

# Information Bulletin no. 2

## Representation Vote

### General

In this bulletin references to the Act and to the Rules of Procedure are a reference to the *Industrial Relations Act* and to Regulation 82-92 under the *Industrial Relations Act*. References to the Board are a reference to the Labour and Employment Board as established under the *Labour and Employment Board Act*. References to the Minister are a reference to the Minister of Labour.

The Board is required by the courts to take a consistent approach in matters of practice and procedure so as to operate effectively and command the respect of parties appearing before the Board and of the public. Moreover, consistency in the Board's approach to decision making is encouraged so as to avoid conflicting results in similar cases. However, the decision of one panel of the Board cannot bind another panel, and consistency in decision making cannot compromise the capacity of any panel member to decide in accordance with the member's conscience and opinion.

**Information bulletins are meant to be used for general informational purposes only. They are not to be considered legal advice on any particular matter. A lawyer should be consulted for that purpose. Information bulletins are always subject to the Act and Rules of Procedure.**

### Purpose

The purpose of this bulletin is to outline the procedures used by the New Brunswick Labour and Employment Board in the conduct of representation votes and in the resolution of any disputes that may arise having reference to a vote. The information contained in this bulletin applies to applications in both the construction industry and general industry, unless otherwise indicated.

A representation vote can be conducted in a number of Board proceedings including certification applications; termination applications; successor rights applications; most recent offer vote applications, and jurisdictional disputes. Representation votes are generally conducted where the Board needs to make a determination of the true wishes of employees or employers, as the case may be, who are affected by an application. Where the Board has directed that a representation vote be taken it may direct the holding of such additional representation votes as it considers necessary to determine the true

*The Queen in Right of New Brunswick and Cupe (Re)* (1982) 133 DLR(3d) 434 (QB) also *United Brotherhood of Carpenters and Joiners of America, Local 1023 et al. and Laviolette et al.* (1998)199 NBR(2d) 270 (C.A.)

*Section 126(2)(a) of the Act.*

wishes of employees. Generally, a representation vote is conducted in the same manner regardless of the nature of the application involved.

### **Voting Arrangements**

Where the Board directs the taking of a representation vote the matter is referred to the Chief Executive Officer (CEO) of the Board who, subject to any provisions that may be contained in the Board's reference, may:

- Settle the list of employees to be used for the purposes of the vote;
- Settle the ballot form;
- Settle the date and hour for taking the vote;
- Settle the number and locations of the poll;
- Prepare notices of the taking of the vote for posting on the employer's premises;
- Act as returning officer or appoint a returning officer;
- Appoint deputy returning officers and scrutineers, if necessary;
- Give direction for disposition of improperly marked ballots and of ballots of persons whose eligibility to vote has been challenged or is in doubt and, generally, for the proper conduct of the vote;
- Take the vote by secret ballot during working hours and on the employer's premises if practicable, or if not, in any other manner and place approved by the Board;
- Direct all persons to refrain and desist from propaganda and electioneering during the day or days of the vote and for 72 hours before the day on which the vote is commenced.

Ordinarily, these arrangements are made in consultation with the parties. Failure to object to arrangements for the vote or to challenge the eligibility of an employee to vote at this stage of the proceedings may preclude a party from raising the matter later.

**List of employees** - In all applications where the Board directs a representation vote the employer is directed to supply a list of employees in the bargaining unit as described in the Board's Order. From this list, which can be amended by agreement of the parties, and which is subject to challenge by them, the voters' list is compiled.

In both general and construction industry, all employees in the bargaining unit, who did not voluntarily terminate their employment or

*see generally Kent  
Homes Ltd. 93  
CLLC 16,076*

*Section 60(a) of  
Regulation 82-92*

*Thibeault v. United*

were not discharged for cause between the date of ordering the vote and the date of the vote, will generally be eligible to vote.

*Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 512 97 CLLC no. 220-015*

Employees who are absent from work during voting hours, and who do not cast a vote, are not counted as eligible and their name is removed from the voters' list at the closing of the poll. Employees who are entitled to vote, and who are present at work during the voting hours but choose not to vote, are counted as eligible.

