Labour Relations Board
Saskatchewan

JAMES WALTERS, Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION and DIMENSION 3 HOSPITALITY CORPORATION operating under the name DAYS INN, Respondents

LRB File No. 238-04; April 26, 2005
Vice-Chairperson, Angela Zborosky; Members: Patricia Gallagher and Leo Lancaster

For the Applicant: Gary Semenchuck, Q.C.
For the Certified Union: Larry Kowalchuk
For the Employer: Leah Schatz

Decertification – Practice and procedure – Applicant asks Board to grant rescission application outright - Only in rare circumstances will Board grant rescission application without vote – As no extraordinary circumstances in case at bar, Board would not consider foregoing secret ballot vote.

Decertification – Practice and procedure – Union asks Board to go behind support evidence on rescission application to determine whether employees understood what they signed – Board notes longstanding practice of accepting support cards at face value and reviews past decisions relating to requirements for evidence of support – Board accepts cards filed by applicant as evidence of wishes of employees who signed cards.

Decertification – Interference – Where no direct evidence of employer influence, Board examines applicant's reasons for bringing rescission application – Board concludes that applicant's reasons not credible or plausible and discusses other circumstances leading Board to conclude that employer encouraged or influenced making of rescission application – Board dismisses application pursuant to s. 9 of *The Trade Union Act*.

***The Trade Union Act*, ss. 3, 5(k), 6 and 9.**

REASONS FOR DECISION

Background:

[1] James Walters (the "Applicant") applied for rescission of the interim Order of the Board dated February 18, 2000, designating the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") as the certified bargaining agent for a unit of employees of Dimension 3 Hospitality Corporation operating under the

name of Days Inn (the "Employer") in Yorkton, Saskatchewan. The effective date of the collective agreement in force between the Union and the Employer is December 1, 2000. The application was filed on October 6, 2004, during the open period mandated by s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), along with ostensible evidence of support from a majority of employees in the bargaining unit.

[2] In response to the application, the Employer filed a reply and statement of employment admitting the certification Order and effective date of the collective agreement and listing 26 individuals in the bargaining unit.

[3] In its reply to the application, the Union stated that there were only 24 individuals in the bargaining unit, although this issue was not pursued at the hearing. The Union also alleged that the application was made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the Employer or Employer's agent, and in particular that the Applicant was hired by the Employer for the purpose of making this application and that the Employer wrongfully targeted and terminated or disciplined supporters of the Union prior to the open period. The Union requested that the application be dismissed pursuant to s. 9 of the *Act*, which provides as follows:

> *9 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.*

[4] The Union also filed evidence of support in the form of membership cards signed in June and July 2004. Cards filed by the Union included some that were signed by the same individuals who signed in support of this application.

[5] This application was heard on November 15 and December 14 and 16, 2004.

Evidence:

[6] The Applicant testified that he resides in Melville, Saskatchewan and that he has been employed with the Employer as a front desk clerk since April 2004. The

Applicant works the 3:00 p.m. to 11:00 p.m. shift, usually on Friday and Saturday and occasionally on Sunday or on another weekday. He occasionally works the 7:00 a.m. to 3:00 p.m. shift and the night audit position. In total he works two to three days per week and earns $7.50 per hour. The Applicant reports to manager, Leslie Squires, and is responsible for handling guest check-ins and any early check-outs. The front desk is operated by two employees along with Ms. Squires during the day while, after 5:00 p.m., one or two employees will work at the front desk, depending on the number of expected arrivals.

[7] The Applicant testified concerning his background and how he came to be employed by the Employer. Upon graduating from high school in 1963, the Applicant attended university and worked toward a Commerce degree. He was employed in a number of accounting positions and worked primarily for Saskatchewan Crop Insurance Corporation for approximately 17 years holding a variety of positions including a senior management position in human resources. From 1992 to 2002, the Applicant operated a personal consulting business. Also of note is that the Applicant was the mayor of Melville, the town where he resides, from 1990 to 1994. In 2002, the Applicant became a constituency office assistant for a Saskatchewan MLA, however this position ended when the MLA was not re-elected in 2003. The Applicant was unemployed and in receipt of employment insurance benefits at the time he obtained part-time employment with the Employer.

[8] The Applicant had been terminated from his position as a constituency assistant on November 8, 2003 and following receipt of a severance package he applied for and obtained employment insurance benefits around December, 2003. The Applicant is 58 years of age and testified that he could not find any other work opportunities in a senior position in business or with government. The Applicant contacted Merv Ozirny who served on Melville's city council while the Applicant was mayor and Mr. Ozirny referred the Applicant to the Employer, stating he had recommended Vern Eger for a position there. Mr. Ozirny told the Applicant he should stop in to see Ms. Squires the next week with his resume. The Applicant did so and he was hired.

[9] In cross-examination, when it was suggested to the Applicant that Mr. Ozirny had not referred Mr. Eger to the Employer for employment, the Applicant stated that Mr. Ozirny told the Applicant that Mr. Ozirny was able to help Mr. Eger get a job with the Employer by talking to someone Mr. Ozirny knew. The Applicant denied knowledge that Mr. Ozirny is a shareholder of the Employer nor was he aware that Mr. Ozirny allegedly tried to convince employees of the Employer to go back to work when they were on strike.

[10] The Applicant explained that he collected employment insurance benefits up to September, 2004 and that he was permitted to earn up to $103 per week without any deduction from his employment insurance benefits, following which there would be a dollar for dollar deduction. While Mr. Walters was hired on a part-time basis, he had hoped that the employment would eventually become full-time.

[11] As a member of the Union, the Applicant testified that he attended two meetings of the Union; one in June, 2004 to discuss contract negotiations and one in October, 2004 at which time this application for rescission was discussed. The Applicant described his reasons for making this application at the October meeting by stating that he was impressed by and cared about the Employer's employees and he did not like the relationship of the Union and its members.

[12] The Applicant testified concerning the reasons he brought this application. The Applicant stated that he was impressed with the positive attitude displayed by Ms. Squires at his interview with her and, subsequently, the positive attitudes of the employees he met. However, approximately one week into the training process, a number of employees approached the Applicant alone to complain about the Union. The Applicant felt something should be done and so he met with a friend in Regina involved in construction to obtain the name of a labour lawyer. The Applicant's friend referred him to Mr. Semenchuck (who came to represent the Applicant at the hearing) and the Applicant met with Mr. Semenchuck on June 4, 2004. Although the Applicant had not yet decided whether he would proceed with the application for rescission, he retained Mr. Semenchuck. The Applicant testified that he has not yet paid Mr. Semenchuck any money but plans to issue Mr. Semenchuck a cheque upon receipt of a bill. In cross-examination by counsel for the Union, the Applicant stated that he

does not know what the total of the bill might be. He stated that his only income is from the Employer and the $800 - $900 he received every two weeks as employment insurance benefits (which expired in September, 2004). The Applicant stated he has investment funds to draw on.

[13] In cross-examination, the Applicant was questioned about his continued part-time employment in the face of the expiration of his employment insurance benefits and the high costs of retaining a lawyer and bringing this application. The Applicant stated that, while he was on employment insurance benefits, he told the Employer to schedule other employees for any extra hours if the Employer was their sole source of income. When questioned if he understood that the collective agreement permitted him to claim additional shifts on the basis of seniority (instead of the shifts going to an employee who was hired subsequent to him), the Applicant replied "I guess I'd have that opportunity if I wanted to." The Applicant testified that he did not apply for the front desk position that was posted because he does not care for the day shift and because he enjoys the work with people that is a feature of the 3:00 p.m. – 11:00 p.m. shift he works. Also, the Applicant clarified that he only wanted to train in the night audit position to perform it in emergencies and that he is not interested in obtaining the position.

[14] The Applicant testified concerning his dissatisfaction with how the Union conducted its meetings. He relayed a situation that occurred at the June 2004 meeting where there was some confusion on the meaning of a motion put forward and how, at the October 2004 meeting, there were no minutes taken.

[15] The Applicant testified that, at the June 2004 meeting, which was established through other evidence to have taken place on June 17, 2004, there was a discussion that an employee might bring a decertification application and there was a suggestion that the Union attempt to have employees sign union support cards again. When an employee asked why they should do this, having already signed a union card, the Applicant stated at that meeting that it would be "like renewing your vows of marriage." Following this meeting, Mr. Eger approached the Applicant to sign a union card again and, when the Applicant asked why he should sign again, Mr. Eger replied that it was "because of this decertification out there" and that "all you're doing is acknowledging I told you this." In cross-examination, the Applicant initially denied that,

on June 23, 2004 when Mr. Eger approached him about the matter, he did not recall being a witness to Mr. Eger signing a union card, remembering only that he signed a card to acknowledge that "[Mr. Eger] talked to [him] about this." When confronted with a copy of Mr. Eger's signed union card, he acknowledged he had signed as a witness and dated it June 23, 2004. When presented with a copy of a second card, the Applicant also acknowledged he had signed that card, dated it June 24, 2004, and, while acknowledging that he understood it to be a union card which authorized payment of dues and the union to bargain on his behalf, the Applicant refused to accept that what he signed was a union membership card and not just an acknowledgement that he was told about a possible decertification and the Union's request to have employees sign cards again. This is so even though the Applicant accepted that this was the second time he signed such a card, he knew what it said, he knew that two signatures were required (one on the front and one on the back) and he had just asked Mr. Eger why he had to sign the card again.

