THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2010 SKCA 123 Date: 20101014

Between: Docket: 1811

United Food and Commercial Workers, Local 1400

Appellant
(Respondent)

- and -

Wal-Mart Canada Corp.

Respondent
(Applicant)

- and -

Saskatchewan Labour Relations Board

Respondent
(Respondent)

Coram:
Klebuc C.J.S., Cameron and Richards JJ.A.

Counsel:
Drew S. Plaxton for United Food and Commercial Workers, Local 1400
John R. Beckman, Q.C. and Catherine Sloan for Wal-Mart Canada Corp.
Barry Hornsberger, Q.C. for Saskatchewan Labour Relations Board

Appeal:

From:	2009 SKQB 247
Heard:	December 2, 2009
Disposition:	Allowed
Written Reasons:	October 14, 2010
By:	The Honourable Mr. Justice Richards
In Concurrence:	The Honourable Chief Justice Klebuc
	The Honourable Mr. Justice Cameron

Richards J.A.

I. Introduction

[1] This is a case about the temporal application of an amendment to *The Trade Union Act*, R.S.S. 1978, c. T-17.

[2] In 2004, the appellant, United Food and Commercial Workers, Local 1400 ("the Union"), filed a certification application with the Saskatchewan Labour Relations Board in respect of employees at a store operated by the respondent, Wal-Mart Canada Corp. At the time, *The Trade Union Act* allowed the Board to make a certification order on the strength of documentary evidence of employee support for a union. The proceedings before the Board went forward. All of the evidence was tendered, and the arguments completed, by late 2005. The Board reserved its decision. It ultimately made an order certifying the Union as the bargaining agent for the employees at the store. However, the order was not released until December of 2008.

[3] The controversy underpinning this appeal arose because, in May of 2008, *i.e.* some two and a half years after argument closed, but nonetheless before the Board rendered its decision, *The Trade Union Act* was amended so as to require an employee vote by secret ballot before a certification order could be made. The Board did not take the amendment into consideration when making its decision.

[4] Wal-Mart contended that the amendment required the Board to order a vote to determine employee support and, as a result, it sought judicial review of the Board's decision in the Court of Queen's Bench. The Chambers judge agreed with Wal-Mart. He quashed the Board's decision on the basis that the Board should have applied the amended version of *The Trade Union Act* in deciding whether to certify the Union.

[5] The Union now asks this Court to overturn the decision of the Chambers judge.

II. Background

A. The Original Proceedings Before the Board

[6] The Union's certification application concerned Wal-Mart's store in Weyburn. It was filed on April 19, 2004. The proposed bargaining unit was described as follows:

> All employees of Wal-Mart Canada in the City of Weyburn, Saskatchewan save and except Department Managers and those above the rank of Department Manager and employees in the Pharmacy, Portrait Studio, Tire and Lube Express, Optical Department and office staff.

[7] In reply, Wal-Mart argued that the proposed unit was not appropriate. It said all employees, except for the store manager and four assistant managers, should be included.

[8] Several employees opposed the certification application on the basis that the Union had used unlawful organizing techniques. In response, the

Union claimed those employees were acting on the advice of Wal-Mart and were under its influence.

[9] All of the above applications were consolidated for hearing. The Board then made some preliminary orders concerning evidentiary matters in June of 2004. Wal-Mart sought judicial review of the Board's decision in this regard. It was successful before the Court of Queen's Bench but this Court ultimately upheld the Board's orders. The Supreme Court subsequently dismissed Wal-Mart's application for leave to appeal.

[10] In July of 2005, Wal-Mart amended its Reply so as to allege that the Union was a "company dominated organization" within the meaning of s. 2(e) of *The Trade Union Act*. However, it did not formally seek leave to make the amendment until November of 2005. The Board dismissed the application at that time, saying written reasons would be provided later.

[11] Then, on November 22, 2005, Wal-Mart gave notice of its intention to argue that s. 9 of *The Trade Union Act* was unconstitutional as being a violation of employers' rights of freedom of expression as guaranteed by s. 2(b) of the *Charter*. On November 28, 2005, Wal-Mart also gave notice of an intention to argue that the evidence of support filed by the Union should be disregarded because the Union had engaged in bribery to obtain it.

[12] By December 13, 2005, the Board had finished hearing evidence and argument with respect to all of the matters before it. As noted above, it reserved its decision.

[13] In 2006, Wal-Mart made an application to the Court of Queen's Bench alleging a reasonable apprehension of bias in relation to the Board and seeking an order prohibiting the Board, as then constituted, from making any orders involving Wal-Mart. The Court of Queen's Bench denied this application and Wal-Mart's appeal was dismissed by this Court. Wal-Mart then sought leave to appeal to the Supreme Court of Canada but was unsuccessful in this regard as well.

[14] The Board finally rendered its decision in December of 2008. It endorsed the bargaining unit proposed by the Union. It also found that, on the strength of the documentary evidence filed, the Union had the support of the majority of employees in the bargaining unit. The Board ordered Wal-Mart to begin bargaining with the Union.

[15] In its decision, the Board also: (a) provided a written explanation for its earlier decision to dismiss Wal-Mart's argument that the Union was company dominated, (b) dismissed Wal-Mart's argument that the Union's evidence of support should be disregarded because it had been obtained by bribery, (c) dismissed the applications of the employees who alleged that the Union had been guilty of unfair labour practices, and (d) concluded it was unnecessary to consider the constitutional validity of s. 9 of *The Trade Union Act*.

B. The Amendments to *The Trade Union Act*

[16] At the time the Union's certification application was filed and argued, s. 6 of *The Trade Union Act* set out the basic rules concerning the Board's

authority in relation to certification orders. For ease of reference, I will refer to it as the "*Old Section*". It read as follows:

> 6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.
>
> (2) Where a trade union:
>
> (a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and
>
> (b) shows that twenty-five percent or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining;
>
> the board shall, subject to clause (k) of section 5, direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:
>
> (c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit; or
>
> (d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.
>
> (3) Repealed.

[17] Effective May 14, 2008, the *Old Section* was repealed and replaced with a set of revised provisions concerning the Board's powers with respect to certification. I will refer to this amended version of s. 6 as the "*New Section*". It is set out below:

> 6(1) Subject to subsections (1.1) and (2), in determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board must direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.

> (1.1) No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application.
>
> (1.2) The board must require as evidence of each employee's support mentioned in subsection (1.1) written support of the application, as prescribed in the regulations made by the Lieutenant Governor in Council, made within 90 days of the filing of the application.
>
> (2) Where a trade union:
>
> (a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and
>
> (b) shows that 45% or more of the employees in the appropriate unit have within 90 days preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining;
>
> the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:
>
> (c) Repealed. 2008, c.26, s.3.
>
> (d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.
>
> (3) Repealed. 1983, c.81, s.5.

[18] As indicated, the basic difference between the *Old Section* and the *New Section* concerns the requirement of an employee vote prior to certification. No such vote was required under the *Old Section*, at least in relation to a bargaining unit where there was no existing certification order. A vote is mandatory under the *New Section* in all circumstances.

C. The Board's Decision Concerning Reconsideration

[19] In light of the introduction of the *New Section*, Wal-Mart asked the Board to reconsider its decision. Wal-Mart's application was dismissed by way of reasons authored by Board vice chairperson Steven Schiefner and dated March 26, 2009. The Board held that, by virtue of filing the certification application, the Union and the employees supporting it had an acquired or accrued right to rely on documentary evidence of support which was not affected by the introduction of the *New Section*. The Board summarized its reasoning as follows:

> [57] In the Board's opinion, upon filing their application for certification with the Board, the Union (and the employees) had an acquired or accrued right to rely upon the card evidence of support filed with their application for certification and that this right was not affected by the subsequent change in the legislation pursuant to the protection afforded to such rights by s. 34(1)(c) of *The Interpretation Act, 1995*. In addition (or in the alternative), the Board is satisfied that the employees and the Union relied upon the state of law at the time they gathered their evidence of support and that they collectively acted upon that state of the law in making their application for certification. In the Board's opinion, their right to do so was sufficiently tangible and exercised or solidified so as to crystallize that right and justify its protection under the common law presumption against the retrospective application of legislative changes. Furthermore, the Board is satisfied that the change to s. 6 of the *Act* provided for in *The Trade Union Amendment Act, 2008* was not merely procedural based on the practical impact on the parties of the change in the legislation and the observation that the change in legislation altered the legal significance of the facts before the original panel. In so holding the Board relies on the criteria enumerated by our Court of Appeal in *Scott, supra*, the finding of our Court of Queen's Bench in *K.A.C.R., supra,* and the decisions of this Board in *K.A.C.R., supra,* of the Manitoba board in *Gourmet Baker Inc., supra*, and of the Ontario board in *City of Scarborough, supra*.

D. The Queen's Bench Decision

[20] As noted, Wal-Mart brought a judicial review application in the Court of Queen's Bench after receiving the Board's ruling with respect to reconsideration. It argued the certification decision was contrary to law

because the Board had based its assessment of employee support for the Union on the *Old Section* rather than on the *New Section*.

[21] The Chambers judge accepted Wal-Mart's argument. He said the obligation to hold a vote set out in the *New Section* was procedural in nature and that, as a consequence, the Board should have applied the *New Section* and ordered a vote to determine employee support for the Union. In setting aside the Board's decision, he summarized his analysis as follows:

> …here, the UFCW had no vested right to insist on a particular procedure involving membership cards being followed by the Board. The method for determination of membership support by a secret ballot was a procedural matter and consequently is *prima facie* intended to have immediate effect. The Board erred in law in not giving effect to the enactment and proceeding under the repealed procedure. This error of law rendered the certification order void.

[22] Wal-Mart also argued that former Board chairperson James Seibel had no authority to participate in the Board's original decision because he had been removed from his position some months before the decision had been rendered. The Chambers judge rejected this argument, saying s. 4(1.2) of *The Trade Union Act* had empowered Mr. Seibel to complete this work.

III. Standard of Review

[23] The Chambers judge did not expressly explain what standard of judicial review he applied in overturning the Board's decision. However, it is apparent from his reasons that he employed the "correctness" standard. The Union says this was wrong and argues that the "reasonableness" standard should have been used. For its part, Wal-Mart says the Chambers judge made no error.

[24] In the end, it is not necessary to resolve this controversy. As will become evident from the discussion below, the same result follows in this appeal regardless of which standard of review is applied.

IV. Analysis

[25] The resolution of disputes concerning the temporal application of legislation is often difficult. However, in working through such matters, it is important to remember the objective of the exercise. That objective, at its heart, is to determine legislative intent. Pierre-André Côté puts the point as follows in *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Les Editions Yvon Blais Inc., 1992) at p. 112:

> As in all questions of statutory interpretation, the dominant principle is the supremacy of legislative intent. The role of both judge and reader is to detect this intent, using all available indications. The text of the enactment itself, the presumptions and the appreciation of its consequences are merely guides to the discovery of legislative intent.

[26] Against this background, the Union submits the Chambers judge erred by characterizing the 2008 amendment to s. 6 of *The Trade Union Act* as being "procedural" in nature and then relying on the common law presumption that changes to procedural legislation apply immediately to all actions, regardless of whether they were commenced before or after the changes came into effect. The Union says the amendment affected its substantive position in that it – or at least the employees who signed support cards – had a vested right to the certification of the bargaining unit at the time the *New Section* came into force. Accordingly, so the argument goes, the *New Section* should not be read as governing the decision-making of the Board in this matter.

[27] The Union's argument is based on the well established common law principle that a statute should not be interpreted as denying existing rights unless it is worded so as to clearly require such a result. See: *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271 at p. 282; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 at p. 638. This approach is, of course, reflected in s. 34(1)(c) of *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2. It reads as follows:

> 34(1) The repeal of an enactment does not:
>
> …
>
> (c) affect a right or obligation acquired, accrued, accruing or incurred pursuant to the repealed enactment;
>
> …

[28] For its part, Wal-Mart disputes the Union's characterization of the effect of the 2008 amendment and says the Chambers judge properly and accurately classified it as being purely procedural in nature. In Wal-Mart's view, the amendment did no more than adjust the rules concerning how a union must prove employee support.

[29] Thus, as presented, this appeal raises the question of whether the enactment of the *New Section* in 2008 effected only procedural changes or whether it had an impact on the Union's "acquired", "accrued", or "accruing" rights as those terms appear in s. 34(1)(c) of *The Interpretation Act, 1995*.

[30] Section 34(1)(c), and its equivalents in other jurisdictions, have generated a significant body of case law. See, for example: R. Sullivan,

Sullivan on the Construction of Statutes, 5th ed. (Markham: LexisNexis, 2008) at pp. 711-727. Two decisions of particular relevance are from this Court and both are relied on heavily by the Union. They are *Royal Canadian Mounted Police Commissioner v. Abell* (1979), 49 C.C.C. (2d) 193 (Sask. C.A.) and *Scott v. College of Physicians and Surgeons of Saskatchewan* (1992), 95 D.L.R. (4th) 706 (Sask. C.A.).

[31] The *Abell* case concerned an application for a firearms certificate. Ms. Abell submitted a completed application pursuant to the governing provisions of the *Criminal Code*. Having done so, there was nothing left for her to do or perform in order for the certificate to be issued. However, the *Code* was then amended and the Commissioner refused to issue a certificate saying that, in light of the amendment, he no longer had the power to do so. This Court found that, in the circumstances at hand, nothing had stood between Ms. Abell's application and the issuance of the certificate. The Commissioner had no inquiry to make, or considerations to weigh, and had only to issue the license. As a result, the majority of the Court said Ms. Abell had "acquired a right or privilege" within the meaning of *The Interpretation Act, 1995*.

[32] The Court took a more studied view of s. 34(1)(c) in the *Scott* case. It involved a situation where Dr. Scott's name had been struck from the membership register of the College after he had failed to pay his annual fees. At the time, *The Medical Profession Act, 1981*, S.S. 1980-81, c. M-10.1 provided for automatic reinstatement when outstanding fees and costs were paid. Dr. Scott disputed the amount owing for costs but, on September 11,

1989, he completed the necessary forms and deposited with his lawyer the amount to cover the sum owing. The registrar of the College then agreed that the amount claimed by the College for costs was excessive. But, when Dr. Scott's application and fees were put before him, the registrar refused to reinstate Dr. Scott because, effective September 25, 1989, *The Medical Profession Act, 1981* had been amended to say a person whose name had been struck from the registrar must apply within one year for reinstatement. Dr. Scott had not met that deadline.

[33] Cameron J.A. described the meaning of "acquired" or "accrued" rights as follows at p. 716:

> Generally speaking these cases hold that before a statutory entitlement may be said to constitute an "acquired" or "accrued" right within the meaning of such provisions: (a) it must be in the nature of a "right" as opposed to a mere "hope or expectation" (*Director of Public Works v. Ho Po Sang*); (b) the right must have become specific to the person claiming it (*Abbott v. Minister for Lands*); and (c) the events giving rise to the right, or the conditions upon which it depends for its existence, all as prescribed by the repealed enactment, must have occurred or been met in advance of repeal (*Hamilton Gell v. White*).

[34] As to "accruing" rights, Cameron J.A. said these were rights which "necessarily or inevitably", not "possibly or even probably", would arise in due course. He summarized as follows at p. 719:

> …the word "accruing", as it appears in the provision and applies to rights and obligations, is used in conjunction with "accrued". The one houses the same basic idea as the other, separated only in time. The difference is merely one of tense. And so I conclude that "accruing" rights and obligations are those necessarily or inevitably, not possibly or even probably, arising in due course. In other words I am of the opinion that before a right--and its correlative duty--may be said to be "accruing", the events giving rise to it or the conditions upon which it depends for its existence, must have been so set in train or engaged as inevitably to give rise in due course to the right and its corresponding duty.

[35] In the end, Cameron J.A. found that Dr. Scott had an "accruing right" when the amendments to *The Medical Profession Act, 1981* came into force. He said, "…what had been set in train was leading inexorably towards the re-entry of [Dr. Scott's] name".

[36] Vancise J.A., Jackson J.A. concurring, took a generally similar approach. Without distinguishing between acquired or accrued rights on the one hand, and accruing rights on the other, Vancise J.A. said two criteria had to be established to engage s. 35 of *The Interpretation Act, 1995*. He wrote as follows at p. 727:

> Left with no definition, the courts have established two criteria or factors which will help to determine whether a right is acquired, accrued or accruing. First, one must establish a tangible or particular legal right, the right cannot be abstract, it must be more than a possibility, more than a mere expectation; and, secondly, establish that the right was sufficiently exercised or solidified before the repeal of the enactment to justify its protection.

[37] Vancise J.A. concluded that Dr. Scott was not someone who had a mere possibility to take advantage of a specific right under the *Act*. Rather, he concluded Dr. Scott "…was one of the persons who acquired the specific right to have his name re-entered on the register".

[38] Wal-Mart says this line of cases does not assist the Union. It relies on three points to contend such authorities are distinguishable and that no accrued or accruing rights are to be found in the circumstances at hand. First, Wal-Mart says the Board had no duty or obligation to certify the Union as bargaining agent on the strength of documentary evidence because, pursuant to s. 6(1) of the *Old Section*, the Board enjoyed a discretionary authority to

order a representation vote and it could have chosen to do just that. In my view, this submission is not persuasive. The reality is that there was a long and consistent line of Board decisions confirming that, in the absence of specified complicating factors, a certification order would be made without the necessity of a vote when documentary evidence demonstrated majority support for a union. See: *Roca Jack's Roasting House and Coffee Co. (Re)*, [1997] S.L.R.B.D. No. 20 (QL) at para. 11; *Doepker Industries Ltd. (Re)*, [2000] S.L.R.B.D. No. 26 (QL) at para. 51; and *Saskatchewan Gaming Corp. - Casino Moose Jaw (Re)* (2002), 90 C.L.R.B.R. (2d) 45 at para. 37. At a purely theoretical level, the Board had the discretionary authority to order a vote notwithstanding the strength of a union's documented support. However, in practical terms, this was not how the Board operated.

[39] As a second point of distinction between this case and *Abell* and *Scott*, Wal-Mart stresses that the proper scope of the bargaining unit was an issue before the Board. It says that, until this question was resolved, there was no entitlement to a certification order. This is a more telling point. Wal-Mart raised what appear to be entirely legitimate questions about whether pharmacy staff, certain department and other managers, and office staff should be included in the bargaining unit. The Board's consideration and resolution of those issues was a prerequisite to the making of a certification order of any kind. Thus, in this regard, this case is quite different than either *Abell* or *Scott*.

[40] The third point raised by Wal-Mart concerns the allegation that the Union had intimidated employees in the course of its organizing drive. It argues there could be no entitlement to certification on the strength of

documentary evidence of Union support unless and until those allegations were resolved in the Union's favour. This too is a consideration of some significance. A finding of intimidation by the Union would have been precisely the sort of thing that would have led the Board to order a vote, notwithstanding the level of Union support evidenced in documentary form. See: *Custom Built AG. Industries Ltd (Trail Tech) (Re)*, [1998] S.L.R.B.D. No. 54 (QL) at para. 114. Again, this is a different circumstance than in the *Abell* or *Scott* cases. The facts here did not necessarily lead "inexorably" or "inevitably" to a certification order without a vote.

[41] Accordingly, if s. 6(1) of the *New Section* is considered in isolation, it might appear that the changes made to *The Trade Union Act* in 2008 were merely procedural and did not impact accrued or accruing rights because they simply changed the way in which union support was to be established. However, in my view, this cannot be the end of the inquiry in this case. As noted earlier, the proper temporal application of s. 6(1) ultimately turns on an assessment of legislative intent. This intent cannot be fully or properly addressed without having regard for the whole of the *New Section*. Indeed, I believe the key to this appeal lies in that broader inquiry.

[42] In order to understand this point, it is necessary to underline that the *New Section* varied from the *Old Section* in three significant ways. First, it introduced a requirement that the Board *must* direct a vote by secret ballot before making a certification order. Such votes were at the discretion of the Board under the *Old Section*. Section 6(1) of the *Old Section*, dealing with the situation (as here) where there was no existing certification order in place,

simply said the Board could direct a vote "in its discretion". As noted, a line of well-settled Board decisions said a vote would not be required if documentary evidence revealed employee support of 50% or more for the union seeking certification. Votes were ordered if documentary evidence revealed support in excess of 25%. See: *Saskatchewan Gaming Corp. – Casino Moose Jaw (Re), supra,* at paras. 36-37.

[43] The second change made by the *New Section* was an increase in the minimum amount of employee support necessary before a representation vote could be held. As explained, s. 6(1) of the *Old Section* did not prescribe a minimum level of support required in situations where there was no existing certification order. However, as a matter of practice, the Board did require evidence of 25% support before ordering a vote. All of this was changed by the *New Section*. Section 6(1.1) now precludes the Board from ordering a representation vote unless at least 45% of the employees in the unit have indicated their support for the applicant union.

[44] The third alteration made by the *New Section* concerns the time period during which documentary evidence of union support is valid. The *Old Section* was silent about the issue in circumstances where there was no existing certification order. The *New Section* reduces that period to 90 days.

[45] These three changes effected by the enactment of the *New Section* are tightly interlinked. Section 6(1) of the *New Section* says the Board must order a vote by secret ballot to determine support for a union seeking certification. This provision is expressly said to operate "subject to subsections (1.1) and

(1.2)". Subsection 6(1.1) refers back to s. 6(1) and says no vote shall be taken unless the Board is satisfied that at least 45% of employees support the union. Section 6(1.2) also references s. 6(1.1) and says written support for a certification application must have been provided within 90 days of the application. It is evident, therefore, that all of these provisions operate as a whole. As a result, they must apply temporally in the same way. For example, the Legislature cannot have intended that s. 6(1) of the *New Section* might apply so as to require the Board to order a vote unless, as specified in s. 6(1.1), a union had a demonstrated minimum of 45% of employee support.

[46] I emphasize all of this because it is clear that ss. 6(1.1) and (1.2) of the *New Section* will have potentially significant impacts if they are applied in situations like the one in issue here, *i.e.* situations where a certification application was filed and argued before the *New Section* came into force. An examination of these impacts sheds a good deal of light on what the Legislature must be taken to have intended when the *New Section* was enacted.

[47] In explaining this point, it is useful to begin with s. 6(1.1) and the question of the level of support necessary to trigger a representation vote. Assume that, during the currency of the *Old Section*, a union filed documents indicating it had the support of 40% of the employees in a proposed bargaining unit. If no certification order was then in place, the Board (on the face of s. 6(1) of the *Old Section*) would have the authority to order a vote, and on the basis of its established jurisprudence, it would proceed to do just that. In other words, the evidence of 40% support would lead inexorably to a vote and the

union and/or the employees who supported it would therefore have an accruing right to a vote.

[48] Now assume that the *New Section*, and its requirement of a 45% level of employee support, is applied to this hypothetical certification application. In that situation, both the union and the employees who had filed documents indicating a 40% level of support would be left completely empty-handed. The Board would be precluded from ordering a vote and the certification application would be destined to fail. In other words, if the *New Section* applied to a certification application filed and argued under the currency of the *Old Section*, but not yet decided when the *New Section* came into force, it would change the legal effect of the documentary evidence of union support. Rather than such support being the basis on which a vote would necessarily come to be ordered, the documentary evidence would be worthless.

[49] The situation with respect to the shelf life of documentary evidence of employee support is similar. In this regard, assume a union collected cards indicating a 70% level of support but waited four months before the certification application was filed. Under the *Old Section*, there would be no problem. The documents would be valid and would operate as the basis of a certification order. But, under the *New Section*, the evidence of support would be meaningless because it was not generated within 90 days of the application date and the certification would be doomed to failure. It follows that, if the *New Section* applied to certification applications filed and argued under the *Old Section* but not decided as of the date the *New Section* came into force, there would be a change in the legal effect of the evidence brought forward

by the union. Rather than putting in train a process that would inevitably lead to a vote, the evidence would have no effect at all.

[50] In the result, it seems very doubtful that the changes effected by the *New Section* in 2008 can be properly described as being purely procedural in nature. However, even if they are characterized in this way, there is still a major problem with Wal-Mart's line of argument. It is this. The presumption it relies on – the presumption that procedural amendments apply immediately – operates only with respect to those "procedures" that have not yet been played out at the time the amending legislation comes into force. Professor Sullivan explains the point as follows in *Construction of Statutes*, *supra*, at pp. 705-706:

> When a provision is found to be purely procedural, it is given immediate effect. It is *not* given retroactive (or retrospective) effect. The presumption against the retroactive application of legislation applies to procedural provisions as it does to all legislation, without exception. Thus, any attempt to apply a procedural provision to a stage in a proceeding that was completed before the provision came into force would be refused, subject to a legislative direction to the contrary.
>
> (emphasis added)

[51] In this case, the evidence had been presented to the Board and all of the legal arguments had been made by December of 2005. The *New Section* did not come into force until May of 2008. Accordingly, even if the *New Section* could be described as being purely procedural in nature, there is no presumption that it applied to the hearing in issue here. Matters before the Board had been wrapped up long before the amendments came into force. The Union and Wal-Mart were waiting for nothing more than the Board's decision.

[52] Thus, when the *New Section* is considered as a whole, it becomes readily apparent that it should not be read as applying to certification applications filed and argued before the date it came into force. Wal-Mart overlooks the linkages between s. 6(1) and ss. 6(1.1) and (1.2) when it characterizes the 2008 amendment to *The Trade Union Act* as affecting matters of procedure only. More significantly, its argument fails to appreciate that, in the circumstances of this case, there is no room to apply the presumption that procedural amendments operate immediately. It follows that the decision of the Chambers judge must be set aside.

[53] Before concluding, I should note that I have not been persuaded by the key authorities relied on by Wal-Mart. *Campbell River Fibre Ltd. (Re)*, [2001] B.C.L.R.B.D. 356 (QL) and *Wayden Transportation Systems Inc. (Re)*, [2001] B.C.L.R.B.D. 457 (QL) both concerned an amendment to British Columbia's *Labour Relations Code* which changed the certification process in that jurisdiction from card-based to vote-based. The British Columbia Labour Relations Board said the amendments were properly characterized as procedural in nature in that they did no more than amend the way in which employee support for a union was established or proven. In my view, the Board's reasoning does not apply here because the relevant amendments to the *B.C. Labour Code* did not parallel the wording of the *New Section*. As a result, the Board did not consider the line of reasoning concerning the interconnections between ss. 6(1), (1.1), and (1.2) which underpin my conclusion in this case. *University of Saskatchewan v. Women 2000*, 2006 SKCA 42, 268 D.L.R. (4th) 558 is of no particular utility in resolving this appeal either. It applies the general legal principles in this area to particular

amendments to the *Human Rights Code* and not involve a situation sufficiently parallel to the circumstances at issue here to be of any meaningful assistance.

V. Conclusion

[54] I respectfully conclude that the Chambers judge erred in quashing the Board's decision. The requirement for an employee vote, added to *The Trade Union Act* in 2008, did not govern the determination of the Union's certification application.

[55] The Union's appeal is allowed. It is entitled to costs both in this Court and the Court of Queen's Bench.

DATED at the City of Regina, in the Province of Saskatchewan, this 14th day of October, A.D. 2010.

"RICHARDS J.A."

RICHARDS J.A.

I concur "KLEBUC C.J.S."

KLEBUC C.J.S.

I concur "CAMERON J.A."

CAMERON J.A.