KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 26**

Date: **2024 02 22**
File No.: KBG-SA-01473-2023
Judicial Centre: Saskatoon

BETWEEN:

SASKATOON TWIN CHARITIES INC.,
o/a CITY CENTRE BINGO

APPLICANT

- and -

SERVICE EMPLOYEES INTERNATIONAL UNION
(SEIU)-WEST
MARY ANNE BEARDY
SASKATCHEWAN LABOUR RELATIONS BOARD

RESPONDENTS

Counsel:

Steven (Steve) J.R. Seiferling	for Saskatoon Twin Charities Inc., o/a City Centre Bingo
Shannon G. Whyley	for Service Employees International Union (SEIU)-West

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FIAT — ELSON J.
February 22, 2024

Introduction

[1] In late 2023, the Saskatchewan Labour Relations Board [Board] dismissed an application to cancel a certification order related to a union's representation of a bargaining unit of employees. The dismissal was based on findings that the employer had committed unfair labour practices that would impact the ability of the employees to make an informed decision about their continued representation by

the union.

[2] The employer now seeks judicial review of the Board's decision. As part of the relief claimed, the employer asks the Court to quash the decision and direct the Board to rule on the decertification application. Pending the hearing of the judicial review, the employer now seeks a stay of proceedings related to that part of the Board's decision. which directs that the unopened representation ballots be destroyed. In the further interim, there is presently a temporary order in place to preserve those unopened ballots.

[3] For the reasons that follow, I am satisfied that the employer's interim application should be allowed and that the current stay of proceedings must continue pending the judicial review proceeding.

Background

[4] The Board's decision is dated December 14, 2023, and is cited as *Mary-Anne Beardy v SEIU-West v Saskatoon Twin Charities Inc.*, 2023 CanLII 118987 (Sask LRB) [*Decision*]. The *Decision* includes a detailed discussion of the evidence received by the Board. For the purposes of this fiat, I will simply summarize the relevant background.

[5] In December 2019, the Board issued a certification order for a bargaining unit of employees at Saskatoon Twin Charities Inc., operating as City Centre Bingo [Employer]. The bargaining agent under the certification order is Service Employees International Union (SEIU)-West [Union].

[6] Although the Union and the Employer engaged in collective bargaining, including mediated bargaining, they had not yet reached a first collective bargaining agreement by the time the Board heard these applications. Indeed, the evidence disclosed that there was no meaningful bargaining between the spring of 2021 and

September 2022, when the Union contacted the Employer to request dates to resume bargaining. Despite continuing communication between September and November 2022, no bargaining dates were set. The evidence discloses that a significant stumbling block hindered bargaining. That stumbling block centred on a dispute about the Employer's responsibility to provide the Union with specific employee information.

[7] Meanwhile, Mary-Anne Beardy, a member of the bargaining unit and the Union, brought a decertification application in March 2023. The Union responded shortly thereafter with its reply as well as an unfair labour practice application. Specifically, the Union's application alleged that the Employer had bargained in bad faith by refusing to provide the employee information to the Union as well as by providing a wage increase during the statutory freeze period under section 6-62(1)(n) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [*Act*]. This statutory freeze applies to the negotiation of first collective agreements following a certification order. The other provisions of the *Act* engaged by the Union's application were sections 6-2(1)(b), (n), (r) and 6-7.

[8] In keeping with its current practice, the Board conducted a representation vote of the bargaining unit members shortly after Ms. Beardy's application was filed and before the hearing. Those ballots have remained sealed since the vote was taken. It is agreed that neither party objected to the conduct of the vote.

[9] The Board heard the evidence for both applications at the same hearing. From a reading of the Board's *Decision*, it is apparent that the Union's allegations against the Employer became the central focus of the hearing. In the end, and as mentioned in the Introduction, the Board sided with the Union. In its order, it:

a. directed the Employer to cease and refrain from contravening the earlier referenced provisions of the *Act*;

b. directed the Employer to post a copy of the order and reasons for *Decision*;

c. dismissed the decertification application; and

d. directed the destruction of the unopened ballots.

[10] Summarizing the *Decision* in a nutshell, the Board concluded that the Employer had committed unfair labour practices in the two respects alleged in the Union's application. First, it found that the Employer failed to bargain in good faith by withholding necessary employee information from the Union. In the Board's view, such information was essential for meaningful collective bargaining. See paras. 117-118 of the *Decision*.

[11] Second, the Board found that the Employer had committed an unfair labour practice when it provided wage increases during the statutory freeze. The Board's discussion of this issue appears at paras. 189-214 of the *Decision*.

[12] As for the impact the Employer's conduct had on the decertification proceeding, the Board relied on its earlier decision in *Williams v United Food and Commercial Workers, Local 1400*, 2014 CanLII 63996 (Sask LRB). After addressing the principles reflected in that case, the Board found that the Employer's conduct was of such a kind that it likely impaired the capacity of the employees to decide the representation question freely and independently.

[13] The Employer followed the *Decision* with its judicial review application. Pending the hearing of the judicial review, the Court is now asked to order a stay of that part of the Board's order that directed destruction of the representation ballots.

Positions of the Parties

[14] The Employer contends that it is important to preserve the unopened

ballots until this Court addresses and decides the merits of the judicial review. It reasons that if the merits of the underlying application are decided in the Employer's favour, the Court would likely direct the Board to rule on the decertification. As an assessment of Union support might follow from that ruling, the Employer goes on to submit that a counting of the preserved ballots would be the best evidence of that support.

[15] Much of the Union's submission against a continued stay of proceedings focusses on the merits of the Employer's overall position. It notes that the Board dismissed Ms. Beardy's application – not one filed by the Employer. Moreover, the Union questions the propriety of the Employer championing a decertification proceeding.

[16] As for the specific issue of preserving the unopened ballots, the Union posits that the Employer has failed to establish irreparable harm, an essential element for interim relief of this kind. In this regard, it relies on the decision of this Court in *Verdient Foods Inc. v United Food and Commercial Workers, Local 1400*, 2019 SKQB 288 [*Verdient QB*], leave to appeal granted in 2019 SKCA 137 [*Verdient CA*].

Applicable Law

[17] The parties agree that the principles applicable to a stay of proceedings application, pending judicial review, are the same as those on an application for an interlocutory injunction. Of course, the leading Canadian authority on interlocutory injunctive relief is the Supreme Court of Canada judgment in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]. Following a line of earlier authorities, such as *American Cyanamid Co. v Ethicon Ltd.*, [1975] AC 396 and *Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110, the Court in *RJR-MacDonald* addressed the elements of the three-part test for an interim injunction order. In the context of this application for a stay of proceedings, the three elements can succinctly be described as follows:

(a) the existence of "a serious question to be tried";

(b) irreparable harm in the event a stay is denied; and

(c) the balance of convenience.

[18] Recent jurisprudence suggests that, while each of these elements must be meaningfully considered, it would be a mistake to view them as independent and equally weighted obstacles to be overcome before a court grants relief. Depending on the circumstances, such a perspective may run contrary to the justice and equitable considerations of a given case. An illustration of this is reflected in the decision of the Saskatchewan Court of Appeal in *Potash Corporation of Saskatchewan Inc. v Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 377 Sask R 78 [*Potash*]. In *Potash*, the appellant criticized the chambers judge's decision to regard "the tripartite test as a series of guidelines to be considered in determining whether injunctive relief sought would be just and equitable". Instead, the appellant contended that each element of the test amounted to hurdles, each of which had to be satisfied as a prerequisite to injunctive relief.