[16] The Applicant testified that he was unhappy with the complaints the Union handled and the grievances the Union took forward to arbitration. He did not believe that a housekeeper who asked her supervisor not to be assigned the cleaning of smoking rooms for health reasons and sat in a coffee room with other employees smoking deserved to be accommodated. The Applicant was very unhappy that the Union would be spending employees' dues on grievances such as this and forcing their bosses to spend money on this instead of the money going to raises for employees. The Applicant was also unhappy with the Union's decision to grieve for an employee in the night audit position who was dismissed for unsuitability. The Applicant was upset that the Employer had to take this employee back to try to train her in something he felt she could not learn. The Applicant concluded that it was the opinion of the employees and now his opinion that the Union was not representing the best interests of a majority of the employees.

[17] In cross-examination, the Applicant stated that he went to the Board's office and obtained the *Act* and a standard form for the application prior to his meeting with Mr. Semenchuck. The Applicant stated that it was not long after his June 4, 2004 meeting with Mr. Semenchuck that he received assistance from Mr. Semenchuck with the application and support forms for the employees to sign. The Applicant further

stated that he approached employees at the work place on his own time before and after the employees' shifts on October 2 and 3, 2004 and that he took employees to his vehicle in the parking lot to discuss the application and have them sign support cards. He also stated that he telephoned some employees at their homes long distance from his home.

[18] The Applicant was also questioned concerning the explanation he gave to employees about the application and the consequences should the application succeed. The Applicant did not explain any of the consequences nor did he discuss with the employees any implications of losing the coverage of the collective agreement. While accepting that many of the employees are part-time and the collective agreement protects the rights of part-time employees to obtain increased hours and also protects employees from being terminated without just cause, the Applicant felt that the Union had not represented the interests of a majority of employees and he could not see any rights the employees had that they would not have under Saskatchewan labour laws. He stated that a number of the employees he approached were the ones who had complained to him in the first place and that he was really bringing this application on their behalf.

[19] The Applicant was questioned extensively in cross-examination by counsel for the Union regarding the information he possessed when he determined that he was unhappy with the grievances the Union was taking forward to arbitration. It became clear that the Applicant was relying on very limited information provided to him by a small group of employees and, in many cases, the information was inadequate or inaccurate. The Applicant never questioned the information he was provided with the employee involved or the Union and its executive. He did not read the arbitration awards prior to making the application. The Applicant also claims he was not given information from Ms. Squires about the termination of one employee.

[20] In cross-examination, the Applicant stated that, as of the June 17, 2004 union meeting when the re-signing of union cards was discussed, he had not yet made up his mind to bring a decertification application. The Applicant was also questioned about what occurred after June 24, 2004, the date he signed another union membership card, that caused him to bring this application. Mr. Walters insisted it was because

employees made further complaints to him about the Union, however, he could not describe any specific instances and referred only to the complaints about the grievances involving the housekeeper and the probationary employee. The Applicant maintained that he and a few other employees felt that proceeding to arbitration with the housekeeper's grievance was a waste of money and that the grievance was not a legitimate grievance. The Applicant admitted that he did not inquire of the Union how much it cost to go to arbitration, whether the members of the Union voted to proceed to arbitration or why the Union was pursuing the grievance with respect to the termination of another employee during her probationary period (another grievance the Union won through arbitration in the summer of 2004). The Applicant felt that probationary employees did not deserve that protection. The Applicant could not answer the question posed to him of on what day or during what time period he made his decision to proceed with this application.

[21] The Applicant was questioned extensively in cross-examination by counsel for the Union concerning telephone calls between his home and his daughter's home and the Employer, specifically with his manager, Ms. Squires. The Applicant answered questions about the frequency of these calls both before and after the introduction in evidence of automated telephone records for the Employer. The Board has reviewed the evidence carefully and determined that it reveals the following salient facts:

1. Prior to reviewing the records, the Applicant stated that the frequency of calls to his home did not increase in September and October, 2004 and that, during his employment, he may have spoken to Ms. Squires or someone at the Employer by phone approximately four to five times per week and that he did not speak to Ms. Squires more in the time period September 12 to October 12, 2004 than in prior months;

2. The Applicant stated he might get calls from Ms. Squires regarding shift changes and from the front desk employees asking questions about his prior night's work or to request coverage of that employee's shift;

3. The Applicant stated that he had several phone calls with Ms. Squires within a day or two following the filing the application regarding the scheduling of the signing of the statement of employment;

4. Upon being confronted with the automated telephone records for the time period June to October, 2004 - which revealed that in June to August, 2004, calls to the Applicant's home from Ms. Squires and the front desk ranged from approximately two to six calls per month and that calls from these sources increased to 14 in September, 2004 and 26 in October, 2004 – the Applicant continued to maintain the position that the frequency of calls had not increased in the time leading up to and during the open period;

5. The Applicant maintained that all the telephone calls related to his employment with the Employer and that he made a number of calls to his wife from work in the evenings. The Applicant acknowledged that those calls cost the Employer in long distance charges and although there is a pay phone in the lobby for personal phone calls by staff, he assumed the Employer found his use acceptable because he "wasn't told it wasn't permitted."

[22] The Applicant denied that he had any contact with the Employer with respect to this application and said that the Employer has had no involvement with the same.

[23] Judy Poppenheim testified on behalf of the Union. She is employed in housekeeping and has been with the Employer for over five years. Ms. Poppenheim testified that she was approached by the Applicant with regard to supporting this application and stated that she told the Applicant that none of the employees liked spending money going to arbitration but that the Employer needed to settle these matters and move on. Ms. Poppenheim was not approached by the Applicant subsequent to this. Ms. Poppenheim admits to being vocal at the meeting of the Union in October 2004 in expressing that she was unhappy with the costs the Union had to incur and the hard feelings caused by the Employer.

[24] Mr. Eger also testified on behalf of the Union. Mr. Eger resides in Melville and is employed in the night audit position previously working five days per week and now working four days per week since September 2004. Mr. Eger is a retired school teacher and principal and has worked for the Employer in the night audit position since 1989.

[25] Mr. Eger testified that, during the strike in the summer of 2003, Mr. Ozirny approached him on the picket line and suggested that Mr. Eger "talk to the ladies and get back to work – go back inside." It is Mr. Eger's understanding that Mr. Ozirny owns shares in or is a partial owner of Dimension 3 Hospitality Corporation ("Dimension Three"). In cross-examination, Mr. Eger was shown Corporations Branch documents relating to the registration of Dimension Three and he agreed the documents do not indicate that Mr. Ozirny is a shareholder. Mr. Eger stated he presumed that Mr. Ozirny had something to do with the company because of his actions on the picket line. Mr. Eger denied that Mr. Ozirny had any involvement in him obtaining employment with the Employer.

[26] Mr. Eger also testified concerning his and the Applicant's signing of the union membership cards in June 2004. Mr. Eger stated that he explained to the Applicant that signing the union card would be a show of support in the event an employee proceeded with a decertification application. Initially, the Applicant did not want to sign again because his employment had only recently commenced but ultimately the Applicant witnessed Mr. Eger signing and then the Applicant decided to sign a card and Mr. Eger witnessed his signature. In cross-examination by the Applicant's counsel, Mr. Eger stated that he undertook the card signing prior to his shift commencing but that the Applicant was on work time and he did not have the Employer's permission to perform this on work time.

[27] Also in cross-examination by the Applicant's counsel, Mr. Eger stated that the employees had heard rumours of a decertification application being made and they used the card signing process as a means to communicate with members to regain their support.

[28] Ms. Squires testified on behalf of the Employer. Ms. Squires resides in Yorkton, Saskatchewan and has been employed as the Employer's general manager since February 2002. Ms. Squires' responsibilities include scheduling, handling accounts receivable, customer and staff relations, hiring, disciplining and terminating employees and the overall day-to-day management of the hotel. Ms. Squires has a high school diploma and one year of university education and is currently taking a hospitality management course. Ms. Squires' work experience includes working in hotels since 1997 first as an employee at a hotel in Swift Current, Saskatchewan and then as a general manager in Medicine Hat, Alberta.

