenor of the Act.

[21] Time is of the essence when dealing with applications for certification. The Board, in International Association of Heat and Frost Insulators and Allied Workers Local 119 v Northern Industrial Contracting Inc., 2013 CanLII 67367 (Sask LRB), explained the importance of expediency in conducting certification votes at paras. 19 and 20 as follows:

> *[19] This Board has little doubt that most employers would appreciate a fulsome opportunity to communicate with their employees prior to a certification vote, just as trade unions would appreciate the same opportunity prior to a vote on a rescission application. However, as this Board noted in the Buyaki case, [United Steel Workers v. Robert Buyaki & Edgewood Forest Products Inc., [2013] CanLII 29666 (SK LRB), LRB File No. 062-13], pre-hearing votes are utilized for the express purpose of shielding employees from the undue influences and the inevitable pressures associated with campaigns in the workplace pending representational determinations by the Board. While there may well be information that may be of benefit to employees in deciding the representational question, the longer the delay between the filing of a certification (or a rescission) application and the conduct of the representational vote, the greater the potential for undue influences and coercion to occur, intentional or otherwise. In our opinion, it is far*

> *more important that employees be shielded from these influences and the inevitable pressures associated with a representational campaign in the workplace than any attempt to optimize the information available to employees in the belief that employees are unable to decide the representational question for themselves without more information. For these reasons, this Board has adopted a general policy that pre-hearing votes should be used and that they should be conducted with reasonable dispatch.*
>
> *[20] To be specific, our policy objective is to have representational votes conducted within days (preferably as few as 5 to 10 days) following the receipt of any application whether the representational question arises (and where the application appears on its face to be in order and meets the threshold requirements of the Act). In our opinion, doing so captures the wishes of employees on a timely basis and provides the best protection from undue influences and coercion, intentional or otherwise. Should an employer desire to communicate facts or opinions to their employees, the process used currently by the Board provides a modest opportunity to do so. In light of the not-insignificant risks associated with an employer attempting to communicate with employees about collective bargaining at this sensitive period of time, in our opinion, the amount of time provided is sufficient. Certainly, in the present application, the Employer would have had more than a sufficient period of time within which to communicate its views to its employees if it desired to do so.*

[22] The Act has broad application and applies to diverse work environments. While identifying the exact number of employees in a small bargaining unit might be relatively simple, the same determination in larger, more complex units may well result in significant delays while the status of employees is sorted out. The Chambers judge's interpretation would have the practical effect of delaying representational votes while the Board ascertains the exact number of employees in each bargaining unit. ***In my opinion, this would be contrary to the purpose and tenor of the Act.***

[23] Third, after a representational vote is taken, an employer has an opportunity to make objections with respect to the appropriateness of the bargaining unit, the eligibility of employees, the manner in which the vote was conducted, and any other relevant matter. This supports the view that s. 6(1.1) is a preliminary step in the certification process where exact numbers are not required. A practical approach is necessary to enable the system to work efficiently.

[24] Fourth, the fact the Board made its decision to order a representational vote within a very short span of time, does not, in and of itself, make its decision unreasonable. In this case, there were unusual circumstances relating to the Board's handling of the application which lent a sense of urgency to the matter. In the circumstances, acting expediently was the prudent thing to do and does not diminish the fact that at the time the vote was ordered the Board was satisfied, on the basis of the evidence filed in support of UFCW's application and the Board's investigation of that evidence, that 45% of the employees of the proposed bargaining unit supported the application.

[25] Finally, the Board's determination that s. 6(1.1) was not meant to apply retrospectively is reasonable. Once a vote is taken, it would serve no purpose to revisit the decision to order the vote. At that point, the employees have spoken and their wishes should be respected.

VI. Conclusion

[26] In my view, the Board's interpretation of s. 6(1.1) of the Act falls within the range of possible acceptable outcomes and was entitled to deference by the Chambers judge. The Chambers judge's view of how that subsection should be interpreted would greatly impact

> *both how the Board operates with respect to certification applications and the speed with which representational votes could occur. The Board's position that the decision to order a representational vote should not be retrospectively reconsidered is reasonable and in accordance with the tenor of the Act.* ***The 45% threshold set out in s. 6(1.1) was meant to be determined at the time the application is made and on the basis of the evidence filed in support of the application, subject only to the Board's investigation. It was not meant to be determined after a full hearing.***
> ***[Emphasis added]***

[20] The Board in *Amalgamated Transit Union, Local 615 v Battlefords Transit System*, 2022 CanLII 99434 (SK LRB)("*Amalgamated Transit Union")* applied similar reasoning under the provisions of the SEA:

> *[75] It is not the role of the Registrar or the Executive Officer to make a final determination before a hearing as to which of the Employer and Union is correct when there is a dispute as to the eligibility of certain people to vote. In this matter, given the dispute over the names, there was an issue whether the Union had filed sufficient evidence of support to trigger a vote pursuant to section 6-12 of the Act. As a result, out of an abundance of caution, the Board directed that the vote be held pursuant to clause 6-111(1)(v) of the Act. Given the decision of the Court of Appeal in United Food and Commercial Workers, Local 1400 v Affinity Credit Union[44], that caution was unnecessary. Based on the information filed by the Union, it had provided sufficient evidence of support for a vote to be held. The 45 percent threshold is not meant to be determined after a full hearing. The operative time for making that determination is when the application is filed with the Board, based on the information provided by the Union. Time is of the essence in conducting a vote. The Saskatchewan Employment (Labour Relations Board) Regulations, 2021 contemplate that a vote may be sealed, to allow for the Board to make a final determination respecting who was entitled to vote, after hearing full evidence. Once that determination is made, the votes can be counted.* ***Once a vote is conducted, no labour relations purpose is served in reviewing whether it should have been conducted. The wishes of the employees can be determined most clearly by counting the ballots. The employees have spoken and their wishes should be respected.***
> ***[Emphasis added]***

[21] The Board adopts the Board's reasoning from *Amalgamated Transit Union* that the *Affinity Credit Union* reasoning applies to the SEA. The wording of ss. 6-9 and 6-12 of the SEA do not contemplate a hearing in relation to the 45 percent issue. The 45 percent threshold is a "preliminary step" to be determined at the time of application that is not meant to be considered at a full hearing. The Town's position that it must be able to evaluate whether CUPE met the threshold for a direction to vote is contrary to the Court of Appeal's holding in *Affinity Credit Union* and the Board declines to depart from the Court of Appeal's jurisprudence.

[22] As such, what information the Board received is not part of either party's case to meet and is not required to be disclosed as a matter of procedural fairness.

[23] This analysis is also dispositive of the Town's argument as to an entitlement to know the information as it relates to the operation of s. 6-9 of the SEA. As noted by the Court of Appeal in

Affinity Credit Union at para 23, the numbers in the application are not required to be exact. The evolution of the statute supports continuing to view this provision as preliminary, as the current wording is less rigorous in the analysis required prior to the Board directing a vote. If it was the intention of the legislature to turn s. 6-9 into a full hearing unto itself, the legislation would have evolved in the opposite direction than it has.

Is the Information Sought Privileged?

[24] Further, even if the support numbers were part of the case to meet, the Board would decline to discuss the information as it is privileged both by statute and at common law.

[25] Pursuant to s. 6-121 of the SEA, the information is privileged. The Town argues that the information sought is not covered by this provision as it is in the possession of the Registrar and the Registrar is not the covered information sought but a summary of the support numbers. The Town is correct that the Registrar is not covered, however, the records at issue are the Board's records. The Registrar acts as the Board's agent in relation to ss. 6-9 and 6-12, the application and support information is the Board's information. This is clear from s. 6-9(2)(b) which requires a union to "file with the board evidence of each employee's support that meets the prescribed requirements." In s. 6-12, it is the Board that directs the vote to be carried out. The Board and its members are the recipients of the information pursuant to the SEA and pursuant to s. 6-121(2) the board cannot require members of the board to give evidence about information obtained for the purposes of Part VI.

[26] Even if the Board is wrong about the interpretation of the statutory protection, support information is privileged at common law, as was stated by the Board in *United Steelworkers of America v. Varsteel Limited*, 2003 CanLII 62863 (SK LRB) at para 11:

> *[11] There is no issue that the Union includes, among its membership, employees of more than one employer. The evidence filed in support of the application demonstrates that at least one of the employees is a member of the Union. The Board has consistently treated support evidence as being highly confidential. The crux of the issue of membership is whether the union considers an employee to be a member in accordance with its usual practices – the details of the union's internal mandate are not of great moment. The Board stated as follows in Core Community Group Inc., supra, at 630-31:*
>
> > *The Board … will not disclose the evidence to any party even when it can be presumed from the facts or evidence of the case that the employee supported the Union. No employee can be compelled to testify as to whether or not they support the Union. The privilege rests with the employee, not with the Union: see Saskatchewan Joint Board, Retail, Wholesale Department Store Union v. Remai Investments Corporation (Imperial 400 Motel – Swift Current), [1997] Sask. L.R.B.R. 303, LRB File Nos. 014-97 & 019-97….*

[27] This is a privilege of each individual who signed a support card. The Town is not seeking this individual information, however, considering that this is a relatively small workplace, disclosing of the total number risks disclosing privileged information of individual employees and thus the total is also privileged in the facts of this case.

[28] As a result, the request for total support numbers in LRB File No. 057-24 is dismissed.

[29] The Board thanks the parties for the helpful submissions they provided, all of which were reviewed and considered in making a determination in this matter.

DATED at Regina, Saskatchewan, this **6th** day of **August, 2024.**

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson