Construction Union Organizing Update: Have we reached the tipping point?

By Jeremy Schwartz and Frank Portman

Any time that an Ontario construction industry employer is targeted by a union's application for certification, the details are critical. Filing deadlines are tight and strictly enforced. The process is heavily reliant on both the union and the employer fully participating and disclosing their knowledge of the workers and worksites at issue.

Two recent cases demonstrate the difficulties inherent in the substantial informational requirements foisted on employers who must file a complete response to an application within only two days of receiving it. At a certain point, it may become a question of more than procedural fairness, but of whether the critical accuracy upon which the Ontario Labour Relations Board relies is being sacrificed for unnecessarily early comprehensiveness. Have we reached the tipping point?

Card Check Certification and the "Day of Application Test"

Construction unions almost always apply for card-check certification, which means they may be certified without a vote if they file membership evidence on behalf of at least 55% of the bargaining unit. To determine whether a union has the requisite support, the Board takes a snapshot of the application filing date to see which employees performed the work of the bargaining unit for a majority of that day. This Day of Application Test (the "Test") is not found in the Act – the Board developed it decades ago and has applied it ever since. The practical application of the Test is that even the most mundane detail of an employee's work may be critical. Quite literally, an employee may be deemed a painter one day and a labourer the next, depending what tasks he performed for a majority of each day.

In any application for certification, the Act provides that an employer must, within two days of its receipt of the application, file a list of all employees in the bargaining unit. For an employer with a large workforce and multiple concurrent projects underway, obtaining and sorting the data to determine who performed bargaining unit work for a majority of a particular day can be quite daunting, especially where there may be multiple trades involved. This requirement alone can therefore be quite onerous.

Nevertheless, over the years the Board has expanded employers' filing obligations beyond the legislated requirements, through rule and response form amendments, to pack a lot of additional "required" information into the already brief two-day response deadline.

For instance, we have written before about the Board's recent decision to impose a new requirement that employers provide detailed information setting out the specific part of each job site on which each employee was working on the application date. If the employer fails to provide that information, there is a strong possibility that the Board will disregard the work at those sites, and may lead to otherwise eligible employees being excluded from the constituency.

When is Fraud not Fraud?

In the first case, Govan Brown and Associates Limited, the dispute centered around the conduct of a union supporter on the application date. This supporter had lied to his site supervisor, telling him that his co-worker would not be coming in as scheduled. In fact, that co-worker had come to the site but was unable to find anyone to work with and had gone home. The supporter had then repeatedly asked to bring in another co-worker to the worksite, and had eventually done so without permission. That new co-worker was a union supporter whose presence appears to have been critical to the success of the application – filed that day (the day on which the Board takes the snapshot).

In response to this seemingly unsavoury tactic, the employer argued that the actions of the union resulted in the presence of a worker who "wasn't supposed to be there" and who should therefore not be considered to be part of the constituency of employees for the purposes of the Test. The employer pointed to a long line of decisions in applications to terminate union bargaining rights, in which the Board held that where an employer brings employees in to work solely for the purpose of voting against the union, those employees do not count. The employer suggested that the analysis should be no different when the union, through deception, similarly manipulates the workforce to assist in an application for certification.

The employer argued that the union supporter's conduct ought to be considered that of the union. It argued that this individual's actions irredeemably tainted the application.

The Board rejected the employer's argument, reasoning that employers have no right to know if a potential employee is on site solely to assist in an application for certification. Moreover, unlike in termination applications, there is no power imbalance to correct as between an employer and the union. Thus, the Board distinguished the termination application caselaw, finding that the basis for the Board's differential treatment of similar employer tactics in termination applications was the power imbalance between the employer and employees, which was not present in an application for certification where the employer is likely unaware that the application is being filed until after the fact.

The Board has long interpreted a provision in the Act prohibiting fraud and misrepresentation as being limited to fraud and misrepresentation "on the Board". Generally speaking, misrepresentations between the parties alone are insufficient to bar an application. The Board held that in this case there was no fraud on the Board.

Finally, the Board held that there is no special relationship between an employer and a union or from an employee towards its employer that would require the disclosure of information such as that concealed in this case.

It is important to note that this was a preliminary decision. The Board has not ruled that the new co-worker was "employed" by the employer and "performed bargaining unit work for a majority of the day". However, if the employer was aware that the new co-worker came to the site and suffered him to work, and if his work was primarily bargaining unit work, it seems likely the individual will be in for the count.

Obviously, this is a major victory for unions, who do not want to have their actions in the lead-up to an application for certification closely scrutinized by the Board.

This blind eye also allows for greater manipulation by a union in determining the constituency of the bargaining unit. Such manipulation may disenfranchising workers who do not support the union, which could compromise the objectivity of the Test.

However, the vulnerability of the system to misrepresentations and omissions is not limited to the date of application. Another recent decision shows how fragile the process of litigating an application for certification can be where a union does not fully disclose all material facts.

A Sin of Omission

In Kenmore Developments Waterloo, the employer provided in its timely response the names of four individuals who it said constituted the bargaining unit. It indicated that they had been performing work on a particular worksite. However, as the case unfolded, it became clear that the employer was also relying on work performed on a second worksite ("Worksite B"). Critically, the employees in dispute had also performed work at the jobsite named in the employer's response ("Worksite A"), or our story would have had a far briefer and tragically mundane ending.

At the case management hearing, the union objected to the admission of any evidence about work performed on Worksite B. The union alleged that it was irreparably prejudiced by the late disclosure, arguing that it would now be a "waste of effort" to investigate the site due to the passage of time.

The Board agreed, and held that the employer was not permitted to rely on evidence of work performed at Worksite B on the application date in its case.

This could have ended the issue. However, there was a critical twist in the story: The Board's Rules require the parties to make documentary disclosure at least ten days prior to the first day of hearing. When the employer received the union's documents, it was shocked to discover notes from the union's organizers which not only established that the union was aware of Worksite B – on the application date, but its organizers had actually been present at Worksite B several times that day.

The Employer immediately brought a Request for Reconsideration of the Board's decision to exclude the evidence, arguing that the organizer's notes showed the union was not prejudiced by the failure to include Worksite B in its response because it had been aware of the site and observed it directly on the application date.

The Board issued a reconsideration decision in which it completely reversed its initial decision.

The Board held that, had it known that the union had investigated Worksite B on the application date, it would have been much less likely to exclude the evidence as to their work. The Board stated that its understanding at the case management hearing was clearly that the union was totally unaware of the existence of the site, and that this supported the union's argument that it had suffered prejudice. This understanding, the Board said, was apparent to all present. The Board

found that it was incumbent on the union to have advised the Board of the presence of its organizers on Worksite B, as it clearly went to the central issue of what prejudice the union suffered.

As a result of the union's failure to disclose, the Board exercised its discretion to allow evidence from Worksite B, even though it was late filed and the employer had not offered a reason for failing to initially disclose the information. The union's failure to correct the Board's clear misunderstanding of central facts that were only within the union's knowledge damaged the union's claims of prejudice to the degree that the evidence would not be excluded on that basis. Perhaps the most remarkable aspect of the reconsideration decision is that it very nearly never happened. If the disputed employees had not also performed work on Worksite A, they would likely have been excluded from the constituency at the case management hearing when the evidence of their work on Worksite B was barred. Had the union not disclosed the Worksite B related documents, neither the employer nor the Board would likely ever have become aware of the organizers' presence at Worksite B. This could have disenfranchised all or some of those disputed employees.

What Can Be Done?

The problems faced by the employers in these cases are unlikely to arise in every case.

However, they illustrate the challenges with the Board's historically harsh approach towards employers seeking to correct even innocent errors or omissions in the application response. As the information that employers must provide becomes more and more detailed, the likelihood of such an error or omission increases substantially. If these errors or omissions continue to be treated in such a strict way, this increases the likelihood of the disenfranchisement of some employees. This is contrary to the stated purposes of the Act.

Likewise troubling to the employer community, is the legitimization of tactics that a lay person would no doubt view as unscrupulous gerrymandering. Given the probability that the Board will preclude the introduction of evidence when the disclosure of a site is late, unions will be more likely to avoid mentioning facts that may impact their assertions of prejudice.

For employers, these decisions underscore the need to have an organizational plan in place to respond to union organizing drives and applications. This plan will include training for supervisors on some of the underhanded tactics employed by some organizers and supporters, and ensuring that the organization is ready and able to respond quickly and accurately to an application for certification. That will almost certainly involve engaging labour relations counsel at the earliest time in the process – or better yet – before there is a process.

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