*Sections 14(4) & 23(5) of the Act*

**Ballot form** –The form of ballot used in a representation vote is as stipulated in Form 70 under the Regulation to the Act. Upon request the Board will provide ballots in English and in French. An employee has the option to vote in either language.

*Section 60(b) of Regulation 82-92*

**Date and hour for taking the vote** -To ensure that all eligible employees are given an opportunity to vote the Board attempts to schedule the vote during normal working hours on a date when the operation concerned is expected to function at normal capacity. Several times may have to be scheduled in order to accommodate shift workers. At the request of the parties the Board may allow mail in ballots from employees unable to be at work on the date of the vote.

*Section 60(c) of Regulation 82-92*

**The number and locations of the poll** – Ordinarily, there will be one poll located on the premises of the employer, however, if this is not practicable, the poll can be conducted in any other manner or place approved by the Board. There can also be more than one location for the poll, which can be moved to different locations to ensure all eligible employees are given the opportunity to vote.

*Section 60(d) of Regulation 82-92*

**Notices of the taking of the vote** – The CEO, subject to any directions from the Board, prepares the notices of the taking of the vote for posting on the premises of the employer.

*Section 60(e) of Regulation 82-92*

The Board must ensure that eligible employees receive adequate notice of the taking of the vote. It is for the CEO to determine what constitutes adequate notice and it will depend on the circumstances of each case.

The Notice can contain whatever specifics are deemed necessary by the CEO; however, as a general rule, it will contain:

- The names of the parties;
- The nature of the application before the Board;
- Information on the manner in which the vote will be taken;
- Information on the role of the scrutineers;
- A detailed description of eligible voters;

- The date, time and place where the vote will be taken;
- A photocopy of the ballot to be used for the vote;
- Instructions on marking the ballot.

Generally, a list of eligible voters will be attached to the Notice.

These notices are to be posted on the premises of the employer and are to remain posted in such conspicuous locations where they are most likely to come to the attention of all employees who may be affected and are to remain posted until after the taking of the vote.

**Returning officer** – The CEO can act as returning officer, or appoint a returning officer and a deputy returning officer, if necessary. It is the returning officer who conducts the vote, inspects the physical arrangements, issues instructions to employees regarding the vote, supplies the ballots, notes the names of those absent from work during voting hours and counts the ballots in the presence of the scrutineers.

*Section 60(f) of  
Regulation 82-92*

**Scrutineers** -As a rule there are two scrutineers at all representation votes, one scrutineer representing the employer and one representing the union. At the CEO’s request the parties each nominate a scrutineer and an alternate scrutineer who are then appointed by the CEO. The scrutineer’s primary function is to assist in the identification of voters, and, as such, they should be familiar with the employees and must be available during the entire period of the vote. An alternate scrutineer only acts in the absence of the scrutineer. The scrutineers also check the voters’ list at the polling place and otherwise assist in the conduct of the vote. The scrutineer should report to the returning officer at the polling station at least fifteen minutes before the poll is to open, unless otherwise indicated, to receive instructions, examine the ballot box and assist in preparations for the opening of the poll. The scrutineer is also present during the counting of the ballots.

*Section 60(g) of  
Regulation 82-92*

**Disposition of improperly marked ballots and of ballots of persons whose eligibility to vote has been challenged or is in doubt** - A ballot is generally considered valid if it clearly indicates the voter’s choice and does not disclose their identity. A spoiled ballot is treated as a ballot cast for the purposes of the count.

*Section 60(h) of  
Regulation 82-92*

Where there is a challenge to the eligibility of an individual to vote that cannot be resolved prior to the vote, the practice of the Board is to allow the individual to vote and segregate the ballot.

The Board’s practice respecting segregated ballots is as follows: the

voter places the ballot inside an envelope on which is stamped “secret ballot”. This envelope is sealed and the returning officer places it inside another envelope that is also sealed and writes on it the name of the person voting. The segregated ballot can be placed in the ballot box or kept by the returning officer. Generally, the Board will only rule on the segregated ballot if it will impact on the outcome of the vote. If the segregated ballot will impact on the outcome of the vote, the segregated ballot will not be counted until the Board rules on the eligibility of the person who cast it. If the Board rules that the segregated ballot is not to be counted, it is destroyed. If it is to be counted and if there is more than one segregated ballot, the inner envelopes are removed from the outer envelopes; the inner envelopes are mixed so as not to reveal the choice of the individual voter, the inner envelopes are opened and examined. If there is only one segregated ballot it is removed from the inner envelope and examined.

**Conduct of the vote/secret ballot** – Prior to the commencement of the vote, the returning officer examines and seals the ballot box in the presence of the scrutineers. All persons whose name appears on the voters’ list will be allowed to vote without proof of identity, unless challenged. The conduct of the vote is by secret ballot. The returning officer issues a ballot to each eligible voter who arrives at the poll during voting hours. The voter will mark the ballot in secret in the polling booth, fold it and place it in the ballot box provided. The returning officer keeps a record of the persons who are issued ballots.

**Propaganda and electioneering** –Electioneering is conduct by a party to an application which is intended to influence the outcome of a representation vote. Electioneering cannot include coercion, intimidation or conduct that is otherwise prohibited.

Although it has not been the normal practice in recent years, the Board and the CEO have the discretion to direct all persons to refrain and desist from propaganda and electioneering for 72 hours before the day on which the vote is commenced.

### **Sealed Ballot Box**

At any time the Board may order the ballot box to be sealed and the ballots not counted until it has had the opportunity to hear submissions from the parties on matters in dispute between them.

Section 60(i) of  
Regulation 82-92

*Section 60(j) of  
Regulation 82-92  
see Kent Homes  
Ltd. 93 CLLC  
16,076*

## **Counting the Ballots**

Employees who are absent from work during voting hours, and who do not cast a vote, are not counted as eligible and their name is removed from the voters' list at the closing of the poll. Employees who are entitled to vote, and who are present at work during the voting hours, but choose not to vote, are counted as eligible and remain on the voters' list.

*Section 14(4) of the Act*

A spoiled ballot is treated as a ballot cast for the purposes of the count.

Unless the Board has ordered the ballot box to be sealed, the non-segregated ballots are counted as soon as the poll is closed.

Ballots are counted in the presence of the scrutineers.

## **Voting Results**

Upon completion of the count the returning officer prepares a Report of the Returning Officer.

*Section 61(1) of  
Regulation 82-92*

The Report of the Returning Officer contains the following information:

- Number of eligible voters
- Number of votes cast
- Number voting "YES"
- Number voting "NO"
- Number of spoiled ballots
- Number of segregated ballots

At the conclusion of the count the scrutineers are required to:

- Witness the Report of the Returning Officer;
- Sign a form indicating that all employees seeking to cast a ballot were properly identified, and that the ballot was conducted in a fair and proper manner;
- Certify that the ballot form was satisfactory in all respects.

Failure to object to the conduct of the vote or to challenge the eligibility of voters at this stage of the proceedings may preclude a party from raising the matter later.

*RE Nova Electric  
Ltd. 90 CLLC  
16,059*

The returning officer serves each party with a copy of the report

*Section 61(1) of  
Regulation 82-92*

along with a Notice of Report. An appropriate number of copies are sent to the employer for posting. A copy of the report is also filed with the Board.

The employer is directed to post the copies of the report and notice on his premises in conspicuous places where they are most likely to come to the attention of all employees who may be affected by the application and keep them posted on his premises until the expiry of the sixth day after the day on which the returning officer served the employer with the copies of the notice and report. After posting the copies the employer is directed to file a return of posting card with the Board.

*Section 61(3) of  
Regulation 82-92*

*Section 61(4) of  
Regulation 82-92*

The Notice of Report of the Returning Officer contains:

- The names of the parties;
- The date the Board directed the holding of the vote;
- The date the vote was held;
- Directions on proper filing of representations/statements of desire as to the conduct of the representation vote, the accuracy of the Report of the Returning Officer, and the conclusions to be drawn by the Board based on the report;
- The date for filing representations/statements of desire with the Board.

## **Representations**

Where a representation vote is ordered after the hearing of an application, a party or any employee or representative of a group of employees who wants to make representations about the conduct of the vote, the Report of the Returning Officer or the conclusions the Board should reach in view of the report, must file a statement of desire. This statement of desire must be received by the Board on or before the deadline contained in the Notice of Report of the Returning Officer which is also the last day for the posting of the copies of the report.

*Section 62(1) of  
Regulation 82-92*

Where no statement of desire has been filed, or where such a statement has been filed but the party does not request a hearing, the Board may dispose of the application upon the material before it and without further notice to the parties or to the employees.

*Section 62(5) of  
Regulation 82-92*

Where the Board receives a statement of desire that requests a hearing before the Board or, if the Board directs that a hearing take place, the Board will serve a notice of hearing on the parties and each person who has filed a statement.

*Section 62(4) of  
Regulation 82-92*

## **Consequences of a Representation Vote**

The outcome of a representation vote is determined on the basis of the wishes of a majority of those employees who were eligible to vote. A majority is more than fifty percent of eligible voters.

### **Effect of Misconduct**

The general requirement for a vote is that employers and unions must conduct themselves so as not to create a situation where the secrecy of the ballot is destroyed or the results of the vote would be unlikely to disclose the true wishes of the employees.

*Kent Homes Ltd.  
93 CLLC 16,076*

In situations where misconduct is substantiated, the Board may order a new vote. Where the Board has ordered that a vote be taken it can direct the taking of such additional representation votes as it considers necessary to determine the true wishes of employees affected.

*Section 126(2)(a)*

### **Board Proceedings in which the Board may Direct the Holding of a Representation Vote**

#### **Certification Applications**

The majority of representation votes are held in certification applications. If an application for certification has the support of between 40% and 50% of the employees in the bargaining unit, the Board must direct that a representation vote be taken. In general industry if an application is supported by more than 50% of the employees in a bargaining unit, the Board may certify without the holding of a vote, but may also order a vote depending on the circumstances of each case.

*Sections 14(2),(3)  
& (5) of the Act*

In the construction industry, once the Board has made a determination that a unit is appropriate for collective bargaining, they will certify a trade union, without a vote, if the application for certification has the support of more than 50% of the employees in the bargaining unit.

*Section 40(8) of the  
Act*

#### **Competing unions**

Where a trade union makes a timely application for certification for employees who are already represented by a trade union, the Board will generally order a vote offering a choice between the trade unions.

The Board will issue a certification order to the applicant where a

majority of the eligible employees in the bargaining unit have voted in favour of the applicant trade union. If the applicant trade union has the support of less than a majority, then the application for certification will be dismissed.

### **Pre-Hearing Representation Vote**

The Act contains provisions for a pre-hearing representation vote - a procedure whereby a representation vote takes place prior to conducting a hearing with respect to matters in dispute between the parties. Where a union requests a pre-hearing representation vote it must make the request in its application for certification and submit with the application membership evidence on behalf of not less than 40% of the employees in the voting constituency.

The voting constituency is generally composed of all employees in the bargaining unit, as proposed by the trade union, employed on the date of application and who remain employed on the date of the vote.

To enable the Board to determine a voting constituency the employer is requested to submit a list of employees who were employed in the proposed bargaining unit on the date of application. This list is forwarded to the trade union upon receipt for verification.

Generally, the Board will direct that the ballots be segregated, the ballot box be sealed and that the ballots cast not be counted until the parties have been given full opportunity to present evidence and make representations.

A party which proceeds by way of a pre-hearing vote application will not be permitted to convert the application to an ordinary certification application when the vote has already been taken, but not counted.

### **Effect of a pre-hearing vote**

After the vote is conducted a hearing is held to resolve any outstanding issues, such as eligibility to vote and appropriateness of the bargaining unit. Only the ballots of those persons found by the Board to be eligible will be counted. All other ballots cast will be destroyed.

Before the Board can count the ballots of eligible employees it must make a determination that at least 40% of these employees were members in good standing of the trade union on the date of application. If fewer than 40% of these employees were members of the trade union on the date of application the application will be dismissed. If when the ballots are counted a majority of the votes cast by eligible

*Re Nova Electric  
Ltd. 90 CLLC  
16,059  
Section 15(2) of the  
Act*

*Section 15(3) of the  
Act*

*Re Nova Electric  
Ltd. 90 CLLC  
16,059*

*Section 15(4) of the  
Act*

employees were cast in favour of the trade union the Board will certify.

### **Termination Applications**

An application to terminate bargaining rights can be filed by an employee(s), an employer or by a trade union. Where the application is made by a group of employees it must be supported by not less than 40 % of the employees in the affected bargaining unit.

*Sections 23(1)(2),23(6) &23(7) of the Act  
Section 23(3) of the Act*

The applicant must file a statement of desire to establish the requisite level of employee support for the application. The statement of desire must be in proper form and it must be received on or before the terminal date set for the application. A hearing will be held so the Board can satisfy itself that the statement of desire is a voluntary expression of employee support for the application. If the Board is satisfied that the application is voluntarily supported by not less than 40 % of employees in a bargaining unit it must order a representation vote amongst those employees.

*Re Tardif [1995]  
N.B.L.E.B.D. No. 19*

*see Sections 66(1)&(5) of  
Regulation 82-92*

Where on the taking of the representation vote more than 50% of the ballots of those eligible to vote are cast in opposition to the trade union the Board will make a declaration that the trade union no longer represents the employees in the bargaining unit.

*Section 23(4) of the Act*

### **Most Recent Offer Vote**

Where during collective bargaining an offer is made by an employer, employer's organization or trade union and rejected by the trade union or employers' organization, the party making the offer can file a request with the Board that the offer be voted on by the employees in the bargaining unit or the employers in the employer's organization. Once a party requests that a vote be taken on the offer – the Board is required to direct that it be conducted.

*Section 105.1 of the Act  
Section 91(2) outlines the  
pre-conditions for a vote.*

*refer generally to Re  
Irving Oil, Refining  
Division I.R.B. 22-1-94  
(unreported decision of  
the Board) see also Re  
Lamèque Quality Group  
96 CLLC 220-051*

A request for a vote must be made to the Board in writing and a copy of the requesting party's most recent offer must be attached.

*Section 105.1(3) of the  
Act*

Where a majority of employees or employers, as the case may be, vote in favour of accepting the offer, the parties are bound by that offer and shall enter into a collective agreement that incorporates the terms of the offer.

*Section 105.1(6) of the  
Act*

*Re Irving Oil, Refining  
Division I.R.B. 22-1-94  
(unreported decision of  
the Board)*

The party who requests the vote must pay the cost of taking a vote. The requesting party is responsible for those extraordinary

expenditures associated with the taking of the vote that would not otherwise be expended by the Board in the course of its ordinary functioning.

*See Sections 69, 79, 80 & 93 105.1(7) of the Act for restrictions on when a vote can be taken.*

### **Jurisdictional Disputes**

A dispute can sometimes arise regarding which trade union has jurisdiction over a work assignment. Where there is a dispute of this nature a complaint can be filed by a trade union, employer or employers' organization. A jurisdictional dispute complaint will generally allege that an employer or employer's organization is being required to assign particular work to persons in a particular trade union, trade, craft or class, rather than to a person in another trade union, trade, craft or class. It can also allege that an employer was or is assigning work to persons in a particular trade rather than to persons in another trade union.

*Section 83(1) of the Act*

The Board has the discretion to order representation votes prior to disposing of certain jurisdictional dispute applications.

*Section 89(4) of the Act*

### **Successor Trade Union Applications**

The Act provides for the preservation of bargaining rights in circumstances where one trade union merges, amalgamates or transfers its jurisdiction to another trade union. The Board, in any proceeding before it, or on application by any person or trade union concerned may make a declaration that a trade union has or has not acquired the rights, privileges and duties of its predecessor. Before issuing any declaration the Board may direct the taking of a representation vote.

*Section 58(2) of the Act*

### **Successor Employer Applications**

Where there has been a sale of a business, which employs individuals who are represented by a trade union, the trade union continues to represent the employees after the sale and until such time as the Board declares otherwise. The purchaser steps into the position of the vendor with respect to any collective agreement in effect or any applications pending before the Board.

*Section 60(8) of the Act*

Where an application has been made and before issuing a declaration

the Board may direct the taking of a representation vote.

|

09/99