INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 771, Applicant v BLACK IRON STEEL ERECTORS LTD., Respondent

LRB File No. 126-23 and 110-23; January 30, 2024
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Don Ewart

Counsel for the Applicant, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771: Gary Caroline

For the Respondent, Black Iron Steel Erectors Ltd.: No one appearing

Construction Industry Certification – Small Bargaining Unit – Direction for Vote Issued.

Reconsideration Application – Directing Votes for Small Bargaining Units – Past Practice of the Board – Fourth, Fifth, and Sixth *Remai* Grounds – Statutory Interpretation – Result Upheld.

REASONS FOR DECISION

Introduction:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an application for reconsideration brought by International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771 [Union].

[2] On July 26, 2023, the Union applied for a construction industry certification for employees of Black Iron Steel Erectors Ltd. [Employer], indicating that there was one employee in the proposed bargaining unit. The Employer did not file a reply.[1]

[3] On the same date, the Union organizer wrote to the Board asking why it was ordering votes for units of two employees or fewer [small bargaining units]. The Board Officer replied that applicants in "representational applications can expect that a vote will be conducted regardless of unit size, provided that they have met the statutory requirements".

[1] The Employer did file an employee list, as required.

[4] On July 27, 2023, counsel for the Union wrote to the Board to object to a vote being ordered. The Board Registrar replied,

> *…As you note, Section 6-22(2) of the Act does not contain mandatory language and the Board may determine that a vote should be conducted. The Board Officer's statement was correct – a potential bargaining unit's size does not entitle any application to a "pass" from the consideration of a vote and the Board must consider whether it is appropriate to order a vote for each application. As each application is considered on a case-by-case basis, Applicants are advised [to] anticipate the potential outcome of a vote being ordered for any application where it could be deemed necessary.*
>
> *…*

[5] On August 1, 2023, a Direction for Vote was issued with a ballot return deadline of August 15, 2023. The Notice of Vote listed one eligible voter in the proposed bargaining unit.

[6] On August 2, 2023, counsel for the Union wrote to the Board asking for reasons for the decision to order a vote in this case. The Executive Officer issued Reasons for Decision on August 14, 2023 [Original Decision].[2]

[7] On August 30, 2023, the Union filed its reconsideration application, copying representatives of the Construction Labour Relations Association of Saskatchewan Inc. [CLR] and the Saskatchewan Building Trades [Building Trades]. Again, the Employer did not file a reply. A certification order was issued on September 5, 2023.

[8] The reconsideration application was set down for Appearance Day for the purpose of scheduling dates. Appearance Day was held on October 3, 2023. The Union filed an Appearance Day form; the Employer did not.

[9] At Appearance Day, the Union asked the Board to provide notice of the reconsideration application to the CLR and the Building Trades. By that point, the deadline for an application to intervene, pursuant to section 25 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* [Regulations], had passed.[3] After Appearance Day, the Board responded to the request, indicating that the Board would not be providing notice, given that the deadline for an application to intervene had passed and notice had already been provided to the CLR and the Building Trades (by the Union).

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[2] *Bargaining Rights International Association of Bridge, Structural, Ornamental, and Reinforcing Ironworkers, Local 771 v Black Iron Steel Erectors Ltd*., 2023 CanLII 73092 (SK LRB) [*Original Decision*].
[3] Within 20 business days after the date on which the original application (the reconsideration application) was filed.

[10] In support of its application for reconsideration, the Union relies on the fourth, fifth, and sixth *Remai* grounds.[4] These are:

- The original decision turns on a conclusion of law or general policy that was not properly interpreted.
- The original decision is tainted by a breach of natural justice.
- The original decision is precedential and amounts to a significant policy adjudication that the Board may wish to refine, expand on, or otherwise change.

[11] The Union asks the Board to reconsider its decision (and policy) for the following reasons:

1. The Board failed to reasonably interpret subsection 6-22(2) of *The Saskatchewan Employment Act* [Act];
2. The Board adopted an interpretation or policy of general application but subsection 6-22(2) requires a vote only in circumstances that justify it;
3. The Board adopted an interpretation or policy in respect of small units without prior notice to the applicant or to the labour relations community in general.

[12] The Union submits that, pursuant to subsection 6-22(2), the Board has discretion whether to order a vote in relation to a small bargaining unit. It says that the Original Decision represents the first time the Board has interpreted subsection 6-22(2) as providing for mandatory votes for small units. The Union asserts that the effect of the Board's decision is to deny employees the protection they enjoy from possible employer intimidation and coercion in cases where their wishes could more easily be ascertained.

[13] The Employer did not participate in the reconsideration application, either in writing or by attending the hearing.

Summary of Argument of the Union:

The Original Decision turns on a conclusion of law or general policy that was not properly interpreted.

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[4] *Remai Investment Corp. v Saskatchewan Joint Board, R.W.D.S.U.,* [1993] 3rd Quarter Sask Labour Rep 103, LRB File No. 132-93 [*Remai*], at 107-8.

[14] Subsection 6-22(2) creates a presumption that the Board will not direct votes unless the circumstances warrant it. In 2008, the Legislature eliminated the Board's discretion to grant bargaining rights to unions based solely on support cards. The legislation was amended to require votes in all certification applications. When subsection 6-22(2) was enacted, it modified that universal requirement such that votes were not required for small units.

[15] In the Original Decision, the Executive Officer erred by drawing direct parallels between certification applications and other applications involving small units and erred by disregarding the purpose of subsection 6-22(2), that is, to moderate the effects of undue pressure or interference on the part of employers. The fact that the Board provides for expedited votes does not alleviate the Union's concern for heightened pressure and interference prior to votes being conducted. The Act does not indicate that votes in small units must be conducted in a timely fashion; it indicates that votes in small units are not required.

The Original Decision is tainted by a breach of natural justice.

[16] The certification application was made without prior knowledge of the Board's new policy related to votes. Implementing such a dramatic change to a practice that has been maintained for almost a decade would have called for notice both to the Union and to others in the community. A hearing ought to have been held on this issue.

The Original Decision is precedential and amounts to a significant policy adjudication that the Board may wish to refine, expand on, or otherwise change.

[17] Given the significant change in policy, the Board ought to have sought input from the labour relations community. In particular, the CLR and the Building Trades ought to have been consulted.

[18] Should the Board reconsider its decision, the Union asks that the Board direct votes in small units only when the circumstances require it.

Analysis:

[19] Section 6-114 of the Act states that an order or decision in a matter arising pursuant to Part VI is binding and conclusive of the matters stated in the order or decision. Section 6-115 states that every order or decision made pursuant to Part VI is final and there is no appeal from that order or decision. It also sets out the Board's authority to reconsider a decision:

> ***6-115****(1) Every board order or decision made pursuant to this Part is final and there is no appeal from that board order or decision.*
>
> *(2) The board may determine any question of fact necessary to its jurisdiction.*
>
> *(3) Notwithstanding subsections (1) and (2), the board may:*
>
> > *(a) reconsider any matter that it has dealt with; and*
> >
> > *(b) rescind or amend any decision or order it has made.*
>
> *(4) The board's decisions and findings on all questions of fact and law are not open to question or review in any court, and any proceeding before the board must not be restrained by injunction, prohibition, mandamus, quo warranto, certiorari or other process or proceeding in any court or be removable by application for judicial review or otherwise into any court on any grounds.*

[20] The Original Decision is a decision of the Executive Officer made pursuant to the authority provided by subsection 6-93(3) of the Act.[5] Pursuant to subsection 6-97(2), a union affected by an act of the Executive Officer may apply to the Board to review, set aside, amend, stay or otherwise deal with the act.

[21] The Union frames its application as a request for reconsideration and relies on the test that has been developed through the related case law. Given the arguments before it, the Board will consider the issue within the reconsideration framework. However, the central question is one of statutory interpretation. Whether the matter had been brought pursuant to subsection 6-97(2) or pursuant to section 6-115 of the Act, the core analysis and final result would be the same.

[22] Next, in assessing the merits of a reconsideration application, the Board continues to rely on the criteria which were first described in *Remai*, at 107-8:

> *…*
>
> *In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:*
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> > *In [Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*

[5] The Executive Officer made the decision to direct a vote pursuant to delegated authority from the Board. See, *Original Decision*, at footnote 3.

> *1. If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
>
> *2. if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
>
> *3. if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
>
> *4. if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
>
> *5. if the original decision is tainted by a breach of natural justice; or,*
>
> *6. if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[23] The Union seeks reconsideration on the basis of the fourth, fifth, and sixth grounds.