[19] Speaking for the Court, Richards J.A. (as he then was) rejected this submission on two bases. First, he concluded that the appellant had overlooked the actual substance of the chambers judge's analysis. Secondly, and perhaps more importantly, he addressed the question, not then yet fully discussed by the leading authorities, about the relationship between each aspect of the tripartite test and how that relationship factors in the justice and equity of the situation in issue. More particularly, he began this discussion at paras. 25-26 where Richards J.A. wrote the following:

> 25 The point raised by Mosaic's argument concerns how independently the tests or considerations referred to in *Metropolitan Stores* [[1987] 1 SCR 110] stand from each other and, as well, how they operate in relation to each other. These questions are not answered, or at least not answered with great clarity, by either the *Metropolitan Stores* decision itself or the Supreme Court's

> subsequent ruling in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).
>
> 26 For the moment, let me observe that the strength of case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue. As will be seen, there are important and considerable interconnections between the three tests. They are not watertight compartments.
>
> [Emphasis added]

[20] After making the above observation, Richards J.A. then set out a helpful overview of the approach to be followed when addressing the three-part test, with particular attention to the balance of convenience. In this regard, I discern a recognition that the justice and equity of a given case may call for a court to give greater weight to the balance of convenience where there is an equally meaningful risk of irreparable harm. The overview, with what I now emphasize as the focal points of this recognition, appears at para. 113 of *Potash*:

> **V. Overview of Proper Approach**
>
> 113 In the interest of clarity, it may be useful to recapitulate the basic points which have been developed in the course of these reasons and to summarize the approach a judge should typically take when deciding whether to grant interlocutory injunctive relief. This can be done as follows:
>
> > (a) The judge should normally begin with a preliminary consideration of the strength of the plaintiff's case. The general rule in this regard is that the plaintiff must demonstrate a serious issue to be tried, *i.e.* the plaintiff must have a claim which is not frivolous or vexatious. If the plaintiff raises a serious issue to be tried, it is necessary for the judge to turn to the matters of irreparable harm and balance of convenience.
> >
> > (b) Irreparable harm is best seen as an aspect of the balance of convenience. The general rule here is that the plaintiff must establish at least a meaningful doubt as to whether the loss he or she might suffer before trial if an injunction is not granted can be compensated for, or adequately compensated for, in

> damages. Put another way, the plaintiff must demonstrate a meaningful risk of irreparable harm. If this is done, the analysis turns to the balance of convenience proper.
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> (c) The assessment of the balance of convenience is usually the core of the analysis. In this regard, the relative strength of the plaintiff's case, the relative likelihood of irreparable harm, and the likely amount and nature of such harm will typically all be relevant considerations. Depending on the particulars of the case, strength in relation to one of these matters might compensate for weakness in another. Centrally, the judge must weigh the risk of the irreparable harm the plaintiff is likely to suffer before trial if the injunction is not granted, and he or she succeeds at trial, against the risk of the irreparable harm the defendant is likely to suffer if the injunction is granted and he or she prevails at trial. That said, the balance of convenience analysis is compendious. It can accommodate a range of equitable and other considerations.
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> (d) The judge's ultimate focus in considering whether to grant interlocutory injunctive relief must be on the overall equities and justice of the situation at hand.
>
> [Emphasis added]

[21] A central feature of the balance of convenience analysis, in the context of serving the justice and equity of a situation, is connected to preserving the *status quo* and not allowing circumstances to unfold in a manner that cannot later be reversed. In circumstances somewhat similar to the present case, preserving the *status quo* emerged as a theme in such cases as *Wal-Mart Canada Corp. v United Food and Commercial Workers, Local 1400*, 2009 SKQB 127; *United Food and Commercial Workers, Local 1400 v Wal-Mart Canada Corp.*, 2011 SKQB 266; *Affinity Credit Union v United Food and Commercial Workers, Local 1400*, 2014 SKQB 198, 449 Sask R 180; and *SCH Maintenance Services Ltd. v Teamsters Local Union No. 395*, 2021 SKQB 314 [*SCH*].

[22] The decision of this Court in *SCH* deserves comment. In that case, the employer sought judicial review of a certification order directed by the Board. Pending the hearing of the judicial review, the employer sought a stay of its obligation to bargain a first collective agreement. McCreary J. (as she then was) granted the stay, concluding that irreparable harm had been established because the duty to bargain also compelled

the employer to disclose confidential information about bargaining unit employees. In this regard, she observed, at para. 7, that once the information is disclosed, such disclosure could not be undone. Following this observation, she went on to conclude that the balance of convenience favoured granting the stay in that it would maintain the *status quo* until the validity of the representation vote, which was the subject of the judicial review proceeding, was determined.

[23] A different approach was followed in *Verdient QB*. In that case, the Board issued a certification order for a bargaining unit of the employer's employees. The employer sought judicial review of the Board's decision, challenging the scope of the bargaining unit. Pending the judicial review, the employer sought a stay of the Board's direction to count ballots of the representation vote taken shortly after the certification application was filed. An initial stay was granted without notice, pending a hearing on the merits before the chambers judge. At first instance, the chambers judge dismissed the employer's application and lifted the stay then in place. A central reason for the dismissal was the chambers judge's view that the employer had simply failed to establish irreparable harm.

[24] The matter then came before the Saskatchewan Court of Appeal in chambers on an application for leave to appeal in *Verdient CA*. In that proceeding, Leurer J.A. (as he then was) granted leave to appeal. It is noteworthy that he also stayed the order to lift the earlier stay of the Board's order. In doing so, Leurer J.A. observed, para. 29 of the leave decision, that not to stay the lift stay order would effectively render the appeal moot.

[25] Before leaving the decisions in *Verdient QB* and *Verdient CA*, I should parenthetically note that both the employer's appeal and its judicial review proceeding were abandoned before either could be heard. Even so, there is precedent value in the observations of Leurer J.A. This value is reflected in such authorities as *SCH* and

Saskatoon Co-operative Association Limited v United Food and Commercial Workers, Local 1400, 2022 SKCA 40.

Analysis

[26] At the outset of my analysis, I think it is imperative to point out that, in addressing the narrow issue before me, I must not take any position on the merits of the Employer's judicial review. Although I have summarized the Board's *Decision*, I did so solely for narrative purposes. Beyond the collateral observation that the judicial review meets the low threshold of a serious issue to be assessed, I consider it inappropriate for me to say anything more. I say this because I discerned that the Union's submission invited me to ground a dismissal of the stay application, at least in part, on a lack of merit in the underlying application.

[27] As for the stay application itself, I am satisfied that the Employer has established a meaningful risk of irreparable harm as that term is described in *Potash*. In this regard, it must be remembered that the purpose of the vote taken by the Board was to determine the level of support for the Union at the time the decertification application was filed, should such a determination prove to be necessary. If the unopened ballots are destroyed, it will be impossible for anyone, including the Board, to ascertain the level of support at the relevant time. This would present a serious problem if the Employer's application succeeds in all respects and eventually results in the Board allowing Ms. Beardy's application. While such an outcome could result in a new vote being ordered if the first ballots are destroyed, the results of the second vote might be significantly different. In making this observation, I accept that the destruction of the initial ballots does not obviously translate into irreparable harm for either the Employer or the Union. It does, however, suggest a palpable level of harm to the representation vote process that is observed and conducted by the Board. In assessing the justice and equity of the situation, this potential cannot be ignored.

[28] More importantly, I am persuaded that, having regard to all the surrounding circumstances, including considerations of justice and equity, the analysis described above especially engages the balance of convenience and the wisdom of preserving the *status quo*. There is no harm or inconvenience in preserving the unopened ballots pending the possibility they may have to be counted. Even if the Union is correct in its observation that this possibility is remote, there is no meaningful downside to either the parties or the Board in maintaining the requested stay. Conversely, I am satisfied there is a palpable downside risk in not maintaining the stay.

Conclusion

[29] In the result, the stay of proceedings, presently in place and related to that part of the Board's order directing the destruction of the unopened ballots, shall continue pending the hearing of the Employer's judicial review application.

[30] The Employer shall have its costs of this interim application, in any event of the cause, but not payable forthwith.

_____J.
R.W. ELSON