[29] Ms. Squires testified concerning the composition of the statement of employment. The Employer included Patty Lemcke on the statement. Ms. Squires testified that Ms. Lemcke worked in housekeeping at the Days Inn in Regina, Saskatchewan until approximately September 18 or 19, 2004 when her family moved to Yorkton. Ms. Lemcke started with the Employer on September 21, 2004 and works approximately three shifts per week. Ms. Squires also testified that Bev Lozinski is still employed with the Employer but is currently on a leave of absence. Ms. Lozinski was included on the statement of employment.

[30] Ms. Squires testified that the Applicant became employed with the Employer on April 26, 2004. When he applied the Applicant had indicated to Ms. Squires that he could work weekends and it was intended that he would work Friday and Saturday evenings from 3:00 p.m. to 11:00 p.m. and occasionally extra shifts. Ms. Squires stated that the position the Applicant was hired into had not previously been filled but that she had decided to hire a second employee to work evenings at the front desk because Mr. Eger, an employee and member of the occupational health and safety committee, had at one time said it would be helpful to do so. Ms. Squires stated that she agreed that it would be useful to have a second employee at the front desk during this time period because it could be particularly busy. A majority of guests check in at this time and require assistance in their rooms. There are also a number of guests in the lobby and the pool at this time. Ms. Squires denied the Union's allegation that the Applicant was hired for the purposes of commencing a decertification drive. Mr. Walters had advised Ms. Squires that he only wished to work approximately 20 hours per week.

[31] Ms. Squires testified concerning the Union's recent grievances and arbitration hearings and the relevant awards and settlement agreements were entered into evidence. The first arbitration award rendered on June 25, 2004 involved the dismissal of a probationary employee, Tracey Dmitruk. The grievance was upheld at arbitration, the arbitration board having found no cause for Ms. Dmitruk's dismissal and it was ordered that Ms. Dmitruk could return to her employment. The second arbitration award, also rendered on June 25, 2004, involved the discipline of a housekeeping employee, Shirley Halushka, who received a written verbal warning for low productivity. The grievance was upheld as there was no just cause for the discipline. Ms. Squires testified that the Employer properly followed all the steps of the collective bargaining agreement in relation to these two grievances.

[32] Ms. Squires also testified in relation to two grievances filed by the Union on behalf of Bev Dorn. On August 25, 2004, an arbitrator rendered an award that represented an agreement between the parties, reached on the day of the hearing, that the Employer would remove a verbal warning from Ms. Dorn's file and that Ms. Dorn would submit a letter to the Employer indicating she should have sought permission prior to making a posting on the bulletin board. Again, Ms. Squires maintained that the Employer followed the appropriate steps of the collective bargaining agreement in relation to these grievances.

[33] Ms. Squires testified concerning a fifth grievance filed by the Union involving the Employer's refusal to appoint Ms. Dorn to the position of breakfast attendant, on the basis that she was the most senior qualified applicant. In the arbitration award dated August 27, 2004, the grievance was dismissed. The Union's sixth grievance, involving Ms. Halushka's departure from employment, was resolved on the day of the hearing by way of payment of a retiring allowance to Ms. Halushka without admission of liability. Ms. Squires again stated that all the steps of the collective bargaining agreement were followed in relation to these grievances.

[34] Ms. Squires testified regarding the status of employee Bev Lozinski, who commenced a leave of absence due to illness on August 11, 2003. Ms. Squires stated that the Employer was kept up to date on Ms. Lozinski's condition through correspondence. Ms. Squires testified that in the spring of 2004, while assessing

staffing needs for the summer season, she wrote to Ms. Lozinski on March 10, 2004 to determine her status because, if Ms. Lozinski would not be returning to work soon, Ms. Squires would have to hire additional employees. On March 31, 2004, Ms. Squires received a letter from Ms. Lozinski that provided details of her ill health and indicated she did not yet know when she would be able to return to work. Ms. Squires stated that she again wrote to Ms. Lozinski on August 31, 2004, it being over one year since Ms. Lozinski commenced her leave of absence to inquire about her status in order to be prepared staffing-wise for her return to work. While Ms. Squires maintained in her evidence that she understood that Ms. Lozinski would be very sick with cancer and that she was not "trying to force her out of the hotel," her correspondence read as follows:

> *Dear Ms. Lozinski:*
>
> *Please be advised we are scheduling your return for work on September 14, 2004 at the front desk at 7:00 a.m. tentatively. If you are unable to return to work on this date, please notify the General Manager, Leslie Squires and let her know a specific date you are able to return to work.*
>
> *We are required to have a date of return for a leave of absence because of obligations to the operations of the hotel. If you are unable to reply with a date of return we will deem your leave of absence expired an issue a Record of Employment. However, positions become available quite frequently throughout the year and we invite you to apply again when you are able to return to work.*
>
> *Sincerely,*
>
> *Leslie Squires*
> *General Manager*

[35] A representative of the Union responded to Ms. Squires' correspondence by letter dated September 9, 2004 indicating that Ms. Lozinski would be on sick leave until April 1, 2005 and that an update on Ms. Lozinski's condition would be provided March 1, 2005. Ms. Squires stated that she did not want Ms. Lozinski to resign and confirmed that Ms. Lozinski is still employed. In cross-examination by counsel for the Union, Ms. Squires acknowledged that stating she would issue a record of employment meant she would terminate Ms. Lozinski's employment.

[36] Ms. Squires testified that she did not speak to any employees about this application or the decertification process nor did she discuss the legal fees incurred by the Employer in relation to the arbitrations. Ms. Squires confirmed that she did not tell employees they would get increased wages if money had not been spent on the grievances and she denied providing any funds to the Applicant to bring this application. Ms. Squires stated that she first learned of this application at the time it was sent to her by fax, following which she had discussions with people from the Employer's head office.

[37] Ms. Squires testified that employees are permitted to call home during their shifts even if long distance, as long as they continue to perform their work, because it may help employees with their work if they can address any problems at home. In cross-examination by counsel for the Union, Ms. Squires was questioned as to why Ms. Dorn was not permitted to receive telephone calls while working even though, at one time, Ms. Dorn's father was under serious medical care. Ms. Squires stated that the front desk employees would take messages for Ms. Dorn so they did not leave guests unattended at the front desk, although Ms. Squires admitted she was not aware whether that was actually a reason for the front desk employees not calling Ms. Dorn to the phone. Ms. Squires distinguished the Applicant's situation from Ms. Dorn's by saying that Ms. Dorn has set break times while the Applicant does not. In re-examination, Ms. Squires stated that Ms. Dorn works in the laundry area which is directly behind the front desk. She also stated that it was her expectation that the Applicant would not take or make personal calls if guests were present and this rule would apply to all front desk employees.

[38] Ms. Squires stated that she often goes without seeing the Applicant at work for some time and that she appreciates the Applicant calling her at work from his home to determine if guests are happy. Ms. Squires also testified that she contacts employees at home, including the Applicant, if a shift change is necessary, or for other work related reasons, or to return the employees' calls. Ms. Squires testified that a number of calls she made to the Applicant on or about October 8, 2004 related to arrangements made to gather signatures for the statement of employment. Ms. Squires prepared a summary of the telephone calls she had with the Applicant and those the Applicant made to his home, including the reason for the call if she was aware of same. From a review of the evidence the Board observes that there were numerous calls made

by the Applicant to his home while he was at work although it is apparent that the number of these calls greatly increased in September and October 2004. The evidence also shows that there were some unexplained calls from Ms. Squires to the Applicant.

[39] Ms. Squires also testified about a pool party that was booked by the Applicant for his granddaughter for September 19 – 20, 2004. Some of the telephone calls were made in relation to this party on approximately September 4, 2004 when the party was booked. Pool parties are usually held from 3:00 p.m. to 7:00 p.m. and therefore the party time of 11:00 a.m. to 3:00 p.m. had to be approved by Ms. Squires. The documentary evidence appears to indicate that the regular pool party rate was $84.00 but that the Applicant's daughter paid $25.00.

[40] Ms. Squires also testified about a pool party booked by Mr. Ozirny for the air cadets on September 29, 2004. The hotel records indicate that these two rooms were booked by Ms. Squires for Mr. Ozirny and were booked without charge. Ms. Squires stated that it is her understanding that Mr. Ozirny is an investor in Dimension Three or in the partnership involved with managing the hotel. Ms. Squires further stated that Mr. Ozirny has no involvement with hiring or firing staff at the hotel nor is he involved with collective bargaining.

[41] Ms. Squires testified that Mr. Ozirny had no involvement in the hiring of the Applicant and that she had actually received a call from Don Urzada, who she understood to be a partner of Dimension Three working out of Regina. Mr. Urzada advised her that the Applicant might apply for a job with the Employer and that, if he did, he would be a good person for her to interview. Not long after this conversation, the Applicant applied. Ms. Squires stated that she interviewed the Applicant the same day he applied following which she decided to hire him. In cross-examination by counsel for the Union, Ms. Squires acknowledged that Mr. Urzada has higher authority than she but she is not aware of any conversations held between Mr. Urzada and the Applicant. Ms. Squires maintained that Mr. Ozirny has no authority over her.

