Revoking Union Bargaining Rights in the Three Provinces

This article will examine the legal issues related to the revocation of union bargaining rights in Alberta, Saskatchewan and British Columbia. Experienced legal counsel in each of the three provinces contributed to this three-part article.

Decertification in Alberta

Whether initiated by employees, an employer or another union, attempting to revoke the bargaining rights of a trade union is often a contentious process. If successful, the effects of revocation are that the employer is no longer required to bargain collectively with the union, any collective agreement in effect for the bargaining unit becomes void and the union is barred for six months from re-applying for certification. As would be expected, a union usually resists a bid to have its status revoked.

Given the importance of determining bargaining rights and the potential for conflict among the various parties, it is important to understand the procedure and requirements for revocation.

Time Limits

A union's bargaining rights can only be revoked within specified times. Employees in the bargaining unit may apply during one of the following periods:

1. If no collective agreement is in force and the trade union is not certified, at any time;

2. If no collective agreement is in force and the trade union is certified, at any time after ten months from the date of certification;

3. If the certification of the trade union is questioned or reviewed by a court, at any time after ten months from the date that the question or review is determined;

4. If the collective agreement is in effect for less than two years, within the last two months of the collective agreement;

5. If the collective agreement is in effect for more than two years, in the 11th or 12th month of the second or subsequent years (provided it is not less than ten months before the end of the agreement), or in the two months immediately preceding the end of the agreement.

6. If there is a legal strike or lockout underway, with the consent of the Labour Relations Board.

If a trade union or employer applies to have the union's bargaining rights revoked, more restrictive requirements apply. An employer may only apply for revocation if it has not bargained collectively with the union for three years after the date of

certification or the date of termination of a collective agreement. Furthermore, the employer must not have employed any employees who would be covered by a certification or voluntary recognition during the same three year period.

In the construction industry, by reason of the statutory provisions which govern the Registration of Employer Organizations, most collective agreements expire April 30, 1995. Thus, the period for employees to revoke a union's bargaining rights would be March and April, 1995. If a new agreement is not reached by April 30, 1995 then the period for revocation would extend until a new agreement is effective. On the other hand, should an agreement be reached and become effective early, the period for revocation could be less than two months or eliminated should an agreement be concluded and effective before March 1, 1995.

Employee Applications

Applications by employee groups must be made in writing to the Labour Relations Board and be accompanied by an employee petition. The petition must contain signatures of at least 40% of the employees in the bargaining unit and be a voluntary expression of the employees' wishes free from influence or perception of influence by management. Employer involvement may taint the petition and cause the Board to dismiss the application. Each signature on the petition should be witnessed; an individual is permitted to witness more than one signature.

Applications must contain the following information:

- full names, addresses, and telephone numbers of the applicant, the employer and the trade union;
- name, address and telephone number of applicant spokesman;
- relevant certificate number, if known;
- relevant section of the Code (i.e. 50(3));
- statement of purpose for the application (this statement must be included as a heading on every page of the petition);
- signature, printed name, address and date of signing of each employee;
- a witness signature for each employee signature.

Once the application and petition are submitted to the Labour Relations Board only the names of the applicant, spokesperson and a contact person are made public by the Labour Relations Board. One employee may fill all three roles, or an agent or lawyer may act for the employee group. The names of all other petitioning employees remain confidential.

Board Investigation

Upon receipt of an application for revocation, an officer of the Labour Relations Board investigates and reports on the application. The Board notifies the parties of the application and the scheduled hearing date, giving written notice for the employer and the union and posting notice at the work site for the employees. From the employer it obtains a list of employees in the bargaining unit.

Objections to the application may be made to the Board in writing. The details of the objection must be clearly stated, and the name, address and telephone number of the objecting party must be included.

The officer sends copies of the completed report, including objections, to all parties who, again, have the opportunity to object to the report. These objections must also be in writing, and they must be sent to the Board and the other parties a full business day before the hearing. If insufficient time is given between receipt of the objections and the hearing, the Board may refuse to consider the objections.

Board Hearing

If a party wishes to present arguments at the Board hearing, it must notify the Board of this intention at least one full business day before the hearing. At the hearing, the party making the application must show the Board that its application is within the specified time limits. If employees are applying, they must establish that they have the support of 40% of the employees. The petition can be used to establish this support. In addition, it must be shown that the support was freely exercised. Someone must appear to satisfy the Board that the application was not influenced by the employer. If another party objects to the petition, someone on behalf of the employees (generally, the spokesman for the petitioning employees) must establish the validity of the petition, or the Board will reject the application.

Revocation Vote

If the Board is satisfied that the application has been properly made, it will order a revocation vote of the employees in the bargaining unit. Employees are eligible to vote if, at the date of the application, they were within the bargaining unit covered by the certification or voluntary recognition.

The application for revocation will be granted if a majority of the employees vote in favour of revocation.

Know the Procedures

Revoking a union's bargaining rights is often a confrontational process. The employer, employees or another union may apply for revocation. The application will be followed by an investigation and report, a hearing and an employee vote; the application succeeds only if supported by a majority of the employees. Being aware of the procedures and requirements for revocation will speed and ease the handling of applications.

Decertification in Saskatchewan

In Saskatchewan, a union's certification is in effect until it is abandoned by the union or until decertification. Abandonment is very difficult to prove and requires convincing factual evidence. Thus, the only viable route to reversing unionization is through an application to the Labour Relations Board to end certification. This article will describe this process.

Time Limits

Decertification begins with an application, and this initial step can only be made by an employee. The application must be made within a 30-day period in the year. The calculation of the 30-day period is based upon whether or not there is collective agreement. If there is no collective agreement, it is in the 30-day period that is no more than 60 nor fewer than 30 days before the anniversary of the certification date. If there is a collective bargaining agreement, the open period is no more than 60 nor fewer than 30 days before the anniversary of the effective date of the contract. It must be noted that the effective date of the contract is the date when the contract begins, not when it ends.

Until new legislation was passed in 1994, under The Trade Union Act, a collective agreement could be terminated. In these situations the open period for decertification would be determined from the certification date. Under the new legislation, except in limited circumstances involving contracts imposed as a first contract under arbitration, collective agreements will remain in effect and the open periods will be calculated from the anniversary of the effective date of the collective agreement.

Employee applications

The one employee in the bargaining unit who is applying for decertification is required to provide evidence of support, usually in the form of signed ballots. It is necessary to have at least 50 percent plus one sign these ballots for a successful rescission application. Apart from the one employee who is making the application, all other signatures are kept in confidence and not disclosed by the Labour Relations Board. Therefore, no one can know who supports the application.

Only those employees who are actually working on the date of application may sign the ballots. However, in construction , in certain circumstances, those on lay-off may sign ballots if they are likely to be recalled to work. As well, since certification in construction is by trade division and by union within the trade division, only those employed in that trade division on the date that the application is filed are entitled to vote.

An issue that arises in construction cases is whether an employee has been properly hired, and is therefore properly within the bargaining unit. Only when properly within the bargaining unit is one entitled to take part in the decision. The issue often arises with regard to employees who are hired "off the street", as opposed to being hired through the union hall, if this is required through the collective agreement. In these circumstances, Labour Boards in Saskatchewan have removed these employees from the group entitled to decide decertification.

Based upon present practice in Saskatchewan, it is imperative that the majority of employees who wish to decertify, be properly in the bargaining unit on the date the application is made. As the Labour Relations Board normally conducts a vote, the majority must still support decertification on the date the vote is conducted in order for a decertification application to be successful.

Revocation Vote

Unlike certification applications where approval will be given if 50 percent plus one of the employee want the union, in decertification, if the union objects, a vote is always

conducted. The only employees entitled to vote are those who were employed at the time that the rescission application was made and who continue to be employed at the time the vote is conducted. No new employees may be added to the list.

One aspect of Saskatchewan law that remains unclear is how a tie vote will be interpreted. Up until recently, a tie vote would lead to decertification. The Labour Relations Board, however, has reversed this practice and indicated that a tie vote would result in the continuation of a union. This matter is presently before the Court of Appeal in Saskatchewan with a decision expected early in 1995.

In summary:

a) an employee must make the application for decertification accompanied by verification of employee support.

b) it can only be made within a 30-day period as specified;

c) only those employees who are properly in the bargaining unit may be placed on a voter list;

d) employees must still be employed on the date of the vote;

e) if a majority of the voters, vote for decertification, then an application will be successful;

f) it is unclear at this time whether or not a tie vote will lead to decertification.

Decertification in British Columbia

Decertification is the formal legal means of revoking collective bargaining rights held by a union thereby terminating the collective bargaining relationship between the union and employer. This process is also used to terminate voluntary recognition relationships, though such relationships have never been certified under the Labour Relations Code of British Columbia (the "Code").

Under the Code, collective bargaining rights and the collective bargaining relationship between an employer and a union may be terminated in the following ways:

(a) decertification,

(b) abandonment, and

(c) partial decertification.

We will discuss each of these routes to termination of collective bargaining rights.

A. Decertification

1. Decertification Initiated by Employees

Employees in a bargaining unit may apply for decertification by submitting an application signed by at least 45% of the employees in the bargaining unit. An application can be made at any time except during the following three time periods:

1. during the 10 months immediately following certification of the union as the bargaining agent for the unit;

2. during the 10 months immediately following a refusal by the Board to certify the union due to unfair labour practices or improper interference by the employer; and

3. during a period designated by the Board following a decertification vote that resulted in majority approval of continued union representation.

Upon receiving a decertification application signed by 45% of the employees in the bargaining unit, the Board must order a representation vote to be held within 10 days of the date of application (or longer if the vote is to be conducted by mail). Officials of the Ministry of Labour carry out and supervise the voting procedure.

If the majority of the votes cast is in favour of decertification, then the Board is obligated to revoke certification. If less than 55% of the eligible employees cast ballots, however, then the Board may order another vote to be held. In the absence of any unfair labour practice complaints, the Board must approve a timely application that has the requisite majority support. Once the certification of the union is revoked any collective agreement between the union and the employer is null and void with respect to the unit concerned; no union may re-apply for certification of that unit within the 10 months immediately following the decertification.

When the Board receives an application for decertification from employees in the unit, it will notify both the employer and the union. The names of the employees bringing the application will not be disclosed. An official from the Ministry of Labour will be assigned to investigate the employees' application, write a report and draw up the voter list.

Prior to the vote being held, the union and the employer will have the opportunity to make submissions stating any objections to the decertification application. If objections are raised which are based on disputed facts, a hearing will likely be held. In order that the vote may take place within the statutory time limit, the decertification vote will usually be held within the time limit and the ballot box sealed, pending the hearing of the objections and/or the determination by the Board.

An employees' decertification application will frequently be objected to on the basis that certain employee on the voter list may not be eligible to vote or that unfair labour practices were committed by the employer or by the union. We will discuss each of these objections.

(i) voter eligibility

Only employees who were on the employer's payroll on the date of the application for decertification are entitled to vote on a decertification vote. The voter list is determined by an official from the Ministry of Labour who investigates the employees' application and examines the employer's payroll records to obtain a list

of employees employed in the bargaining unit on the date the employees' application was received by the Board.

Employees who were not in the unit on the date of application but were hired before the date of the representation vote are not permitted to vote. The Board, however, does have the discretion to allow persons to vote who were employees in the unit on the date of application but who are not employees in the unit on the date of the vote. If the employees in the unit are on strike, then it is only those employed in the bargaining unit at the time the strike commences who are entitled to apply for decertification and who are eligible to vote.

(ii) Unfair Labour Practices on Decertification

The Board has the option of granting or refusing an application for decertification without conducting a vote if, after a hearing into an unfair labour practice complaint, the Board is satisfied that either the union or the employer has committed an unfair labour practice or if it believes that a representation vote will be unlikely to represent the true wishes of the employees because of improper interference by the employer. In general, it is an unfair labour practice for an employer to instigate, encourage, assist, promote or otherwise interfere with or influence a decertification application.

2. Decertification of a Voluntary Recognition Relationship

A union may acquire bargaining rights without being formally certified as bargaining agent under the Codes through voluntary recognition. Voluntary recognition occurs if the employer agrees to recognize the union as the representative of a unit of employees and enters into a collective agreement with that union without going through the process of formal certification The Code provides for the termination of voluntary recognition rights through the same process (described above) as for certified collective bargaining rights.

B. Abandonment

An employer may apply for decertification of a union's bargaining rights and the Board may cancel the certification of a union where the Board is satisfied that the union has "abandoned" its bargaining rights. In deciding whether a union has abandoned its bargaining rights, the Board will consider all the surrounding circumstances, including:

1. the length of the union's inactivity with respect to the bargaining unit;

2. any attempts by the union to renew the collective agreement;

3. whether the union has been involved in the administration and enforcement of the collective agreement;

4. whether the terms and conditions of employment have been changed by the employer without objection from the union; and

5. any extenuating circumstances which might explain the union's lack of interest in the bargaining unit.

A trade union can also make an application for abandonment if it no longer wishes to represent the bargaining unit. However, it cannot unilaterally decertify, it must show that it has abandoned the unit.

C. Partial Decertification

A partial decertification occurs when the board varies an existing certification so that a group of employees within the unit is excluded or "varied out" on the basis that it is no longer appropriate to include them. Either the employer, the union, the employees or other interested parties may apply for partial decertification of a bargaining unit. Unlike an application for complete decertification, the employees' wishes are not a key factor for partial decertification. The key factor is whether the existing bargaining unit continues to be appropriate for labour relations purposes. Consequently, a vote will usually not be ordered.