Fourth Ground: The Original Decision turns on a conclusion of law or general policy that was not properly interpreted.

[24] In *Kennedy*, the Board described this particular ground in the following manner:

> *…As a result, this ground is generally restricted to circumstances where there is an inconsistency between the decisions rendered by different panels on an important issue of law or policy. However, this ground has also been relied upon by the Board to re-examine a prior decision in circumstances where it is alleged the Board misapplied or misconstrued its enabling statute. See: United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp., 2009 CanLII 13640 (SK LRB), [2009] CanLII 13640 (SK LRB), 173 C.L.R.B.R. (2d) 171, LRB File No. 069-04; and Saskatchewan Government and General Employees' Union v. Government of Saskatchewan, supra.*[6]

[25] The essence of the Union's argument is that the Executive Officer has reversed a longstanding interpretation of subsection 6-22(2) and, in doing so, has misconstrued the Act. It asserts that the only reasonable interpretation of subsection 6-22(2) is that a vote is to be ordered only in unusual or extenuating circumstances. The Union says that the new policy "turns a limited discretionary power into a mandatory provision".[7]

[26] The following statutory provisions are relevant to this matter:

DIVISION 3
Acquisition and Termination of Bargaining Rights

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[6] *Kennedy v Canadian Union of Public Employees, Local 3967*, 2015 CanLII 60883 (SK LRB) [*Kennedy*], at para 20.
[7] Union's Supplemental Submissions, November 8, 2023, at 5.

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.*

…

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.

…

DIVISION 5
Votes

Votes by secret ballot
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.

Voting requirements
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.

[27] The Union has put in issue the Executive Officer's interpretation of the statute. For ease of reference, it is worth reproducing the relevant excerpts from the Original Decision:

[8] I begin by noting that in 2008, with amendments to The Trade Union Act,[5] the Legislature removed the Board's discretion under that statute to not order a vote with respect to a certification application:

[14] In 2008, The Trade Union Act was amended to institute a requirement that employees vote prior to certification being granted by this Board. A representational vote was not mandatory under the legislation prior to 2008. While the Board had the authority to order that a representational vote be conducted prior to the amendment, the long standing jurisprudence of the Board was to accept card evidence of support and to only direct a representational vote in a certification application in limited circumstances (not relevant to the present application). With the 2008 amendment to the Act, Saskatchewan adopted a mandatory vote regime, wherein the Board must now direct that a representational vote be taken (by secret ballot) in certification applications to determine what trade union, if any, has the support of a majority of employees in a workplace. In doing so, the legislature moved Saskatchewan from what had previously (and somewhat inaccurately) been referred to as an "automatic certification" system to a "mandatory vote" system. Since that time, the Board has appointed agents to supervise our representational votes and our agents are given some discretion in how these votes are conducted.[6]

[9] It is well-known that the Board aims to conduct representation votes promptly once a certification application has been filed. In 2013, in Northern Industrial, the Board explained this as follows:

> *[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 (sic) 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.[7]*

[10] In 2014, The Trade Union Act[8] was repealed with the enactment of The Saskatchewan Employment Act.[9] The latter maintains the requirement for representation votes with respect to certification applications, generally, through ss. 6-12 and 6-13.[10] In addition, however, it includes s. 6-22(2), which states:

> ***6-22*** *…*
>
> *(2) A vote by secret ballot is not required among employees in a bargaining unit consisting of two employees or fewer.[11]*

[11] A similar provision did not exist in The Trade Union Act prior to its repeal.

[12] The Board has interpreted s. 6-22(2) as permitting it to issue certification orders without a vote for bargaining units consisting of one or two employees. In practical terms, this has meant that where the parties to a certification application agree upon the one or two employees who fall within the scope of the proposed bargaining unit on the date the application is filed and the Board is satisfied that there is unanimous support amongst those employees for the application, certification orders have been issued without a vote. I acknowledge that the Union has obtained orders in such circumstances on previous occasions.[12]

[28] In summary, the Executive Officer acknowledged that sections 6-12 and 6-13 require representation votes in relation to certification applications but observed that the Board has interpreted subsection 6-22(2) as permitting it to issue certification orders without a vote for bargaining units consisting of one or two employees. To be sure, there is no decision in which this Board has applied the modern principle to determine the proper interpretation of subsection 6-22(2). Rather, the Board's interpretation is primarily reflected in its policy and practice. [8]

[8] Furthermore, this case does not engage the principle of *stare decisis*. There is no case from this Board that provides an interpretation of ss. 6-22(2) in line with the modern principle (see, to be sure, *International Brotherhood of Electrical Workers, Local 2038 v Tron Construction & Mining Inc*., 2023 CanLII 27425 (SK LRB), which contains no analysis on the issue. See also, the approach of the Ontario Board to *stare decisis* in *Dagmar Construction Inc*., 2003 CanLII 44834); nor is there a related decision from a court (see, *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653 at paras 112 and 113).

[29] Whereas in the past, it was the Board's practice not to direct a vote in a certification application for a small bargaining unit, the Executive Officer indicated that, in the future, "a prompt directed vote should be anticipated in any certification or rescission application".

[30] The Union argues that subsection 6-22(2) creates a presumption that the Board is not to direct votes unless the circumstances warrant it. The Union points to the wording of the provision which states, "[a] vote by secret ballot is not required among employees in a bargaining unit consisting of two employees or fewer". It states that the provision is explicit that votes "are not required" in small units.

[31] The Union argues that the change in practice overlooks the policy implications inherent in the exemption pursuant to subsection 6-22(2). The desire to ensure that employees have an opportunity for "sober second thought" in all cases "cannot override the statutory provision that votes in very small units are not required".[9] A benefit of the provision is that it can "obviate the effects of [undue] pressure or interference by employers once they discover that their one or two employees want to be organized".[10]

[32] The Union argues that the Original Decision misconstrues the intent of Act. Although that decision does not include a statutory analysis, the Board has been asked to interpret subsection 6-22(2) to determine if the decision should be reconsidered. To consider the Union's argument, the Board will interpret subsection 6-22(2) in accordance with the modern principle of statutory interpretation.

[33] It is well established that the modern principle has been incorporated into section 2-10 of *The Legislation Act*:

> ***2-10****(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.*
>
> *(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.*

[34] The Court of Appeal in *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77 (CanLII) [*Arslan*] provided helpful guidance on how to apply the modern principle:

> *[59] Under the modern principle, the court first forms an initial impression as to the meaning of a legislative provision from its text (i.e., its "grammatical and ordinary sense"). Then, so*

[9] *Application for Reconsideration*, at 5.
[10] *Application for Reconsideration*, at 5.

> *as to infer what the Legislature intended to enact, the court will take into account the purpose of the provision and all relevant context. As this suggests, the latter part of the inquiry involves the contextual determination of legislative intent.*
>
> *…*
>
> *[62] As noted, even where the court's initial impression of a legislative provision is readily arrived at, the court is required to consider the broader context to read the provision "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." In Atco Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board), 2006 SCC 4 at para 48, [2006] 1 SCR 140, Bastarache J., for the majority, wrote:*
>
> > *This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.*

[35] Subsection 6-22(2) indicates that a vote by secret ballot is not required among employees in a small bargaining unit. The initial impression of the meaning of subsection 6-22(2) is that a vote of a particular type, specifically one that is conducted by secret ballot, is not required; *not* that a vote, in general, is not required.

[36] Subsection 6-22(1) sets out the general rule, that is, that all votes required pursuant to Part VI or directed to be taken by the Board must be by secret ballot. Subsection 6-22(2) sets out the specific exception, that is, that a secret ballot vote is not required in respect of a small bargaining unit. Pursuant to sections 6-12 and 6-13, the Board is required to direct a vote to be taken to determine whether a certification order should be issued. Section 6-12 is clear that, once the application is filed, the Board is required to direct a vote. Logically, the vote pursuant to that direction would occur after the direction is made – not before.

[37] The intent of section 6-22 is confirmed by the scheme of the Act, and specifically, Part VI of the Act. Section 6-22 is located within Division 5 which relates to "Votes". Division 5 describes specific requirements for the conduct of votes (section 6-22) and specific areas in which the Board may exercise discretion in relation to votes (section 6-23). As with section 6-22, section 6-23 refers to a "vote required pursuant to this Part, or directed to be taken by the board". Both of the sections that are contained in Division 5 build on the existing requirements for votes or, in cases where not required by Part VI, the Board's existing discretion to direct a vote.

[38] The object of section 6-22 is to outline the specific requirements relating to the secrecy of votes, subject to any exemptions (6-22(2)) or conditions (6-22(4)). This object is confirmed by the subject matter addressed by each of the subsections contained within section 6-22. Subsection (3) ensures that the secrecy of secret ballot votes is maintained such that voters are not competent or compellable to give evidence. Subsection (4) operates to ensure that the results of the vote are made available to the employees who were entitled to vote. This provision protects the right of entitled employees to the availability of the results of the votes that are required or directed, despite the fact that the votes are required to be by secret ballot.

[39] Section 6-23 provides the Board with the discretion and authority to do certain acts in relation to the conduct of votes that are required or directed. For example, the Board may supervise, conduct, or scrutinize a vote; establish the manner and time of the vote; determine eligibility requirements; determine whether a person is entitled vote; and require that parties give eligible employees an opportunity to vote.

[40] Neither of these sections qualifies the requirement for a vote to be held. They are premised on the fact that votes are required. Instead, section 6-22 qualifies the secrecy requirement related to the conduct of the vote; section 6-23 provides the Board with discretion and authority with respect to the conduct of the vote.

[41] The purpose of subsection 6-22(2) is a practical one. In cases involving small bargaining units, there are practical challenges to maintaining the secrecy of the vote. In a one-person bargaining unit[11], it is obvious who has voted and how. In a rescission application involving a two-person bargaining unit, the applicant who files the application is also a voter; that leaves only one other voting employee. In either a certification or rescission application, two employees who vote must vote in favour of the application for it to be granted.

[42] Subsection 6-22(2) acknowledges these practical realities. It ensures that, in practice, the parties and the Board can comply with the legislation in cases involving small units. It provides for the option not to direct a secret ballot vote in cases where there may be inadvertent or unintentional non-compliance with the Board's direction.[12]

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[11] Proposed or otherwise.

[12] In the present case, the Executive Officer appears to have relied on the standard form for a Direction for Vote which orders a secret ballot be conducted.

[43] The Union argues that the provision may "obviate the effects of [undue] pressure or interference by employers once they discover that their one or two employees want to be organized".[13] The counterpoint to this argument is that, in both certification and rescission applications, there is a potential for the parties to exercise undue influence over employees at the organizing stage. The purpose of the voting requirement is to provide an opportunity for sober second thought in relation to these applications. The voting requirement is consistent with the Legislature's intention, through the enactment of the Act, to shift the balance in labour relations between unions and employers.

[44] The majority has reviewed the dissenting reasons of Member Kagis in this case. With the greatest respect to Member Kagis, the words of the relevant provisions, read in context, are clear. The majority's interpretation is in step with the scheme and object of the Act, and the intention of the Legislature. To find that pre-existing support evidence can be treated retroactively as a vote would be to read more into the Act than the provisions can bear. Section 6-103 does not grant the Board power to disregard the clear intent of the Act.

[45] In summary, it is mandatory for the Board to direct a vote in relation to a certification application. Subsection 6-22(2) does not modify this requirement. It modifies only the requirement for a secret ballot vote. Although the Executive Officer did not engage in this statutory analysis, he reached a conclusion that is consistent with the proper interpretation of the Act.

[46] Having found as much, the Board cannot disregard the law by suspending further implementation of the policy that has been established.[14]

Fifth Ground: The Original Decision is tainted by a breach of natural justice.

Sixth Ground: The Original Decision is precedential and amounts to a significant policy adjudication that the Board may wish to refine, expand on, or otherwise change.

[47] The fifth and sixth grounds are interrelated. The Union relies on both of these grounds to argue that the Board should have sought input from the parties and the labour relations community at large.

[48] In *Kennedy*, the Board provided a helpful description of the sixth ground:

> *[25] The final permissible ground for an application for reconsideration deals with circumstances where the original decision was precedential and amounted to a significant*

[13] *Application for Reconsideration*, at 5.
[14] See, dissenting reasons.

> *policy adjudication. Simply put, this ground permits the Board to take a "second look" when it makes major new policy adjudications or when it [departs] from past jurisprudence on a significant issue. However, in both cases, the matters in issue must have significant impact on the labour relations community in general. See: Construction Labour Relations Association v. Canadian Association of Industrial Mechanical and Allied Workers, Local 17, [1979] 3 Can. L.R.B.R. 153. See also: Saskatchewan Government Employees' Union v. Mary Banga, [1994] 1st Quarter Sask. Labour Rep. 291, LRB File No. 014-94.*

[49] The Union argues that the decision has a significant impact on the labour relations community in general. The Board had an established policy that it had maintained over a period of years, and this policy had set an expectation within that community.

[50] It is well established that the content of the duty of fairness is variable, depending on the circumstances in which the decision is made. Despite this variation, there is a "common core to the participatory rights that the duty of fairness requires".[15] The principal purpose of the duty has been described in the following way:[16]

> *…Its principal purpose is to provide a meaningful opportunity for those interested to bring evidence and arguments that are relevant to the decision to be made to the attention of the decision-maker, and correlatively, to ensure that the decision-maker fairly and impartially considers them.*

[51] Related to this, the Union relies on the following quotation from author, Sara Blake:[17]

> *…Applicable guidelines, policies and directives should be disclosed to parties so that they may make submissions regarding their application to their case.*

[52] In this case, the Union was aware of the potential for a vote to be directed. To be sure, there was a lack of clarity in the description contained in the Board's second email to the Union. Although it indicated that a vote could be directed, it did not clarify that the Board was adopting or was considering adopting a universal approach. When the Union raised its concerns, the Board could have clarified that it was adopting or considering adopting a universal policy.

[53] However, the Board did not breach procedural fairness with respect to the Union's interests in its application. The Union was aware that a vote could be directed. It even made brief, written submissions in support of its position with respect to a vote.

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[15] Donald J.M. Brown, Q.C. and the Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Rel 3, Oct 2023) Vol 1 (Toronto: Thomson Reuters, 2023) [*Brown and Evans*] at 7-80.
[16] *Brown and Evans*, at 7-80.
[17] Sara Blake, *Administrative Law in Canada*, 7th Ed. (Toronto: LexisNexis, 2022), at 3:01.

[54] Furthermore, as far as the current case is concerned, the decision to direct a vote had no impact on the certification of the unit. The Union has not indicated that there was any coercion on the part of the Employer in this case. The Union does not ask that the Board rescind its certification order. Instead, the Union's overarching concern is with the operation of the policy in the future.

[55] As well, the only potentially relevant remedy would have been to provide the Union with the opportunity to make further submissions on this issue. Through the reconsideration process, the Union has had a meaningful opportunity to make submissions, both in writing and through an oral hearing. Leading up to and at the hearing, the Union was represented by able and experienced counsel. During the hearing, the panel engaged in lengthy discussion with counsel to ensure an understanding of the Union's arguments. It is apparent that the determining factor is the interpretation of the statutory provision. The Union has raised and has argued this issue, both in writing and orally.

[56] The Union also suggests that the Board should have consulted more broadly prior to changing its policy with respect to a vote.

[57] The Board is unable to engage in consultations with the broader labour relations community each time it makes a change to its policies, procedures, and practices. The Board has to make numerous such decisions on an ongoing basis. In order to function efficiently and effectively, it must retain the discretion to choose the appropriate approach to making these decisions. Some will appropriately be made by the Executive Officer, some by this representative Board[18], and others through broader consultation.

[58] Here, the matter is a question of pure statutory interpretation. The question is whether the policy reflects a proper interpretation of the law. Therefore, it would not have been appropriate to engage in broad community consultations. The interpretation of the Act is a duty to be performed by the Board.

[59] The Board made a related observation in *United Steelworkers v Arain and Comfort Cabs Ltd*., 2019 CanLII 79296 (SK LRB):

> *[32] The Act does not give the Board authority to make policies, or give any such policies the force of law. The most that can be said about the Board policies is that they are an attempt to reflect the proper interpretation of the law. In this case the Original Decision found that the policy no longer reflected a proper interpretation of the law subsequent to the amendments to the legislation in 2008. The fact that it was ten years after the*

[18] Consisting of representation on behalf of employers and employees.

> *amendments before a party challenged the accuracy of the policy, causing the Board to make a ruling on the issue, does not affect the proper interpretation of the law. The Original Decision found that the policy was inconsistent with the Act. The policy cannot override or contradict the Act. The original panel, having found the policy was inconsistent with the Act, rightly directed that the policy was to be disregarded.*

[60] Furthermore, the only person who has expressed an interest in this matter is the Union. The Union indicated that the CLR and the Building Trades would have an interest in the matter, given the preponderance of small bargaining units in the construction industry. However, the CLR and the Building Trades were copied on the reconsideration application, which raised and argued the issue of statutory interpretation, and they expressed no interest in it. The Board has been ordering votes in small bargaining units since March 2023, and no application to intervene in this matter has been filed.

[61] Given the result the Board has reached on the question of statutory interpretation and the opportunity it has provided to the Union to make submissions, there is no further action to take pursuant to the fifth or sixth *Remai* grounds.

[62] For the foregoing reasons, the application for reconsideration is dismissed.

[63] Member Ewart concurs with these Reasons.

DATED at Regina, Saskatchewan, this **30th** day of **January, 2024.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson

DISSENT

[64] With the greatest respect to my colleagues on this Labour Relations Board panel, I cannot support the majority's decision.

[65] The Original Decision provides no statutory foundation for ending the discretion the Board exercised up to the time of this application not to order a vote for certification of small units (ss. 6-22(1) and (2)). The Original Decision justifies the change by arguing that since applications for

decertification have been processed via a vote for many years, applications for certification should be processed in the same way. This argument is flawed, however. There is no evidence as to whether votes in decertification applications were ordered as a matter of policy or statutory interpretation or some other reason. And if the Original Decision's goal was to achieve consistency, it could as easily have directed that a vote in decertification applications in small units would be at the Board's discretion, as it has been in certification applications.

[66] This majority decision uses "pure statutory interpretation" to uphold the Original Decision, which did not rely on statutory interpretation at all. The Original Decision reviewed the evolution of the sections in question and looked at two decisions that address somewhat comparable situations. The Original Decision did not closely analyze the language of s. 6-22 nor the interpretation of s. 6-22 that the board has used since 2014, other than to acknowledge how it had been interpreted. It looked at making certification and decertification processes consistent, with a special emphasis on allowing employees an opportunity to "vote their conscience."

[67] The majority applies a completely different analysis, demonstrating thereby that the Original Decision's analysis was incorrect or at least flawed, but still concludes that the Original Decision stands. This is not a result I can support, irrespective of whether I agree with the majority's statutory analysis.

[68] Certification is foundational to unions' existence, so any change, whether to policy or to legislation, has considerable significance. Potentially affected parties - almost exclusively construction unions in this instance - should be afforded an opportunity to comment on or challenge the change before the fact.

[69] The Original Decision refers to the vulnerability of employees in small bargaining units as follows:

> *[9] It is well-known that the Board aims to conduct representation votes promptly once a certification application has been filed. In 2013, in Northern Industrial, the Board explained this as follows:*
>
> > *[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 (sic) 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.*

[70] The majority decision briefly considers the vulnerability of employees in small units:

> *[42] The Union argues that the provision may "obviate the effects of [undue] pressure or interference by employers once they discover that their one or two employees want to be organized".[19] The counterpoint to this argument is that, in both certification and rescission applications, there is a potential for the parties to exercise undue influence over employees at the organizing stage. The purpose of the voting requirement is to provide an opportunity for sober second thought in relation to these applications. The voting requirement is consistent with the Legislature's intention, through the enactment of the Act, to shift the balance in labour relations between unions and employers.*

[71] Neither decision gives much weight or air time to the issue of employee vulnerability.

[72] First, the majority's consideration implies that, in an organizing context, employers and unions are equally able and equally likely to exert "undue influence over employees." The board's own decisions, recently and historically, demonstrate that, in fact, employers are far more likely to "to exercise undue influence" than unions.

[73] Second, the board has broad powers, described in s. 6-103, to support "the attainment of the purposes of this Act". Surely, permitting employees to exercise the right to select a union free of whatever pressures an employer might bring to bear is one of those purposes. Downplaying the significance of employees' vulnerability ignores the reality of the extent to which an employer can pressure a single employee, whether within "5 to 10 days" or more.

[74] I would have suspended further implementation of the Original Decision, advised the community of the proposed policy change, and explained the statutory basis for the change before further implementing the change. I would have had the board provide potentially affected parties an opportunity to make submissions on the proposed change.

Aina Kagis
Board member representing employees