[42] Stephan Whelan testified on behalf of the Employer. Mr. Whelan resides in Regina and has been employed with Dimension Three as a director of operations since 1999. He oversees the day-to-day operations of five hotels, including the Days Inn

Regina, Days Inn Yorkton, Days Inn Calgary Airport, Days Inn Medicine Hat and the Motel 6 in Medicine Hat. Mr. Whelan has the five general managers of the five hotels reporting to him, including Ms. Squires. Mr. Whelan has a hospitality management diploma and has held several positions at the Travelodge Hotel in Regina since 1989.

[43] Mr. Whelan described the corporate structure of the Employer. He testified that Mr. Ozirny is not directly involved with Dimension Three but is a limited partner of the SHP Limited Partnership ("SHP") which owns the Days Inn Regina and the Employer. Dimension Three is the general partner in this limited partnership contractual arrangement with SHP. Under this arrangement, Dimension Three as the general partner has the sole responsibility for managing the Employer. Dimension Three is owned by D. Rosten Enterprises, Folstad Investments Ltd. and Millennium Investments Corp. with Mr. Urzada being the president, Donald Rosten being the secretary/treasurer and Donald Folstad being the vice-president of Dimension Three. The Saskatchewan Corporations Branch records for Dimension Three indicate it owns the business names SHP Limited Partnership, Days Inn Regina and Days Inn Yorkton. Mr. Whelan also testified concerning the shareholders of the three corporate owners of Dimension Three which include each of Mr. Rosten, Mr. Folstad, Mr. Urzada (of Millennium Investments Corp.) and certain named family members and family trusts of each. Mr. Whelan stated that Mr. Ozirny is not involved in any of those three corporations and his only involvement is as limited partner in SHP. He would have invested money, thereby purchasing a partnership unit for which he could receive a return on his investment. He would also receive a financial statement in relation to the business on a regular basis.

[44] Mr. Whelan also stated that Mr. Ozirny has no role in the management of the Employer and specifically is not involved in any hiring, firing or discipline except to the extent that he may have an opinion about hiring an individual but that it is up to Ms. Squires or a general manager of the hotel to make the hiring decision. In cross-examination, Mr. Whelan denied any reporting relationship to Mr. Ozirny as an owner and testified that he reports only to the three principals of Dimension Three: Mr. Urzada, Mr. Rosten and Mr. Folstad.

[45] Mr. Whelan testified that he was involved in the negotiations of the last collective agreement on behalf of the Employer along with Don Ewart, a management

consultant, and Mr. Whelan confirmed that there was previously a lock out/strike lasting more than 50 days. Mr. Whelan stated that Mr. Ozirny had no role in those negotiations or in bringing employees back to work. Mr. Ozirny was not instructed to make any comments to the picketing employees.

[46] In cross-examination by counsel for the Union, Mr. Whelan was asked if Mr. Ozirny received complimentary rooms for the air cadet pool party because he is an owner of SHP, which owns the Employer. Mr. Whelan responded that it was a possibility and that that is up to the general manager to determine.

[47] The Employer's final witness was Mr. Urzada. Mr. Urzada currently resides in Regina and, while he is involved in a number of businesses, his primary day-to-day work is managing the Travelodge South hotel in Regina. Mr. Urzada referred to himself as a partner in and president of Dimension Three and stated that Dimension Three is a management company that manages several hotels in Saskatchewan and Alberta. Mr. Urzada confirmed that SHP is the limited partner in the limited partnership with Dimension Three and that the shareholders of SHP are not involved in the day-to-day operation of the Employer. Mr. Urzada testified that, through a contractual arrangement with SHP, Dimension Three receives a fee based on a percentage of the profits of the business. This contract is for a five year period.

[48] Mr. Urzada also testified about the hiring of the Applicant. Mr. Urzada stated that he had received a telephone call from Mr. Ozirny who stated he knew someone who was looking for work. He described the Applicant as a former mayor of Melville who knew lots of people and was good with people. Mr. Ozirny suggested to Mr. Urzada that, if the Employer had a position open, Mr. Walters would be a good fit for the front desk. Mr. Urzada stated that he telephoned Ms. Squires and provided this information to her as he has done with other good referrals made to him. Mr. Urzada stated that the decision whether to hire a person is left to the general manager and his or her superior, Mr. Whelan, stating that "they have to live with who they hire – that's what SHP pays them to do."

[49] In cross-examination, Mr. Urzada confirmed that the management contract with Dimension Three could be terminated by SHP.

[50] Also in cross-examination by counsel for the Union, Mr. Urzada stated he knew nothing about any attempt by Mr. Ozirny to influence picketing employees to return to work. He also stated he knows nothing about the rooms given to Mr. Ozirny free of charge for the air cadet pool party stating that is up to the general manager and Mr. Whelan to make those decisions and it depends on the circumstances.

Relevant Statutory Provisions

[51] Relevant statutory provisions include ss. 3, 5(k), 6(1) and 9 of the *Act*, which provide as follows:

> 3 *Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> *5 The board may make orders:*
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> *(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
>
> *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> . . .

> *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.*
>
> . . .
>
> *9 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.*

Argument:

The Applicant

[52] Counsel for the Applicant argued that all material was properly filed in support of the application for rescission and the application should be granted on that basis or, alternatively, if the Board had any questions, it could order a vote. The Applicant further submitted that there was no evidence to indicate employer involvement/influence with the application.

The Union

[53] Counsel for the Union submitted that the only order that could be made by the Board should it accept the application is a vote and that the certification Order could not be rescinded without a vote.

[54] The Union took issue with the Applicant's failure to explain the nature of his application to the employees from whom he sought support and the Applicant's failure to explain the consequences should the certification Order be rescinded. The Union questioned how the Applicant could represent a majority of employees without such an explanation; in other words, the support evidence could not be accepted by the Board if the employees did not understand the nature and implications of what they were signing.

[55] The Union also took the position that the application should be dismissed because of employer influence/involvement/interference with the application. The Union argued that the Applicant's reasons for bringing the application were not plausible and as such the Board could draw the conclusion that the Applicant was influenced in bringing the application by the Employer.

[56] The Union noted that the Applicant claimed that he brought the application because of complaints of other employees concerning the grievances the Union filed and the grievances the Union took to arbitration yet, despite the Applicant's experience as a mayor and business consultant, the Applicant did not appear to know any of the details of the cases or the results of the arbitrations. The Applicant did not speak to the employees involved or to the Union concerning the merits of the cases nor did he inquire of the cost to the Union of running these hearings. The only other reason offered by the Applicant for bringing the application was his displeasure with the Union for not keeping minutes of a meeting and not running a meeting properly, a reason the Union argues is weak when the result is the loss of the provisions of the collective agreement.

[57] The Union observed that the Applicant stated that he made his decision to bring the application in June, 2004, yet he attended a meeting of the Union, left the impression that he intended to "renew his vows" by signing another membership card, and then actually signed a card on or around June 24, 2004, the purport of which the Applicant must have understood. The Union questions what occurred after June 24, 2004 to cause the Applicant to make the decision to bring this application. The Union pointed out that on June 25, 2004 the Employer lost the arbitrations involving Ms. Dmytrik and Ms. Halushka. Following this Ms. Dorn's matter was resolved to the satisfaction of the Union. The Applicant did not indicate any displeasure that these three employees were successful, only that the Employer was put to the cost of running these hearings when it could have used that money to pay the employees higher wages. The Union found it difficult to accept that the Applicant felt that the possibility of higher wages was more likely and more important than enforcing the terms of the collective agreement against the Employer when the result of a successful rescission application would be losing the protection afforded by the collective agreement.

[58] The Union also submitted that the Applicant repeatedly stated that he brought the application on behalf of other employees who were complaining about the Union yet none of these employees testified on his behalf. The Union questioned whether this statement was true given that one of the three people the Applicant claimed to be acting for was Ms. Poppenheim. Ms. Poppenheim testified on behalf of the Union at the hearing and stated that she did not support such an application. Alternatively, the Union submitted that it was suspicious that the Applicant would bring the application on behalf of these other employees, having insufficient reasons of his own, when the cost of retaining a lawyer to assist him would be high and his current source of income was only a two or occasionally three shift per week position at the hotel which paid him $7.50 per hour. The Union advanced the proposition that it made no sense that the Applicant, who earned a little over $100.00 per week, would hire a lawyer at a rate greater than that per hour, to conduct a three day hearing before the Board.

[59] The Union maintained that the Applicant had been hired for the purpose of bringing this application. Given the Applicant's prior employment history and his position as a mayor, the Union argued that it was suspicious that the Applicant, a resident of Melville, would take a part-time job in Yorkton, paying $7.50 per hour, earning just over $100.00 per week, with no compensation for travel expenses. The Union also pointed out that it was suspicious that when the Applicant first gave evidence it was established that Mr. Ozirny referred the Applicant for a position with the Employer but that evidence of Mr. Ozirny's close connection with the Employer did not come out in evidence until the Employer's witnesses testified and explained that Mr. Ozirny was a partner in the company which owned the Employer and had a contractual relationship with the Employer to manage the hotel.

[60] The Union also suggested that other evidence of employer influence included the failure of the Applicant to acknowledge, even upon reviewing the hotel telephone records, that the number of calls from the hotel and Ms. Squires to his home, greatly increased just prior to and during the open period for bringing this application. The Union also pointed out that Ms. Squires had no answer for the increase in calls to the Applicant at his home during the time period in question except to say that she appreciated the conscientiousness of the Applicant for keeping her informed and taking

an interest in the guests. The Union also pointed out that Ms. Squires testified that she indicated that it was acceptable for the Applicant to make personal calls to his home at a cost to the Employer and all employees were permitted this benefit, yet Ms. Squires also acknowledged that Ms. Dorn was not permitted to take important personal calls while working, even though Ms. Dorn worked in a room just behind the front desk.

The Employer

[61] The Employer filed a written brief which the Board has reviewed. The Employer took the position that there was no evidence that the Employer influenced or interfered with the application in any way and that it had no knowledge of the application until it was served with the same by the Board. The Employer referred to the cases of *Shuba v. Gunnar Industries Ltd. And International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870,* [1997] Sask. L.R. B.R. 829, LRB File No. 127-97 and *Lotus Ferguson v. Hotel Employees Union, Local 41 and El Rancho Food & Hospitality Partnership*, [2004] Sask. L.R.B.R. 26, LRB File No. 024-04.

[62] The Employer took the position that there was no direct evidence of employer influence/interference. The Employer relied on *Robert Monahan and Capital Pontiac Buick Cadillac GMC Ltd. And United Steelworkers of America,* [1993] 4th Quarter Sask. Labour Rep. 109, LRB File No. 169-93, stating that the Applicant had no link to management other than through a normal working relationship and that, because the Applicant provided a plausible explanation for bringing the application, no inference should be drawn on the facts of this case that there was employer involvement or influence. In this regard the Employer also referred to *Cavanagh v. Canadian Union of Public Employees Local 1975 and University of Saskatchewan Students' Union* [2003] Sask. L.R.B.R. 226, LRB File No. 047-03; *Bernadette Leushen v. Service Employees International Union, Local 333 and Lutheran Sunset Home of Saskatoon* [2002] Sask. L.R.B.R. 248, LRB File No. 029-02; *Ace Masonry Contractors Ltd. and Masons International Union of America, Local 3*, [1984] Aug. Sask. Labour Rep. 45, LRB File No. 225-84; *Poberznek v. United Masonry Construction Ltd. and International Brotherhood of Bricklayers and Allied Craftsmen, Local Union #3*, [1984] Oct. Sask. Labour Rep. 35, LRB File No. 245-84; *Wilson v. Remai Investment Co. Ltd. and Sask. Joint Board, Retail, Wholesale and Department Store Union*, [1990] Fall Sask. Labour Rep. 97, LRB File No.

088-90; *Trevor Saranchuk and United Steelworkers of America and Capital Pontiac Buick Cadillac GMC Ltd.* [1998] Sask. L.R.B.R. 756, LRB File No. 152-98; *Howard Stillborn v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and Comfort Mechanical Ltd.* [2000] Sask. L.R.B.R. 118, LRB File No. 244-99; *Ken Chrunik, Sheldon Thomas and Chris Stretten v. National Electric and International Brotherhood of Electrical Workers, Local 2038* [1996] Sask. L.R.B.R. 568, LRB File No. 060-96.

[63] The Employer also cited *Wells v. Remai Investment Corporation and United Food and Commercial Workers, Local 1400*, [1996] Sask. LRBR 194, LRB File No. 305-95 and *Leavitt v. Confederation Flag Inn (1989) Limited and United Food and Commercial Workers, Local 1400,* [1990] Winter Sask. Labour Rep. 64, LRB File No. 225-89, accepting that an employer has no legitimate role to play in an application for rescission and that, in order for the Board to dismiss an application pursuant to s. 9 of the *Act*, the conduct of the applicant and the employer must be of a nature and magnitude that it compromises the ability of the employees to make a choice about representation.

[64] The Employer took the position that it has not created an environment in which union representation has become impossible. The Employer stated that the grievances and arbitration hearings in the summer of 2004 have no bearing on this application. The Employer maintained that it complied with the terms of the collective agreement in handling the grievances, that it engaged in settlement discussions with respect to some of the grievances and that it is common to go to arbitration to resolve grievances. The Employer also maintained that it has agreed to bargain collectively with the Union for a renewal of the current collective agreement. The Employer cited *Heeds v. Canadian Union of Public Employees, Local 1975 and Country Classic Fashions Ltd.* [2003] Sask. L.R.B.R. 293, LRB File No. 224-02 in support of its position that the rescission application should not be dismissed.

[65] The Employer submitted that there was no evidence to suggest that the Applicant's decision to make this application did not originate with the Applicant, nor to suggest that the Applicant's views had not been spontaneously expressed.

Union Rebuttal

[66] In rebuttal, the Union pointed out that the Employer did not seem to be taking a neutral position as it should on this type of application, by defending the Applicant's reasons for bringing this application and the Employer's involvement in the matter. The Union also argued that the Applicant and the Employer failed to explain the coincidence of the increase in phone calls to the Applicant from the hotel just prior to and during the open period. Lastly, the Union pointed out that there was not merely a disagreement about the interpretation of the collective agreement in relation to the grievances that went to arbitration during the summer leading up to the open period but rather the Employer had dismissed some employees and the issue was solely about whether the Employer had to prove just cause and if so, whether it had done so.

Applicant Rebuttal

[67] Counsel on behalf of the Applicant responded that the open period did not commence until October 1, 2004 while a number of the telephone calls occurred prior to that. The Applicant also argued that there was little proof of who made the phone calls in question and, in any event, Mr. Eger had no right to access those records and make notes about them.

[68] In relation to the Union's argument that the Applicant needed a plausible reason for bringing the application and that he failed to explain to employees that they would lose the coverage of the collective agreement if they supported the application, the Applicant argued that the wording of the support form clearly indicates to the employees that if they signed it, the Union would no longer represent them.

[69] The Applicant also argued that Mr. Ozirny is not one of the owners and, in any event, this application concerns the Employer, who Mr. Ozirny is not. Specifically, there was no evidence that Mr. Ozirny has a controlling interest in the business, he has no involvement in the day-to-day management of the Employer and there was no evidence that he could influence the bringing of the application by the Applicant.

Analysis and Decision:

[70] The primary issue under consideration in this case is whether the application was made in whole or in part on the advice of, or as a result of the influence of or interference or intimidation by the Employer. There are however two preliminary issues that must be addressed. The first issue relates to the type of order that may be obtained on this type of application and the second issue relates to an argument made by the Union that the Applicant cannot truly enjoy majority support for the application if the nature and implications of the application were not properly explained to employees when the Applicant solicited their support.

Vote on Rescission Applications

[71] In argument the Applicant requested that the Board grant the application outright and argued that if the Board had any questions concerning the support or whether the application was influenced by the Employer, it could order a vote. While this issue was not pressed in argument, it merits comment by the Board.

[72] It has been the practice of the Board for numerous years, to require a vote of the employees upon an application for rescission, which is not dismissed for employer influence or for lack of evidence of majority support, and only in rare circumstances will the Board grant an application for rescission without a vote. In *Saranchuk v. United Steelworkers of America and Capital Pontiac Buick Cadillac GMC Ltd.*, [1998] Sask. L.R.B.R. 286, LRB File No. 250-97, the applicant, having filed evidence of support from approximately 45% of employees in the bargaining unit, argued that the Board should grant a secret ballot vote to determine whether the certification order should be rescinded. While observing that there is no statutory requirement for the Board to order a vote on a rescission application and therefore it is in the Board's discretion when to order a vote, the Board cited its longstanding policy of ordering a vote on an ordinary rescission application only where the evidence of support filed is from 50% plus one employee in the bargaining unit. In reaching this conclusion the Board referred to *Monahan, supra,* at 117:

> *The apprehension of betrayal provides the answer to a question frequently asked by employers and their representatives whenever the Act is the topic of discussion. The question is why will the Board grant the certification applications of unions on the basis of the support cards filed by the Union, but rarely grant a decertification application on the basis of the support cards filed by the Applicant.*

[73] The Board recently considered a request to grant a rescission order without a vote in *Beres v. Saskatchewan Joint Board Retail, Wholesale and Department Store Union and Loraas Disposal Services Ltd.*, [2005] Sask. L.R.B.R. ---, LRB File No. 263-04 (not yet reported) upon the request of the applicant, union and employer, on the condition that the application not be granted until certain unfair labour practices the union had filed against the employer had been disposed of, resolved or withdrawn. The Board declined to grant the order requested, observing that there was a two year period between 1988 and 1990 when rescission orders were granted without secret ballot votes and without the benefit of reasons for decision being issued to explain why such orders were granted. The Board observed that, in the last ten to fifteen years, the Board has only granted such an order on a few occasions in restricted circumstances where there was a single employee in the bargaining unit and that employee brought the application. Given that there are no extraordinary circumstances in this case, it is not one where the Board would consider foregoing a secret ballot vote.

Effect of Evidence Filed as Majority Support

[74] The Union argued that the Applicant had not properly explained the nature of the application and the effect it would have on employees, including the loss of their rights and benefits under the collective agreement, and therefore the Board should disregard or discount the support evidence filed by the Applicant. In other words, the support evidence filed does not represent the wishes of the majority because the support is not properly informed. In response, the Applicant argued that the employees were asked to read the support form when it was signed and that it would be clear to those employees what the purpose, intent and effect of the application would be.

[75] While there are no forms prescribed by the *Act* or the *Regulations* for use as evidence of support for an application for certification or an application for rescission, it has been a longstanding practice of the Board to accept support cards at face value

and not to make inquiries concerning evidence of support beyond the cards filed, absent an allegation that support may have been obtained in a manner contrary to the *Act*. As a matter of practice, the Board subjects the cards to a fairly high degree of scrutiny to determine their authenticity.

[76] While there have apparently been no previous cases where the Board has been asked to go behind the cards on a rescission application to determine whether the employees truly understood the nature of what they were signing, the Board has considered this issue in the context of a certification application. The Board's rulings in that regard are instructive. In *Hotel Employees and Restaurant Employees Union, Local 767 v. Chi Chi's Restaurant Enterprises Ltd.*, [1986] Sask. Labour Rep. 31, LRB File No. 035-86, on an application for certification, certain employees came forward to present evidence and argument on a number of issues which included whether the union was guilty of misrepresentation in its organizing campaign and whether evidence of support from employees under 18 years of age could be voided. In dismissing those arguments, the Board stated at 34:

> *The Board has always required an applicant for certification to establish majority support as of the date on which the application is filed, and only if there is a cloud over the union's organizing campaign in the form of coercion, undue influence, or misrepresentation, will the Board order a vote by secret ballot rather than rely on the support cards. That policy facilitates the employees' choice of collective bargaining, renders pointless the imposition of sanctions on the employees once the application has been filed, and protects as much as possible the future relationship between the union and the employer from the acrimony that often arises during a pre-vote contest between the union and anti-union forces. In this case there are no reasons why the Board should depart from its normal practice by ordering a vote.*

[77] In *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Western Automotive Rebuilders Ltd. and Dudra, Bui and Le*, [1993] 1st Quarter Sask. Labour Rep. 156, LRB File Nos. 239-92 & 263-92, also an application for certification, it was necessary for the Board to consider whether the union was guilty of misrepresentation in its gathering of evidence of support. In determining that such a conclusion could give rise to two consequences, either the union was guilty of an unfair labour practice or the support evidence would become flawed, the Board stated at 162:

> *It is clearly important for this Board to be alert to the possibility that the signature of an employee which is used to support an application for certification has been obtained under circumstances which impair the ability of that employee to make a truly free choice. On the other hand, it would be unduly intrusive, not to mention impracticable, for the Board to attempt to assess the process by which each employee receives and assesses information prior to signing a card. In our view, for us to nullify the evidence of support provided by any signature, it would have to be established that the obtaining of that signature was so contaminated by lack of information, misunderstanding or improper conduct that it could not be regarded as genuine at all.*

[78] With respect to the issue of the requirements for evidence of support, reference may be made to *International Woodworkers of America v. Beaver Lumber Company Limited*, [1977] May Sask. Labour Rep. 30, LRB File No. 112-77, where the Board outlined those requirements as they pertain to certification applications at 31:

> 1. *They must be signed by an employee within the appropriate unit.*
> 2. *They must expressly, or by necessary implication, authorize the Union in question to bargain collectively on behalf of the employee.*
> 3. *They must bear a date not earlier that six months before the date of the application by reasons of the provisions of Section 6(2) and (3) of The Trade Union Act….*

[79] The support card which the Applicant had employees read and sign reads in part as follows:

Saskatchewan
Saskatchewan Labour Relations Board
Application for Revocation of Bargaining Rights
(s. 5(k) the Trade Union Act)

NAMES OF EMPLOYEES WILL BE KEPT CONFIDENTIAL

I HEREBY WISH TO APPLY TO REVOKE THE BARGAINING RIGHTS HELD BY:
<u>Saskatchewan Joint Board Retail, Wholesale and Department Store Union.</u>
I UNDERSTAND THAT IF THE APPLICATION SUCCEEDS, THE UNION WILL NO LONGER BE THE EXCLUSIVE BARGAINING AGENT AND WILL NO LONGER REPRESENT ME IN COLLECTIVE BARGAINING.

. . . .

[80] The Board finds no reason to depart from its practice and accepts the cards filed by the Applicant as evidence of the wishes of the employees who signed the

cards. The Board finds that the evidence of support was signed by employees in the appropriate unit, was dated within six months prior to the application being filed and that the wording on the support cards filed, while somewhat technical, appropriately expresses the intention to no longer have the Union represent the employee and allows the Board to draw an inference that the employees would have understood the implications of signing the same. The Board does not find that the obtaining of support was so contaminated by a lack of information that it could not be considered genuine. In addition, there was no evidence that would suggest that the support was improperly obtained and no employees have come forward to suggest that they did not understand the implications of what they signed. As stated previously, the Board's policy is to order a secret ballot vote on all rescission applications, unless there are extraordinary circumstances that the Board has determined are not present in this case. A vote would also protect against any misunderstanding that may have arisen on the part of any employee who signed in support of this application.

Employer Involvement

[81] The final issue to be determined is whether the application was made in whole or in part on the advice of, or as a result of the influence of or interference or intimidation by the Employer.

[82] In *Nadon v. United Steelworkers of America and X-Potential Products Inc. o/a Impact Products*, [2003] Sask. L.R.B.R. 383, LRB File No. 076-03, the Board stated at 386 and 387:

> *The issue to be determined is whether the Board ought to order a vote of the employees on the rescission application. In determining whether to grant a rescission vote, the Board must balance the democratic rights of employees to select a trade union of their own choosing (or whether to be represented by a union at all) against the need to ensure that the employer has not used its authoritative position to improperly influence the decision: Shuba v. Gunnar Industries Ltd., et al., [1997] Sask. L.R.B.R. 829, LRB File No. 127-97.*
>
> *It is necessary to be vigilant regarding the exercise of influence by an employer in such cases, because the cases are legion that such influence is seldom overt but often may be inferred from unusual circumstances and inconsistent events, meetings and conversations not adequately explained by innocent coincidence.*

[83] Commencing at 832 of the *Shuba* case *supra*, the Board set out the factors to consider when determining whether to grant an application for rescission and order a vote:

> *In determining whether to grant a rescission vote, the Board must balance the democratic rights of employees to select a trade union of their own choosing, which is enshrined in s. 3 of the Act, against the need to ensure that the employer has not used coercive power to improperly influence the outcome of the democratic choice. In Wells v. United Food and Commercial Workers, Local 1400 and Remai Investment Corp., [1996] Sask. L.R.B.R. 194, the Board described its approach to the balancing task as follows, at 197-198:*
>
> > *Section 3 of The Trade Union Act reads as follows:*
> >
> > *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
> >
> > *The Board has often commented on the significance of the power which is accorded to employees under this provision to make their own choices concerning representation by a trade union. We have also stated that the rights granted under Section 3 include the right to decide against trade union representation as well as the right to undertake activities in support of a trade union. In the decision in United Food and Commercial Workers v. Remai Investment Corporation and Laura Olson, LRB Files No. 171-94 and 177-94, the Board made the following observation:*
> >
> > > *Counsel for the Employer urged the Board to take the same view of Ms. Olson's conduct as we took in Brandt Industries Ltd., LRB File No. 095-91. In Brandt Industries Ltd. the Board recognized the right of employees to debate the representation question vigorously and to campaign against*

> *the Union. We still regard this as an important right. In F. W. Woolworth Co. Limited, LRB File No. 158-92, the Board returned to this theme and stated that charges against individual employees of interfering in an organizing drive are particularly serious because of the chilling effect that they can have upon the democratic process which is at the heart of The Trade Union Act.*

Earlier decisions have made it clear, however, that the Board is alert to any sign that an application for certification has been initiated, encouraged, assisted or influenced by the actions of the employer, as the employer has no legitimate role to play in determining the outcome of the representation question. In the Remai Investment Corporation decision from which the above quotation was taken, the Board went on to say:

> *However, there is a distinction between two employees debating the representation question as they work side by side or while they ride to work and what Ms. Olson did. Brandt Industries Ltd. does not stand for the proposition that one of those employees can enlist the coercive power of management in order to gain the support of other employees for his or her position.*

In the case of Kim Leavitt v. Confederation Flag Inn (1989) Limited and United Food and Commercial Workers, LRB File No. 225-89, the Board made the following comment:

> *The Board has frequently commented upon the relationship between Section 3, which enshrines the employees' right to determine whether or not they wish to be represented by a union, and Section 9 of the Act. These sections are not inconsistent but complimentary. Section 3 declares the employees' right and Section 9 attempts to guard that right against applications that in*

> *reality reflect the will of the employer instead of the employees.*

The Board proceeded to make the following statement:

> *Generally, where the employer's conduct leads to a decertification application being made or, although not responsible for the filing of the application, compromises the ability of the employees to decide whether or not they wish to be represented by a union to the extent that the Board is of the opinion that the employees' wishes can no longer be determined, the Board will temporarily remove the employees' right to determine the representation question by dismissing the application.*

In Susie Mandziak v. Remai Investment Corp., LRB File No. 162-87, the Board made a similar point:

> *While the Board generally assumes that all employees are of sufficient intelligence and fortitude to know what is best for them and is reluctant to deprive them of an opportunity to express their views by way of a secret ballot vote, it will not ignore the legislative purpose and intent of Section 9 of The Trade Union Act. Section 9 is clearly meant to be applied when an employer's departure from reasonable neutrality in the representation question leads to or results in an application for decertification being made to the Board. In the Board's view, this application resulted directly from the employer's influence and indirect participation in the gathering of necessary evidence of employee support.*

This statement makes clear that Section 9 is directed at a circumstance in which an employer departs from a posture of detachment and neutrality in connection with the issue of trade union representation. There have been cases where an

> *employer has taken a direct role in initiating or assisting an application for rescission of a certification order, and in these cases, it is fairly easy for the Board to identify the conduct on the part of the employer which constitutes improper interference. On the other hand, as the Board pointed out in Rick Poberznek v. United Masonry Construction Ltd. and International Union of Bricklayers and Allied Craftsmen, LRB File No. 245-84, employer interference is rarely of an overt nature, and the Board must be prepared to consider the possibility that subtle or indirect forms of influence may improperly inject the interests or views of the employer into the decision concerning trade union representation.*

[84] The Board has determined that there is no direct evidence of employer involvement, influence or intimidation with this application. The Board must determine, however, whether there is evidence from which it can draw an inference that the Employer has been involved with the application or has interfered with or intimidated or influenced the application being made to an extent that the true wishes of the employees cannot be determined by a vote.

[85] In order to determine whether there is such employer involvement, the Board has typically examined a number of circumstances, the significance or importance of which will vary from case to case. One of the factors which is often examined and bears relevance to this case is the applicant's reasons for bringing the application. When those reasons are not plausible or credible, the Board may also go on to examine other suspicious or unusual circumstances including, but not limited to, the circumstances surrounding the applicant's hiring, aspects of the applicant's relationship with the employer, the timing of the application and how the application was financed. Once the Board has examined the whole of the circumstances it can determine whether it will draw an inference that the employer has intimidated, interfered with or influenced the bringing of the application.

[86] In *Rowe v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Canadian Linen and Uniform Service Co.*, [2001] Sask. L.R.B.R. 760, LRB File No. 104-01, the Board dismissed an application pursuant to s. 9 of the *Act* in circumstances where the applicants lacked any credible reasons for rescinding the

certification order and lacked knowledge about their own application, including how all the support was obtained and who prepared an anti-union leaflet they distributed.

[87] In *Swan v. Canadian Union of Public Employees, Local 1975 and Treats at the University of Saskatchewan*, [2000] Sask. L.R.B.R. 448, LRB File No. 258-99, the Board closely examined the reasons offered by the applicant for bringing the application and stated at 457 through 459:

> *[29] . . . One of her alleged bases for making the application – dissatisfaction with the Union in its failure to conclude a collective agreement two years after certification – is one that is often cited by applicants for rescission but in this case is not plausible. It was likely suggested to her by someone else. Ms. Swan is not, and never has been, interested in having a collective agreement at the University location. In her opinion, as expressed in her letter to The Sheaf, the employees at the University location that obtained certification in the first place were "being ridiculous." In her opinion, as she stated in argument, the Union "has no valid purpose in the workplace." We do not accept that her alleged frustration with the delay in obtaining a collective agreement has anything to do with her motivation to seek rescission. In her circumstances, it makes no sense. And there was no evidence that such a ground was discussed with or among the employees when she was garnering their support for the application. That ground is specious, and we cannot accept that she reached the conclusion to advance it as a basis for the application on her own. It draws into issue the bona fides of her motivation for the application.*
>
> *[30] This leads us to the second ground alleged by Ms. Swan as the basis for applying for rescission: that Union dues for these employees are so onerous that it makes no sense for them to be organized and be bound to pay dues. In her opinion they will be worse off financially, a view that necessarily implies they will not get their money's worth. But again, this is not credible: the employees have paid no dues; Ms. Swan did not know how much they would eventually have to pay, or what the Union would obtain for them as far as a contract is concerned. Dissatisfaction with payment of dues is also a reason that is often advanced by an applicant for rescission, and it may form part of a credible rationale for an application. But in the present case there was no objective basis for Ms. Swan to make the assertion either to the Board or to her fellow employees. The payment of dues could not be an issue because it has not yet been resolved what they will be or what the employees will receive in return under a collective agreement.*
>
> *[31] The plausibility of an applicant's reasons for applying for rescission of a certification order – that is, the credibility of the rationale – and the bona fides of the applicant's motivation for so doing, are matters*

for us to consider on an application for rescission. In Pfefferle v. Ace Masonry Contractors Ltd. and Bricklayers and Masons International Union of America, [1984] Aug. Sask. Labour Rep. 45, LRB File No. 225-84, in dismissing an application for rescission, former Chairperson Ball stated, at 46:

> *Although the applicant denies having discussed this application with the co-owners and the members of their family, the Board finds it difficult to accept that denial at face value since all of the employees work fairly closely with one another. Furthermore, the Board is not satisfied that the applicant has an honest belief, well founded or otherwise, that the union has failed to adequately carry out its responsibilities as his bargaining agent.* ***He attempted but failed to advance any credible rationale for applying for rescission, and that, coupled with all of the other circumstances, leads the majority of the Board to conclude that the application has been made in whole or in part as a result of the influence of the employer.*** [emphasis added]

[32] Similarly, in Poberznek v. United Masonry Construction Ltd. and International Union of Bricklayers and Allied Craftsmen, [1984] Oct. Sask. Labour Rep. 35, LRB File No. 245-84, the Board commented that the absence of plausible reasons for supporting an application for rescission may be a sign that the application was initiated by the Employer. At 36, the Board observed:

> ***…[The Board] cannot accept the proposition that the Applicant acting spontaneously, and alone, and at his own expense, with no knowledge of industrial relations between the employer and the union, and no idea of how the application might affect him personally, took it upon himself to retain a lawyer to apply for rescission at a time that happened to coincide with the available open period.*** [emphasis added]
>
> *Employer influence is rarely overt. Under the circumstances, the only inference the Board can draw is that this application was made in whole or in part on the advice or as a result of influence by the employer*

[88] In *Swan, supra,* the Board found that the applicant's reasons were not plausible. In finding the applicant had no sufficiently credible rationale for bringing the application, the Board referred to additional circumstances that the Board felt warranted drawing the inference that employer representatives influenced the making of the application. Specifically, the Board found that the applicant had a close relationship with

the owner/managers, she had an unusual interest in labour relations at the employer's location where she did not yet work and the applicant transferred to the subject location on the eve of the open period and began to organize the making of the rescission application almost immediately thereafter. On the evidence the Board did not accept that the applicant did this without the advice or influence of management or without having any discussions with management about the labour relations situation. Further unusual circumstances considered by the Board in dismissing the application due to employer influence include that management had provided the applicant with certain employee information and that the employer had created an environment ripe for a rescission application due to its intransigence in collective bargaining.

[89] In the present case it is first necessary for the Board to closely examine the Applicant's reasons for bringing the application and when he made the decision to bring the application. The Applicant testified that he first considered making a rescission application a week or two into his employment because of the positive attitude of some of the employees and his manager Ms. Squires. There was also some unhappiness expressed to him about the types of grievances the Union was taking forward to arbitration. The fact that the Applicant was considering this application so soon after commencing his employment and basing it in part on the attitude of his manager Ms. Squires, along with consideration of the circumstances of the Applicant's hiring, leads the Board to draw an inference that the Employer influenced the bringing of this application.

[90] The Board concludes that the Applicant's reasons for bringing the application are not plausible and that he did not appear to act spontaneously. At the hearing the Applicant claimed to be representing the interests of other employees in bringing the application. When pressed, the Applicant could identify only three employees who were complaining, one of whom testified at the hearing and denied taking this position. The Applicant also expressed some dissatisfaction with how the Union conducted its meetings and the fact that no minutes were kept of a meeting in June 2004. The Applicant visited legal counsel for information about making an application for rescission on June 4, 2004. He did nothing further for a period of time and in June 2004 he attended a union meeting where the possibility of a decertification application was discussed.

[91] Following the union meeting, the Applicant signed another union membership card that indicated his support for the Union. Although the Applicant was evasive about the meaning of signing such a card and he maintained that he did not sign it with a view to supporting the Union but only acknowledging that the Union discussed the matter with him, the Board concludes that the Applicant understood the nature of what he was signing. The Applicant could not explain what occurred after his signing of the card to cause him to make his decision to bring this application. He repeatedly stated that it was because of the complaints of other employees about the grievances the Union was proceeding with yet he could not identify any complaining employees other than those he mentioned at the outset. The Applicant also could not identify any new complaints about the Union and, by the time the card signing campaign in favour of the decertification began, the evidence indicated that the Union had won two of the three grievances which it had pursued through arbitration and had settled three others in a favourable manner. The Applicant had little understanding of the nature of the grievances or the results. The Applicant also had little understanding of the benefits provided by the collective agreement or what would be lost should the certification Order be rescinded. While the Employer's witnesses denied any involvement or promising higher wages, the Applicant maintained that, had the Union not proceeded with the grievances, the Employer would have given the employees wage increases. Given the relatively new and largely acrimonious relationship between the Union and the Employer, the Applicant's adamant views that the employees would receive wage increases are without substantiation and suggest that he must have been given some indication of the same by the Employer. Furthermore, the reason for the increasing volume of telephone calls from Ms. Squires and the hotel to the Applicant just prior to and during the open period were not adequately explained as necessary to the Employer's business and the calls from the Applicant to his home indicate that preferential treatment was either being given to the Applicant or, for some unusual reason, the Applicant presumed that he could put the Employer to this cost.

[92] The Board has found that the Applicant offered no credible rationale or plausible explanation for bringing the application. In addition, there are other unusual circumstances that lead us to conclude that the Employer influenced the bringing of this application. The circumstances of the hiring of the Applicant by the Employer and the

Applicant's acceptance of the terms of his employment are suspicious and, combined with the lack of a credible rationale for bringing the application, lead the Board to draw an inference that the Employer encouraged or influenced the making of the application. The Applicant's employment history included a fairly high level of business experience both in a senior management position and as a business consultant and most recently as an assistant to an MLA. He also served a term as the mayor of Melville. The Applicant was seeking comparable work in the public or private sector and was in receipt of maximum employment insurance benefits when he was offered and accepted a position that paid him $7.50 per hour working only part-time and necessitating a regular commute from Melville to Yorkton with no compensation for travel expenses. The Applicant provided no explanation of why he would accept and retain such employment, for which he is so obviously over-qualified and as a result of which he could be subject to deduction of a portion of his employment insurance benefits. Further, the Applicant retained that employment and those minimal hours (both before and after expiry of his employment insurance benefits) despite his ability to claim additional hours under the collective agreement, or to seek to obtain better paying employment either within or outside the hotel.

[93] The circumstances mentioned above become more suspicious when the circumstances of the Applicant's hiring are examined. The Applicant came to be employed through a referral from Mr. Ozirny, a former fellow councilor from Melville, who has apparent financial ties to the Employer. While the evidence was not entirely complete in relation to Mr. Ozirny's involvement with the Employer's business, the evidence clearly indicates that Mr. Ozirny is a shareholder in the company that owns the hotel property and contracts with Dimension Three to manage the hotel on that company's behalf. While the evidence appeared sufficiently clear that Mr. Ozirny was not to have any involvement in the day-to-day operation of the Employer, nor did he have direct authority over Ms. Squires or Mr. Whelan, he clearly had a direct interest in the financial success of the Employer. It is also apparent that the Employer gave special consideration to Mr. Ozirny by providing rooms free of charge for him to book the air cadets pool party (a decision made by Ms. Squires). It is also apparent that the Employer extends Mr. Ozirny a certain amount of deference by accepting his opinion of who might be a good employee for the Employer. Mr. Whelan passed on Mr. Ozirny's recommendation to Ms. Squires who, after interviewing the Applicant for a position that

did not previously exist in the hotel, immediately offered the Applicant employment in the very position (front desk) for which Mr. Ozirny recommended him. In the absence of Mr. Ozirny's testimony and in light of Mr. Ozirny's financial interest in the hotel, the Board accepts the evidence put forward by the Union that Mr. Ozirny made comments to locked out/picketing employees during the strike to get back to work, thereby taking a direct interest in the labour affairs of the Employer and not being neutral in this respect.

[94] In addition to the above circumstances, which have led the Board to infer that the Employer was involved with and influenced the bringing of this application, there is the issue of how the Applicant's legal fees would be paid. Again, there is no direct evidence that the Employer would in any way be responsible for such payment, however, it is simply not plausible that the Applicant, who earns $7.50 per hour at two or three shifts per week in a position away from his town of residence, having no other source of income, would represent two or three other employees who had complaints, retain a lawyer to assist in bringing this application and conduct a three day Board hearing, without any regard for its cost or how he might pay the same. It is not believable that the Applicant would bring such an application when he had few personal complaints about the Union, claimed to be primarily bringing the application on behalf of two or three other employees while having little knowledge of the results of the grievances or the implications of losing coverage of the collective agreement. While there is no direct evidence that the Employer would be responsible for the legal fees and while this factor alone would not be considered the basis for the dismissal of the application, combined with other circumstances noted above, it strains the credulity of the Board to accept that the Applicant acted spontaneously and without the influence of the Employer in making the application.

[95] The Board has determined that, in the circumstances of this case, an inference must be drawn that the Employer influenced the bringing of the application and interfered with the application in a manner and to the extent that the true wishes of the employees cannot be determined with a secret ballot vote. Some of the circumstances outlined above, such as the circumstances of the Applicant's hiring, his reasons for and timing in bringing this application, cannot simply be erased such that the Board could be satisfied that the results of the vote represent the true wishes of the employees.

[96] The evidence also implies that there is an element of the apprehension of betrayal from which the Board could reasonably conclude that the evidence of support does not represent the true wishes of the employees and to such an extent that a vote would not be appropriate in the circumstances. In *Monahan, supra,* while the Board acknowledged that it could likely be proven on every application for rescission that there exists a fear among employees that an applicant might betray their position to their employer, the apprehension of betrayal is a relevant consideration. The apprehension was explained in this way at 116:

> *The Union argued that the relationship between the Applicant and management would cause employees to support the Applicant out of fear that is they did not, this would be made known to management. We accept this as a legitimate concern not because the evidence indicates that the Applicant did this, but because we accept that some employees might think that he would or might. In these circumstances, some employees might be influenced to support the Applicant by signing a card, not because they wished to give up their right to bargaining collectively, but because they feared being exposed to their Employer if they did not.*

[97] The Board has determined that the apprehension of betrayal is high in this case in light of a number of factors. Firstly, the evidence indicates that at the Union's June, 2004 meeting the issue of decertification arose and the Union decided that, in anticipation of a possible rescission application being made, it should have employees sign membership support cards again. The Union undertook such a process in late June and early July 2004 and filed this evidence with its reply to the application. The Board has reviewed the cards filed in support of the application and those filed by the Union and has determined that some employees signed both. While this may simply indicate that some employees changed their minds between June/July and the beginning of October, the Board has concluded that other evidence points to the apprehension of betrayal being a factor in that change in position. In a small workplace such as this, the Applicant's unusual employment situation (as discussed above) would likely have been apparent to other employees, as would his close relationship with Ms. Squires and possibly the preferential treatment he received in being given a discount for his granddaughter's pool party and in using the Employer's telephone to make frequent personal long distance calls. The Applicant's conduct in soliciting the support of the employees also becomes a relevant factor. The Applicant did not explain the nature of

the application to employees nor did he explain that the employees would lose the coverage of the collective agreement. This lack of explanation, along with the special relationship he enjoyed with the Employer and his hiring circumstances lead the Board to conclude that employees may have signed out of fear that, if they did not, this would be made known to management.

[98] We find, on a balance of probabilities, that the application was made at least in part on the advice of or as a result of influence by the Employer within the meaning of s. 9 of the *Act*.

[99] Therefore, the application is dismissed.

DATED at Regina, Saskatchewan, this **26th** day of **April, 2005**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson