Labour Relations Board
Saskatchewan

KEN DESJARLAIS, Applicant and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 739 and L. J. WOODLEY PAINTING AND DECORATING LTD., Respondents

LRB File No. 062-06; August 14, 2006
Chairperson, Angela Zborosky; Members: Ken Ahl and Hugh Wagner

For the Applicant:	Ken Desjarlais
For the Certified Union:	Betty Ann Cox
For the Employer:	Sue Barber

Decertification – Interference – Where no direct evidence that application made as result of employer interference, Board looks for evidence from which it could reasonably draw inference of employer interference sufficient to compromise employees' ability to decide through secret ballot vote – Where applicant had credible rationale for bringing application, demonstrated proper knowledge and understanding of decertification process and no facts from which Board could draw inference of employer involvement with gathering of support, Board declines to find employer interference and orders vote.

Decertification – Practice and procedure – Where employees initially attempted to file several applications for rescission but only one application for rescission ultimately filed accompanied by individual evidence of support from majority of employees, Board concludes that earlier attempt did not invalidate support evidence properly obtained by applicant and filed in confidential manner with ultimate application – Board orders vote.

Decertification – Practice and procedure – Board comments on need for employers to file proper statements of employment with properly taken specimen signatures but declines to make findings relating to completion of statement of employment where union agrees to its composition.

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

REASONS FOR DECISION

Background:

[1] Ken Desjarlais (the "Applicant") applied pursuant to s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") to rescind the certification Order issued by the

Board to the International Union of Painters and Allied Trades, Local 739 (the "Union") on August 23, 2002. The Union and L. J. Woodley Painting and Decorating Ltd. (the "Employer") are parties to a provincial collective agreement covering the painters trade division with effective dates from July 1, 2004 to April 30, 2007. The application for rescission was filed on May 5, 2006 and was therefore properly made within the open period.

[2] The Union filed a reply to the application asking the Board to dismiss the application pursuant to s. 9 of the *Act* and alleging that the Employer had engaged in conduct for the purpose of influencing employees to support the application or that the application was made on the advice of the Employer or as a result of influence, interference or intimidation by the Employer.

[3] The Employer filed a statement of employment on May 12, 2006 listing nine employees in the bargaining unit. The Applicant filed what purports to be evidence of support for the application from a majority of the members of the bargaining unit.

[4] A hearing was held in Regina on June 16, 2006 and July 10, 2006.

Evidence:

[5] The Applicant has been employed as a painter for nearly 5 years and came to work for the Employer some time following certification by the Union. He was previously employed as a painter for a company also unionized by the Union and was aware that the Employer was unionized before commencing work there. The Applicant stated that he has a great relationship with the principal of the Employer, Larry Woodley.

[6] The Applicant testified that he found out about the rescission process through an acquaintance who worked for a certified company. This person referred him to the Board. The Applicant stated that, before approaching other employees, he first discussed the matter with one of his coworkers in the bargaining unit, Sean Sernick, on a number of occasions while they were in his vehicle traveling to and from job sites. These discussions began at approximately the end of March and beginning of April 2006. The Applicant and Mr. Sernick both attended at the Board's administrative office, at which time Board staff advised them of the process and provided them with the

appropriate forms. The Applicant stated that he did not seek the assistance of a lawyer. The Applicant testified that throughout April 2006 he began to put the paperwork together and talk to the employees to gather support for the application. He stated that these discussions usually occurred on their own time, often in the evenings either at the employees' homes or a meeting place such as a coffee shop or a park, although some of the discussions occurred at the job site where he was working or at the job sites of the other employees. He attended at these other job sites on his own time and without the knowledge of Mr. Woodley or Mr. Wiens, knowing they would disapprove (he was aware that Mr. Woodley and Mr. Wiens occasionally attended at the job sites, but stated that he could avoid them because he knows what their vehicles look like). He was able to contact the employees because he knew the job sites they worked at, some of the employees' addresses, and all of their telephone numbers, information which he had available to him as a result of being a shop steward.

[7] The Applicant stated that he was aware of the open period during which the application had to be filed through the paperwork he received from the Board and through reference to the dates in the collective agreement.

[8] The Applicant stated that his discussions with the employees included asking them how they felt about the Union. He explained to the employees about the form of the support required for the application. In cross-examination, the Applicant denied that he led the employees to believe that the Union had moved to Winnipeg or that the Employer would favour decertification. The Applicant acknowledged that he did not tell the employees they might lose their benefits as a result of decertification although, when Jim Fockler asked him about this, the Applicant indicated to him that "we'd have to fly by the seat of our pants -- take it on as it goes" and that no promises could be made about benefits.

[9] The Applicant testified that the primary reason why he wanted to rescind the certification Order was because there was "no representation." Specifically, the Applicant's complaint was that the Union did not have a representative in Saskatchewan from mid-November 2005 when then union representative Terry Parker resigned, until approximately 3 weeks prior to the hearing of this application when a Mr. Simon was hired. Although he did not have any specific issues for the Union to address during this

time period, as shop steward he would hear the complaints of the employees. The Applicant was very satisfied with the representation Mr. Parker provided and indicated that he and the employees appreciated the assistance Mr. Parker gave with respect to required paperwork in relation to the Union's benefits.

[10] In cross-examination, the Applicant acknowledged that he had applied for the union representative position vacated by Mr. Parker and that, following an interview, he was not hired for the position. On the evidence, it was clear that the Applicant was not pleased about this, was unhappy about the fact that it took 6 1/2 months for the Union to fill the position and felt that the position was only filled with Mr. Simon as a result of the Applicant's application being filed.

[11] As an additional reason for bringing the decertification application, the Applicant felt he could do as well with the Employer on his own, without having to pay dues to the Union. The Applicant was cross-examined in depth by counsel for the Union concerning the rights and benefits he obtained through the collective bargaining agreement (including dental and health benefits) and the assistance of the Union to which he may no longer be entitled should the Union be decertified. He acknowledged that he had taken several painting courses put on and paid for by the Union although he was displeased that there were not any courses offered recently. He also pointed out that the courses the Union offered would not assist him in obtaining his journeyman's certificate. The Applicant indicated that he was confident that he could look out for his interests and provide for his family without the coverage of the collective agreement. He believed that his employment was secure even without representation by the Union because he is a good worker and has a good relationship with the Employer. The Applicant acknowledged that he had been fired in 2003 and required the assistance of Mr. Parker to obtain his job back, which Mr. Parker was able to do the next day. The Applicant had no immediate plans to request a pay raise and neither that matter nor the issue of the application for rescission was discussed with either Mr. Woodley or Mr. Wiens, either before or subsequent to the filing of the application, except for a brief conversation when the employees were called for a meeting with the Employer to sign the statement of employment.

[12] In cross-examination concerning the Applicant's claim that there was "no representation," the Applicant acknowledged that there was a meeting of the Union held in Regina in January 2006, although the Applicant stated that he did not feel that one meeting was sufficient as the Union had held monthly general meetings when Mr. Parker was still employed with the Union. The Applicant stated that he was aware that the Union's local office phones were forwarded to the Winnipeg office following Mr. Parker's resignation.

[13] Mr. Fockler, an employee in the bargaining unit who testified on behalf of the Union, stated that he became aware of the Applicant's intention to apply for decertification when the Applicant approached him at a job site, asked him if he liked the Union and whether he would like to decertify the Union. He stated that they had no discussion about the consequences of the decertification. When asked in cross-examination whether he had any concerns about what would happen with the benefit plans if the Union was decertified, Mr. Fockler replied that he did not, although he acknowledged that he had used the dental and eye plans provided for under the collective agreement. He acknowledged that he would have to pay for those services if the Employer did not do so following a decertification. Mr. Fockler stated that he was unaware whether there were any complaints by the employees that there was "no representation" available once Mr. Parker had left his position. He described his relationship with both the Employer and the Applicant as a good one. While Mr. Fockler acknowledged that the employees have a fairly close relationship with the Employer's representatives, they do not socialize or see each other outside the workplace. He denied talking to anyone about the decertification.

[14] A significant amount of evidence was led concerning the signing of support evidence by the employees for this application. The Applicant testified that he made copies of the paperwork he received from the Board in order that those employees in favour of decertification could complete and sign the same. It became evident that the paperwork to which the Applicant referred was the Board form for an application for rescission. The Applicant testified that he swore the statutory declaration contained in the application in the presence of Sue Zmetana who is a financial planner associated with Partners in Planning and who notarized his signature. Partners in Planning is a financial services firm with which the Employer and Mr. Woodley and Mr. Wiens

personally do business. The Applicant became aware that Ms. Zmetana could notarize documents through being advised of the same when he and a few other employees were painting the business premises of Partners in Planning.

[15] The Applicant stated that, when he had his form completed toward the end of April 2006, he attended at the offices of Partners in Planning and had Ms. Zmetana notarize his signature. On May 2, 2006, the Applicant attempted to file his paperwork with the Board although, due to certain errors in the application and the fact that he was not yet within the open period to properly file the application, he did not actually file the application with the Board on that day. The Applicant stated that he met with Ms. Zmetana again on May 2, 2006 with an application he had "corrected" in order to have her notarize his signature once again and, on May 5, 2006, he filed his application with the Board.

[16] With respect to his first attendance at the offices of Partners in Planning at the end of April 2006, the Applicant testified that he also had those employees interested in decertification attend there to have them sign the forms and have their signatures notarized by Ms. Zmetana. The Applicant had been under the mistaken impression that each employee who supported his application for rescission was required to complete an application for rescission and swear it in the presence of a notary public. The Applicant had attempted to file these completed forms with his application for rescission when he attended at the Board on May 2, 2006 and he stated that this was a further reason why the Board rejected the filing of his application on that occasion.

[17] In cross-examination, the Applicant was questioned concerning his and the other employees' attendance at Partners in Planning. The Applicant stated that the number of hours he works in a day varies significantly. On this particular day he went to work at 8:00 a.m., returned home at 10:30 a.m. to obtain his paperwork, and then picked up Mr. Sernick, at which time they both attended at the offices of Partners in Planning at approximately 11:00 a.m. He stated that he had not made an appointment with Ms. Zmetana but believes that Mr. Sernick may have, and he was adamant that he had never discussed this matter with either Mr. Woodley or Mr. Wiens. He had previously told any employees interested to attend at Partners in Planning at approximately 11:00

a.m. When the Applicant was asked whether other employees had permission to leave work to attend at Partners in Planning, he stated that he did not know whether the employees were working or not as he and Mr. Sernick usually work together on their own. Although Ms. Zmetana obviously saw the documents that were being sworn, the Applicant denied disclosing the nature of the documents to Michael Wolfond, who is the individual at Partners in Planning with whom Mr. Woodley and Mr. Wiens dealt. The Applicant stated that the second time he attended upon Ms. Zmetana (on May 2, 2006), the other employees did not attend there, as he had become aware through his first attempt at filing an application with the Board that the employees in favour of decertification should not also be completing separate applications for rescission.

[18] Mr. Fockler testified that he was given a time and place to attend Partners in Planning to have his document notarized. He believes he went to see Ms. Zmetana at approximately 10:30 or 11:00 a.m. and that he traveled directly from his work site without having obtained the permission of the Employer to do so. He believes that he saw two other employees while he was there, although he believed they were not the Applicant or Mr. Sernick. When he had signed the document, he returned to work, stating that it had taken him approximately 15 minutes. Mr. Fockler acknowledged that Mr. Wiens and Mr. Woodley regularly attend at the job sites for brief periods of time and, while he appeared to be aware of a workplace rule that he should not leave his work site during work hours, he seemed to believe that the 15-minute trip to Partners in Planning was of little consequence. He stated that he did not notify the Employer that he was attending at Partners in Planning and he specifically denied having any discussions with Mr. Woodley or Mr. Wiens about the application.

[19] In cross-examination, the Applicant indicated that, when he filed this application with the Board on May 5, 2006, he submitted individual support cards signed by the employees in favour of decertification. He stated that he had attempted to comply with the guidelines of the Board and that the support cards were signed by the interested employees, not witnessed or notarized by anyone and not in petition form. He stated he gathered this support on his own.

[20] Ms. Zmetana testified on behalf of the Union and stated that she has previously notarized documents for both Mr. Woodley and Mr. Wiens, whom she came

to know as they were clients of her partner, Mr. Wolfond. She stated that she would not have met or spoke with either Mr. Woodley or Mr. Wiens in their personal or business capacity because they are not her clients, however, she acknowledged that she may have spoken to them in passing when they were in the office. With respect to the appointment for the employees' attendance at her office to have their documents notarized, Ms. Zmetana stated that one of her several assistants would have placed the appointment on her calendar as "L. J. Woodley employees needing a document notarized." She has no recollection of talking to either Mr. Woodley or Mr. Wiens about the setting of the appointment. She further stated that it is not her practice to notarize documents for members of the public however she would make that service available for clients, people she knew, or those that might be related to clients, in either their personal or business capacity. She indicated she does not charge a fee for that service.

[21] Ms. Zmetana stated that her first contact with the employees of the Employer would have been some time in late April or early May 2006. She recalled the initial meeting was for a group of employees and was around lunchtime. A 1-hour time frame had been set for the employees to drop by because she believed they had to get away from work to sign the documents. She believed most of the employees were in their work clothes and specifically remembers paint on their hands. She stated that the employees may not have all attended at once but rather "drifted in" through the hour. It was her recollection that each employee produced his identification (which her assistant would have told them was required) and she witnessed their signatures and notarized a two-page document, which she understood to be related to a process to dissolve the Union, although she did not recall any specific details. It was her recollection that Mr. Wiens and Mr. Woodley were not present for these meetings.

[22] Ms. Zmetana said that she saw the group of employees on only one occasion but that the Applicant and another employee came back to see her on another day. At this time, she witnessed either one or both of their signatures and notarized their documents.

[23] Ms. Zmetana stated that she may have spoken to her assistant about the signing of these documents but not likely to anyone else in the office, including Mr. Wolfond, because the matter did not seem of any consequence to her. She stated she

had not received instructions from anyone in the office to assist these employees. In cross-examination, Ms. Zmetana was asked about her perception of who she performed this service for and Ms. Zmetana responded that she viewed this as a courtesy to the employees of the Employer because her company deals with that company.

[24] Mr. Parker, who testified on behalf of the Union, is currently employed with the Saskatchewan Provincial Building and Construction Trades Council and has been so employed since November 15, 2005. Prior to taking this position, he was an organizer and business agent for the Union, responsible for the day-to-day operations of the local in Saskatchewan, and working with the Union's business manager, John Sedor, from Winnipeg. Mr. Parker had held this position with the Union for approximately 6 years and he had been involved in organizing and certifying the Employer in approximately 2003. He stated that the provincial painters collective agreement automatically covered the employees following the certification. Mr. Parker testified concerning the representation he provided to the employees of the Employer during his tenure, including negotiating a renewal collective agreement, resolving grievances, and arranging numerous training courses for all unionized members in the province. A significant amount of evidence was led in this regard and it indicated that Mr. Parker was a dedicated and hard-working union representative. He testified that he assisted the employees with a number of disagreements they had with the Employer over the years.

[25] Mr. Sedor, the Union's business manager for Manitoba and Saskatchewan, testified on behalf of the Union. He testified that, on November 10, 2005, letters were sent to Union members and employers in Saskatchewan advising of Mr. Parker's departure and providing instructions to contact him as a representative of the Union. He testified that he came to Saskatchewan on several occasions following Mr. Parker's departure to service the members. He does not recall receiving even one call from any of the employees of the Employer during this time. At a meeting of the Union held in Regina in January 2006, he recalled the employees raising concerns about Mr. Parker's departure and the hiring of a new representative. At this meeting, three individuals indicated interest in the position. Mr. Sedor was involved in the selection of the replacement for Mr. Parker.

[26] With respect to the signing of the statement of employment, Mr. Sedor stated that the Union wished to be present for the signing, however he stated that it appeared that it might have been completed before he received notification of the decertification application. He stated that he attempted to reach the Employer for two days following receipt of the application, but the Employer was unreachable. He stated that he recalled having a conversation with Mr. Woodley on an unrelated matter on May 8, 2006 during which time Mr. Woodley asked him whether he had heard that "my boys are decertifying." He believes he received a faxed copy of the decertification application on May 9, 2006.

[27] Mr. Sedor explained the dues structure of the Union. It included a monthly payment of $20.00 plus 3% of the employee's gross pay. That would have amounted to $880.00 for the Applicant in the last year, an amount that he could deduct on his income tax return. He also testified that the Employer must pay in to the Union's health and welfare fund.

[28] Both Mr. Woodley and Mr. Wiens testified on behalf of the Employer. Mr. Woodley testified that he is a journeyman painter, has been in the business for approximately 20 years and that he and Mr. Wiens currently are in charge of the business. Both Mr. Woodley and Mr. Wiens denied having any discussions with any of the employees concerning the decertification application.

[29] Mr. Woodley stated that he first learned of the rescission application when he received a copy of the same from the Board, which appears to have been a few days after the employees went to Partners in Planning. He stated that he thought "something was up but not this" and that he was not aware of any of the discussions the employees held between themselves. When he became aware of the application, he contacted Mr. Sedor to advise what had occurred and suggested that he "should get here to deal with it." Mr. Wiens testified that he first saw the application for rescission when it was sent to him by the Board on May 8, 2006. He stated that on May 9, 2006 he took the documentation to the Employer's lawyer as he was uncertain how to complete it. With the assistance of the lawyer, he completed the statement of employment by setting out the names of employees employed on the date the application was filed. He swore the document in the presence of the lawyer. He stated that he then waited two to three

days, on the advice of the lawyer, in case the Union notified the Employer that it wanted to send someone to witness the signatures. Although Mr. Wiens stated that he had not asked Mr. Woodley if he had received a call from the Union, Mr. Woodley testified that he was away from the office for a couple of days that week and had received no message from the Union in the meantime. On May 11 or 12, 2006, the employees came to sign the statement of employment. Mr. Wiens stated that he then delivered the documents to the Board on Friday, May 12, 2006, which was either the same day or the day after it was signed by the employees.

[30] Mr. Woodley testified that when Mr. Wiens returned with the completed statement of employment from the lawyer's office, he noticed that it did not include the name of Gary Eistetter, a casual employee of the Employer. Mr. Woodley had contacted Mr. Eistetter to see if he was working on the day the application was filed and, because he had been, Mr. Eistetter's name was added to the statement of employment, after Mr. Wiens had sworn the document. Mr. Eistetter signed the statement of employment at the same time as the other employees did on May 11 or 12, 2006.

[31] Mr. Woodley and Mr. Wiens both described their relationship with Partners in Planning. Mr. Woodley indicated that he and his spouse have been dealing with Mr. Wolfond for approximately 10 to 12 years, usually in February of each year. Mr. Wiens indicated that he has been dealing with Partners in Planning for approximately 20 years and that it is Mr. Wolfond who he usually sees, although occasionally he will see Ms. Zmetana if Mr. Wolfond is away. He indicated that the last time he spoke to Ms. Zmetana was a few months ago when he purchased a bond for his granddaughter. When the business requires them to swear a statutory declaration, on occasion they attend at the offices of Partners in Planning to do so. Mr. Woodley testified that the Employer has painted the interior office premises, as well as Mr. Wolfond's and Ms. Zmetana's residences, over the years. Mr. Woodley recalled that the Applicant was one of the employees who painted the office premises.

[32] Both Mr. Woodley and Mr. Wiens stated that they were not aware that the employees went to Partners in Planning to sign statutory declarations related to this application. No employees had asked for their permission to leave work during the workday to do so, they were not involved in any arrangements for the employees to

attend there, and they received no statement of account from Partners in Planning with the respect to the notary services. Mr. Woodley stated that there had been no suggestion by anyone with Partners in Planning that they notarized the documents as a courtesy to the Employer, and he expressed no surprise that the employees had the documents notarized there as the employees had worked there painting the business premises for approximately two months and the partners there would have become well known to them.

[33] Mr. Woodley testified that there had been no grievances filed with the Employer since 2004 and he characterized his relationships with the Union, Mr. Parker and Mr. Sedor as very good ones. In cross-examination, Mr. Woodley acknowledged that in the past the Employer had violated the collective agreement by allowing less senior employees to work and for not remitting certain union dues. Mr. Woodley stated that those issues had been resolved with the Union in 2004. He recalled a situation with one employee who had a poor attitude where he and Mr. Parker worked together to resolve the attitude problems of the employee.

[34] A significant amount of evidence was led concerning the status of employment of a few of the employees on the statement of employment, however, because the Union accepted the statement of employment as being accurate, it is not necessary to detail that evidence here. The only aspect of that evidence that forms a basis for the Union's argument that there has been employer influence with respect to this application concerns the payment of wages to Les Burns on a piece work basis rather than on an hourly rate basis as is provided for under the collective agreement. Mr. Sedor had little information about any possible arrangement in this regard but noted that there is nothing in the collective agreement concerning either piece work or the ability to subcontract work.

[35] Both Mr. Woodley and Mr. Wiens were questioned in cross-examination by the Union concerning certain errors in dues reporting and remittance documents and the number of hours of work of employees. The evidence indicated that Ceridian, the Employer’s payroll company, appears to have been responsible for the errors that occurred, except with respect to the piece work situation with Mr. Burns. In that regard, the whole of the evidence of Mr. Woodley and Mr. Wiens suggested that there had been

negotiations between the Union and the Employer on a piece work arrangement, although there was some confusion as to whether or not a final arrangement had been agreed upon, as well as the nature of that arrangement. Those negotiations began in the latter part of 2005 when Mr. Woodley and certain representatives of the Union, including Jack White, the assistant to the general president of the International Union, met at a conference in Las Vegas and Mr. Woodley had indicated that the Employer could capture a greater portion of the residential painting market if it could institute a piece work arrangement. Subsequent to this conference, Mr. White met with each of Mr. Woodley and Mr. Wiens on separate occasions where an agreement was discussed with reference to a piece work arrangement in the drywall industry in Toronto. Included in this discussion were possible piece work rates and the calculation of dues to be paid on those rates. To date, the Employer has not been submitting dues to the Union on the piece work performed by Mr. Burns. Mr. Woodley explained that it was his understanding that Mr. Wiens and Mr. White were still attempting to come to an agreement on the numbers but that, in the meantime, the Employer had the approval of Mr. White to continue on with the assignment of piece work. Mr. Wiens testified as to a similar understanding and he believed the final numbers for piece work and for the amount of dues had not yet been worked out with Mr. White. Mr. Woodley stated that it was his understanding that Mr. Burns was to submit his monthly dues to the Union and that, with respect to the other remittances, the Employer had all the documentation in place so that, once the issue of the calculation of union dues was resolved, the Employer would remit the proper amount. Mr. Wiens had the same understanding with respect to the calculation and remittance of dues by the Employer. In cross-examination of Mr. Wiens, the Union introduced a letter sent by Mr. White to Mr. Woodley dated July 7, 2006 (following the first day of the hearing of this application) which outlined Mr. White's understanding that an agreement on the piece work had been reached and that the Employer should be submitting union dues. It appears that Mr. Woodley views the piece work arrangement under which Mr. Burns works as acceptable because of the ongoing discussions with Mr. White.

[36] In cross-examination, Mr. Woodley stated that only Mr. Burns has done piece work, although two additional employees have expressed interest in doing so. He stated that he has no intention of changing to all piece work to the exclusion of hourly paid employment should the Applicant be successful with the decertification application.

He stated that some employees are "hourly people" who would prefer to work a full day with lunch and coffee breaks and therefore he would not require all employees to perform piece work. In addition, not all jobs lend themselves to piece work rates. Mr. Woodley stated that some large and difficult jobs would require him to pay employees on an hourly basis. With respect to the rates paid for piece work, Mr. Woodley indicated that it is an amount per square foot, with additional payment if there are difficult aspects to the job such as high stairwells, fireplaces, poor drywall, etc. In setting the amount per square foot, he attempts to approximate what the employee would earn had it been on an hourly rate basis. In setting the rate of the amount for extra work, Mr. Woodley denied that this would have the effect of violating the collective agreement stating that the employee is paid for this extra work at his or her regular hourly rate under the collective agreement. When asked in cross-examination whether the employees' rates of pay would change if the Union was decertified, Mr. Woodley indicated he would not pay the employees less and that they would probably stay the same, given that rates are somewhat set in the industry and because the Employer does not want to lose its employees. He indicated that the Employer has always tried to be fair to the employees. While the Employer has had big projects in the past, its primary business over the last two to three years has been painting houses, a market which operates primarily with non-unionized companies.

[37] In response to questions asked in cross-examination, Mr. Woodley indicated that, prior to the certification of the Union, he had tried to maintain benefit plans, however, it had not worked because employees were always attempting to get the money back that they paid into the plan. He also indicated that, if the Union was decertified, the issue of benefit plans would be discussed with the employees if they wish to maintain them. He denied having had any discussions with the employees about these issues.

[38] In cross-examination, both Mr. Woodley and Mr. Wiens acknowledged that the Employer has a policy in place that prohibits employees from leaving the work site during their shifts. Mr. Woodley acknowledged that he might have put a copy of the policy into employees' pay envelopes every so often. Mr. Wiens testified that he attends the work sites either alone or with Mr. Woodley and usually unannounced. He indicated that, if he came upon a work site and an employee had left the job, he would later make

inquiries as to where the employee had been. When asked whether the employees generally complied with the rule requiring them to notify the Employer of their absence, he said they sometimes do. Mr. Wiens testified that, on the date the employees went to Partners in Planning, he did not receive notification from any of the employees that they would be away from their work sites. He stated that he does not recall visiting any work sites on the day in question, noting that he only goes out a few times per week.

[39] In cross-examination, Mr. Woodley acknowledged that, at the time of the certification drive in 2003, he attempted to determine who was behind it. He stated that at first he was "totally depressed," partly because he knew nothing about unions, but as time went on, he found the arrangement acceptable. He stated that the Union has been fair to the Employer in negotiating rates and by his evidence he appeared to have little problem with the Union representing the employees. He stated that he had no intention of subcontracting work in the future should the Union be decertified, unless he took on more work than he could handle. While acknowledging he would have more flexibility if he were not required to contact the Union to obtain employees, the arrangement requiring him to contact the Union and the Union sending qualified painters has worked well because, in his words, you "can't just grab a painter off the street," due to the skills required.

[40] Other evidence led at the hearing regarding Mr. Burns and the piece work arrangement was directed to the question of whether Mr. Burns should be included on the statement of employment, however, because the Union accepts the composition of the statement of employment, that evidence will not be detailed here.

Statutory Provisions:

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

> *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.*
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> . . . .
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> *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.*

Arguments:

The Applicant

[42] The Applicant argued that, as he had filed evidence of majority support, his application ought to be granted. He felt that he had sufficient reasons for wanting the Union decertified. The Applicant said that neither the Employer nor any of its representatives had anything to do with his application, nor did the Employer influence the support for the application by reason of the employees having attended at the offices of Partners in Planning to sign statutory declarations concerning their initial support for an application.

The Union

[43] Ms. Cox, counsel for the Union, argued that the application ought to be dismissed pursuant to s. 9 of the *Act* because it was made as a result of influence or interference by the Employer or its agent. Counsel relied on the decisions of the Board in *Susie Mandziak v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Remai Investment Corp.*, [1987], Dec. Sask. Labour Rep. 35, LRB File No. 162-87; *Martyn Arnold v. United Steelworkers of America, Local 5917 and Westeel Ltd.,* [2005] Sask. L.R.B.R. 5, LRB File No. 275-04; and *Garry 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 to support the proposition that while there is often limited evidence of direct influence or interference by an employer and such influence or interference is rarely overt, the Board may consider more subtle or indirect forms of influence which could allow the Board to draw an inference that the employer influenced or interfered with the making of the application in this case. Counsel pointed to the fact that Mr. Fockler testified that discussion of the rescission application was done on company time in direct contradiction to the Applicant's testimony that he gathered support on his own time. In addition, the Union argued that the evidence of Ms. Zmetana should be preferred over that of Mr. Fockler with respect to the attendance of the employees at Partners in Planning. The Union also relied on *Clayton Walters v. Xponential Products Inc., operating as Impact Products and United Steelworkers of America, Local 5917*, [2002] Sask. L.R.B.R. 65, LRB File No. 214-01.

[44] Counsel for the Union argued that the Board should conclude that the Employer had knowledge of and gave tacit approval for the employees to attend at Partners in Planning to sign evidence of support for this application. The Union also argued that the Employer facilitated the employees signing of the statutory declarations at Partners in Planning thereby influencing the making of the application. Counsel pointed to certain facts in evidence to support the drawing of these inferences including the existence of a workplace rule which prohibited employees from leaving work sites, the fact that Mr. Woodley and Mr. Wiens often visited the work sites of employees and employees would be aware of that, the fact that the Employer had a business connection

with Partners in Planning in terms of painting contracts and Ms. Zmetana having notarized documents for the Employer, and the fact that Mr. Woodley and Mr. Wiens had a personal financial connection with Partners in Planning. The Union suggested that there was no way for the Applicant to know that Ms. Zmetana was a notary public other than by being advised of the same by the Employer. Ms. Zmetana testified that she provides this service only to clients or relations and that she viewed her signing the statutory declarations for the employees as a favour to the Employer. The Union suggested that there was therefore a coercive element implicit in the employees' attendance at the offices of Partners in Planning such that the employees' attendance there cannot be determined to be voluntary. The Union argued that, where the Employer's conduct leads to a decertification application being made, it compromises the employees' ability to choose whether to belong to the Union to the extent that their wishes can no longer be reliably determined by the Board and the Board must temporarily remove their right to choose by dismissing the application.

[45] The Union relied on *John Berner v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Loraas Disposal Services Ltd.*, [2000] Sask. L. R.B.R. 776, LRB File, No. 034-00 to support its argument that the employees signing of statutory declarations as support for an application for rescission is akin to filing petition evidence, commonly rejected by the Board because it lacks confidentiality. The Union argued that, even though only one of the applications was filed with the Board along with a different form of support evidence, it would be reasonable for the employees to expect that their attendance at Partners in Planning would not be kept confidential from the Employer. In addition, counsel asserted that the process the employees followed in signing the statutory declarations was coercive in the sense that it was more formal (i.e. swearing a document as opposed to simply signing evidence of support in the presence of a witness) and it was done in a more public manner, thereby causing it to lose its confidentiality. Counsel suggested that normally support cards are signed by employees separately from one another, not gathering as a group to swear a document all in the presence of the same notary. The Union argued that, in a small workplace, this process has the effect of being coercive.

[46] Union counsel also argued that the Applicant's rationale for the making of the application does not withstand credible scrutiny. Counsel pointed out that, although

the Applicant felt he received improper representation following the resignation of Mr. Parker and the lack of a replacement, he was aware how to reach the Union's representative in Winnipeg, Mr. Sedor, had not attempted to contact Mr. Sedor and, in fact, had no issues that needed to be addressed by the Union during that time. Counsel referred to *Katrina 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; *Larry Rowe and Anthony Kowalski v. Canadian Linen and Uniform Service Co. and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [2001] Sask. L.R.B.R. 760, LRB File No. 104-01; *James Walters v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Dimension 3 Hospitality Corp. operating under the name Days Inn*, [2005] Sask. L.R.B.R. 139, LRB File No. 238-04; and *Trevor Saranchuk v. United Steelworkers of America and Capital Pontiac Buick Cadillac GMC Ltd.*, [1998] Sask. L.R.B.R. 756, LRB File No. 152-98 and urged the Board to find that the Applicant failed to advance any credible rationale and that, along with the other circumstances in this case, should lead the Board to conclude that the application was made as a result of employer influence. The "other circumstances" to which the Union referred includes the circumstances of the employees' attendance at Partners in Planning and the Employer's relationship with Partners in Planning, the Applicant's use of benefits provided for under the collective agreement and the fact that the Employer would have the ability to subcontract work or assign piece work if the decertification was successful. The Union took the position that these circumstances provide sufficient evidence for the Board to draw the inference that the Employer has not remained neutral on the application. The Union argued that the campaign seemed "too clean" in a small workplace such as this, where there was a close relationship between the Employer and its employees.

[47] Although a significant amount of evidence was led and elicited through the witnesses at the hearing concerning the composition of the statement of employment, the Union, in argument, indicated its willingness to accept the evidence contained in the statement of employment. The Union had some concerns about the fact that the employees' signatures were obtained after the document was sworn by Mr. Wiens and that one name and signature were added after the statement was sworn. The Union pointed to the Board's decisions in *Canadian Union of Public Employees, Local 4683 v. Alice Ross and Hertz Northern Bus (1993) Ltd.*, [2006] Sask. L.R.B.R.

109, LRB File No. 193-05; and *Service Employees International Union, Local 299 v. Vision Security and Investigation Inc.*, [2000] Sask. L.R.B.R. 121, LRB File No. 228-99 which indicate that a statement of employment is considered evidence and must therefore be completed and sworn properly. The Union argued that the process the Employer used in this case was questionable.

[48] The Union argued that, in the alternative, should the Board conclude that the application should not be dismissed pursuant to s. 9 of the *Act*, the Board should order a vote to test the true wishes of the employees.

The Employer

[49] Counsel for the Employer denied that there was any employer influence or involvement in the making of the application. The Employer only became aware of the application when it received a copy of the same from the Board following its filing by the Applicant. Counsel pointed out that the evidence does not raise even a suspicion of employer influence let alone circumstances that would allow the Board to draw an inference of employer influence. She pointed out that the Applicant had his own reasons for bringing the application and there was no evidence that the Employer had anything to do with his decision. The Applicant had the information he required about the employees through his position as shop steward.

[50] With respect to the discussions employees may have held at the workplace concerning the representation issue and the policy of the Employer that employees are not to leave the work site, counsel argued that this evidence is not relevant in that these facts do not suggest that the Employer knew of the decertification campaign. The fact that the employees utilized Partners in Planning, with whom the Employer had a business relationship, to sign statutory declarations is a mere coincidence and it is understandable that the employees might utilize Partners in Planning given that certain employees, including the Applicant, had contact with the staff of Partners in Planning through the painting of the Partners in Planning business premises. Counsel for the Employer argued that the personal relationship that the principals of the Employer had with Partners in Planning does not lead to an inference of employer influence. Counsel distinguished the *Arnold* case, *supra*, on its facts, as in the

Arnold case, the father of a manager was involved in the decertification campaign and the application was sworn at the law firm where the manager's mother worked. In addition, there were other circumstances in the *Arnold* case from which the Board reasonably drew an inference of employer influence. The Employer also referred to the Board's decision in *Scott 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, where the Board held that the fact that the key organizer of the decertification application was the son of the lawyer for the employer was insufficient in itself to establish employer influence where there was no evidence that the lawyer assisted the organizer.

[51] The Employer also referred to two decisions involving El-Rancho Food & Hospitality Partnership (*Melissa Matychuk v. Hotel Employees and Restaurant Employees Union, Local 206, and El-Rancho Food & Hospitality Partnership o/a KFC/Taco Bell*, [2004] Sask. L.R.B.R. 5, LRB File No. 242-03 and *Lotus Ferguson v. Hotel Employees and Restaurant Employees Union, Local 206, and El-Rancho Food & Hospitality Partnership o/a KFC/Taco Bell*, [2004] Sask. L.R.B.R. 26, LRB File No. 024-04) where the Board held, in the latter case, that the fact that each of the applicants in the two cases utilized the same notary public was, in the absence of additional evidence, not suggestive of employer influence. The Employer therefore argued that the fact that the employees utilized the same notary public in this case is insufficient to allow the Board to conclude that the Employer influenced the application. The Employer urged the Board to accept the evidence of Mr. Fockler concerning the details of his and other employees' attendance at Partners in Planning.

[52] Counsel also pointed out that no inference could be drawn from the Employer's relationship with the Union that could lead the Board to conclude that there was employer influence. Counsel noted that in *Charmaine Evans v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and Saskatchewan Indian Gaming Authority cob as Northern Lights Casino*, [2002] Sask. L.R.B.R. 313, LRB File No. 258-00 the Board allowed the application for rescission, concluding that the application was not made in whole or in part, on the advice of, or as a result of the influence or intimidation, by the employer even though the employer in that case had not been "an exemplar of neutrality and detachment"

concerning the issue of union representation. Counsel pointed out that, in this case, there had not been a grievance since 2004, the representatives of the Employer and the Union had gotten along well, and there was no evidence of anti-union animus. Mr. Woodley was candid in his evidence that, at the time of the certification application, he had made inquiries as to who was responsible for bringing the application and that he was "depressed" about the certification, but thereafter accepted it. Counsel for the Employer argued the Employer had not created an environment or atmosphere that led the employees to make the application but rather it was the conduct of the Union in the months preceding the application by not having a union representative present in Saskatchewan that appeared to lead to the making of the application.

[53] Counsel for the Employer distinguished the *Ross* and *Berner* cases, *supra*, and argued that there was nothing about the execution of the statement of employment that should cause the Board to have concern about its legitimacy as evidence in this case, also pointing out that the Union was not disputing the composition of the statement of employment. While the Employer may have added a name to the statement of employment after it was sworn, it was for the purposes of filing an accurate and complete document with the Board. The Employer also submitted that the fact that the employees signed the statement of employment after it was sworn was of no consequence in this case.

Analysis and Decision:

[54] The primary issue in the case before us is whether the application for rescission 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 an agent of the Employer. Several decisions of the Board, including those cited by the Union and Employer on this application, outline the case law relevant to this determination. In *Matychuk*, *supra*, the Board stated at 12:

> *[24] As noted by the Board in 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, at 832, we must balance the democratic right of employees to choose to be represented by a trade union pursuant to s. 3 of the Act, against the need to ensure that the employer*

> *has not used coercive power to improperly influence the outcome of that choice.*
>
> *[25] In Wells v. Remai Investment Corporation and United Food and Commercial Workers, Local 1400, [1996] Sask. L.R.B.R. 194, LRB File No. 305-95, at 197, the Board observed that it is alert to any sign that an application for decertification 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." However, not every suspicious or questionable act or circumstance will necessarily lead to the conclusion that an application has been made as a result of influence, interference, assistance or intimidation by the employer. As noted in 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, at 66, the conduct must be of the nature and magnitude that it compromises the ability of the employees to make the choice protected by s. 3 of the Act:*
>
> > *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.*
>
> *[26] Of course, as noted in Poberznek, supra, and many other decisions of the Board, evidence of such conduct is rarely direct or overt and the Board will consider whether more "subtle or indirect forms of influence may improperly inject the interests or views of the employer into the decision concerning trade union representation": see, Wells, supra, at 198.*

[55] In the present case, there is no direct evidence that this application was made on the advice of or as a result of influence or interference by the Employer. The question then remains is whether or not there is any evidence from which the Board can reasonably draw an inference of employer interference or involvement which is of a nature or extent that it would compromise the ability of the employees to decide whether or not they wish to be represented by the Union through a secret ballot vote.

[56] A relevant consideration on an application for rescission is whether the Applicant has a credible rationale for bringing the application. The Board stated in *Swan*, *supra*, at 458 and 459:

> *[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.*
>
> *[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:*
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> > *…[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.*
> >
> > *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*

[33] However, in Gabriel v. Saskatchewan Science Centre and United Food and Commercial Workers, Local 1400, [1997] Sask. L.R.B.R. 232, LRB File No.345-96, at 242-43, the Board emphasized that there are limits to its scrutiny of those reasons:

> *The Board has observed, however, that the requirement of a "credible rationale" does not mean that the Board should scrutinize the reasons given by employees for supporting an application for rescission to determine whether they are well-founded or articulated in a sophisticated way. In the Remai Investment Corporation decision, supra, the Board made this comment, at 198:*
>
> > *In this case, Ms. Wells herself put forward a variety of reasons why she and other employees wished to disengage themselves from a collective bargaining relationship. It is not necessary, in our view, that an applicant demonstrate that their views of the Union were completely accurate or fair, but that they had given the matter sufficient thought that we could be confident that they came up with the idea themselves. Though it was not possible to form a view concerning the motives of the two other employees who, along with Ms. Wells, spearheaded the campaign to gather support for the application, we are prepared to accept that the applicants advanced a "credible rationale" for the application.*

[57] The Applicant gave as his primary reason for bringing the rescission application his dissatisfaction with the Union for not replacing its former representative, Mr. Parker, in a timely fashion. The Applicant felt that the employees had "no representation" in Saskatchewan during the 6 1/2 months that the local was without a representative here. The Applicant opined that it was the filing of this application that prompted the Union to finally fill Mr. Parker's vacated position. A secondary reason for bringing the application was that the Applicant no longer wished to pay dues to the

Union, apparently feeling that it was not worthwhile given the lack of representation in Saskatchewan and that he could save that money by adequately representing himself.

[58] The Union urged us to draw a comparison with the situation in the *Swan* case, *supra*. In that case, the applicant gave as reasons for bringing her application that she was frustrated with the delay in obtaining a collective agreement and that the union dues were too onerous. The Board concluded that the applicant had advanced no sufficiently credible rationale for bringing the application because she had only been transferred from a non-unionized store to the unionized store a few weeks before making her application and did not have an interest in a collective agreement being reached in the unionized location. The Board also concluded that her rationale that the union dues were onerous and that the employees were worse off financially with having a union was not credible because the employees had not yet paid any dues and the applicant was unaware of what the employees would eventually have to pay and what the union might obtain for wages under a collective agreement. The Board, having found the applicant's reasons implausible, examined other circumstances of the case to determine where the idea for the application had really come from. Based on the relationship between the applicant, the owner and the owner's daughter, a letter she wrote to the editor of the University newsletter outlining the state of negotiations between the union and the employer while she was still employed at the non-unionized location, her transfer to the unionized location on the eve of the open period, her campaigning for her application immediately upon arriving at the unionized location, and the provision of employee information to assist with the application given to her by the owner along with the intransigence of the employer in bargaining, the Board concluded that the application was made on the advice of or as a result of influence by the employer and accordingly dismissed the application.

[59] Here, the Applicant felt that there was no representation because the Union was without a Saskatchewan representative following the resignation of Mr. Parker. While it may appear that the Applicant's rationale is not credible because he made no attempts to contact Mr. Sedor in Winnipeg for assistance during this time nor did he demonstrate much disadvantage resulting from the lack of a representative in Saskatchewan, he appears to have honestly held the belief, whether well founded or not, that he and the other employees had not been receiving the proper attention to which

they were accustomed when Mr. Parker was employed by the Union. Even though Mr. Sedor was present in Saskatchewan on a number of occasions during this time period, the Applicant had a perception that the employees were not receiving proper representation and it matters not to our analysis whether that perception was accurate or fair or whether the Applicant acted hastily in bringing the application for rescission.

[60] In our view, the circumstances in the case before us are more akin to those in *Saranchuk*, *supra*, where the Board examined whether the applicant had a "credible rationale" for bringing the application by considering whether that rationale was linked to the independence of the applicant from the employer. In this regard, the Board stated at 756:

> *[22] In the present case, Mr. Saranchuk rejects USWA because it costs him money and he is willing to forego the benefits of the collective agreement for himself and other employees in order to save the dues money. He is confident in his own abilities to keep his job and his current rate of pay and benefits. Although Mr. Saranchuk was unaware of the actual percentage used to determine his union dues, he was aware of the annual amount that he paid and the fact that union dues were calculated as a percentage of his income, not at a flat monthly rate.*
>
> *[23] The Board concludes that Mr. Saranchuk is somewhat typical of younger employees who are concerned more with immediate financial gain than they are with more long term needs such as health benefits, pensions and the like. Nevertheless, Mr. Saranchuk's explanation is a plausible one. As a result, the Board will not draw an inference of employer interference in this situation.*
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> . . . .
>
> *[25] There is no doubt that Mr. Saranchuk was confident in his ability to retain his job and his pay and benefits following the rescission application, even though he will not retain the benefit of the collective agreement if the application is successful. At that point, the terms and conditions of employment for the employees revert to the common law and to the minimum standards set out in The Labour Standards Act. There is no guarantee that the terms and conditions of work will remain the same, improve or worsen for employees once the certification Order is rescinded. In this regard, however, although Mr. Saranchuk may be overly optimistic in his own ability to retain the benefits he now enjoys, there is no*

> *suggestion in the evidence that his optimism has been encouraged or influenced by Capital.*

[61] While the Applicant may not have had a lot of knowledge of the consequences of decertifying the Union, he did not seem to be surprised by the fact that the Employer would not be bound to maintain the current level of wages and benefits. As with the applicant in *Saranchuk*, he was simply unconcerned about this. The Applicant seemed confident in his ability to make a decent living without the Union. Although the evidence led at the hearing suggested that the Applicant would be better off financially by paying tax deductible union dues given that the value of health and dental benefits to him well exceeded this amount in a one-year period, the Applicant appeared genuine in his feelings that he would be better off without the Union. While this might appear somewhat irrational at face value, it is not for us to determine whether his belief is accurate, fair or well founded. We must only be satisfied that he has given the matter sufficient thought and come up with the idea himself. We are satisfied that he did and we note that his testimony that he did not receive any assistance or advice from Mr. Woodley or Mr. Wiens in deciding to make or in making this application, was not shaken in any way.

[62] Other evidence led at the hearing also suggested that the Applicant had an honest belief that his overall financial position would not be worsened by the loss of union representation. In fact, the evidence concerning the business environment suggested that, even though there appears to be stiff competition with other non-unionized painting contractors where wage rates must be a factor, given the shortage of skilled labour and Mr. Woodley's evidence that wage rates are somewhat set in the industry and that he cannot afford to lose skilled employees, the Applicant might feel his position and level of wages are secure. Although that may be optimistic on his part, we refer to the following analysis in the *Evans* case, *supra*, where the Board stated at 326 and 327:

> *[50] . . . In the present case, Ms. Evans's espoused reasons for making the application for rescission are not particularly informed and might be considered by some more experienced observers to be rather shallow and short-sighted. We cannot, however, say that they are so implausible as to be incredible or the result of some bad faith design and not worthy of acceptance as a*

> *sufficient basis upon which she might honestly, if not soundly, conclude that the application is appropriate in her circumstances. She expressed confidence that she was capable of adequately representing herself in any relations with the Employer. There was no evidence that she did not decide to initiate the application on her own.*

[63] The whole of the evidence of the Applicant is, in our view, suggestive of an additional but related motive for bringing the application. The evidence led at the hearing and through the Applicant in particular, leads the Board to speculate that one of the Applicant's reasons for wishing to decertify the Union related to the fact that he was not hired as the Union's representative to replace Mr. Parker. His disappointment was obvious. Whether that in fact formed part of his motivation or not, there is simply no evidence in this case suggestive of Employer involvement in the formation of the Applicant's decision to bring the application.

[64] In addition to the plausible explanation given by the Applicant for making the application, the manner in which he proceeded with the application suggests that there was no employer influence or involvement in this application. The Applicant contacted the Board for information concerning how to decertify the Union after being referred there by an acquaintance in another unionized workplace. There is no suggestion that the Employer assisted in this regard. The Applicant's evidence, which went unchallenged at the hearing, suggested that he sought and received information from the Board on a number of occasions concerning the process for making such an application and he possessed a fair degree of knowledge in this regard. He was aware that the Employer was to have no involvement with the making of the application and of the requirement that the application be made in an open period with reference to the collective agreement. In our view, the application was not "too clean," as was suggested by the Union. Illustrative of this conclusion is the initial failed attempt at filing the decertification application. The Applicant stated that the Board rejected his initial application because it was made slightly prior to the open period and because the Applicant purported to file evidence of majority support for the application in the form of separate applications for rescission sworn by each of the employees who supported the application. Having become aware of these deficiencies, the Applicant took appropriate steps, which he stated were based on information provided by Board staff, to remedy the deficiencies and file a proper application before the Board.

[65] In our view, the Applicant demonstrated a proper knowledge and understanding of the process, similar to the applicant in *Matychuk*, *supra*, wherein the Board commented, at 13:

> *And, unlike the co-applicants in Rowe, supra, the Applicant was quite well-informed about the process for the application. She demonstrates that, contrary to the common assertion by employers and employers' counsel before the Board that it is not reasonable to expect an employee to initiate a rescission application by him or herself, an employee may indeed make an application without the "assistance" of the employer with reasonable diligence and a modicum of initiative.*

[66] Likewise, there were no facts from which to draw an inference of employer involvement or interference with respect to the gathering of support by the Applicant. The Applicant stated that he had the employee information required to solicit the support of the employees for the application through his role as shop steward. Although it appeared at the hearing that the Union disputed the Applicant's assertion that he was the shop steward in the workplace, it appeared that at least one employee who testified at the hearing believed that the Applicant was, in fact, the shop steward. In any event, we are satisfied that, whether it was because he was the shop steward or because this is a small workplace where a number of the employees have worked together for a fairly significant period of time, the Employer had no involvement in providing the Applicant with this information.

[67] Considering all of the evidence, it appears that the Applicant's discussions with employees concerning decertification and the gathering of support for the application occurred primarily on his own time but, at least in part, on company time. Some of these discussions occurred while driving to and from job sites and may well have occurred at the job sites themselves. Without more, however, this does not lead to an inference of employer involvement where the Employer had no knowledge that such discussions occurred. In addition, the fact that a number of employees may have left the job site without the Employer's permission in order to attend at Partners in Planning to sign statutory declarations in support of the application, in violation of the workplace rule regarding the same, does not lead us to draw an inference of employer influence or involvement. Had there been any evidence that the Employer knew or should have

known that the employees were in violation of the workplace rule and did nothing about it, we might have concluded otherwise. However, the workplace is somewhat unusual in that the Employer does not directly supervise the employees for the duration of their shifts, given that the employees work on several job sites away from the Employer's principal place of business.

[68] The Union was also concerned that the Employer influenced or interfered with the making of the application by reason of the employees' attendance at Partners in Planning to swear statutory declarations in support of the application, given (i) the relationship that the Employer, Mr. Woodley and Mr. Wiens had with Partners in Planning; and (ii) the public and formal nature of signing support in that manner.

[69] With respect to the first aspect concerning the relationship the Employer had with Partners in Planning, the submission appears to have two alternate arguments. The first of the arguments concerns the suggestion that the only way that the employees could have come to sign statutory declarations there was through either the Employer referring or making an appointment for the employees to attend at Partners in Planning for the purpose of swearing the statutory declarations. This conclusion cannot be supported on the evidence. In this regard, we accept the evidence of the Applicant, Mr. Wiens and Mr. Woodley that the Employer was not involved in arranging such a meeting. It is entirely believable that the idea to attend Partners in Planning originated with the Applicant, given that he painted their office premises and the residence of Ms. Zmetana. Nothing in the evidence of either Mr. Fockler or Ms. Zmetana (who we note was a credible witness with nothing to gain from her testimony) contradicted this or causes us suspicion.

[70] This situation is somewhat similar to the situation in *Cavanagh*, *supra*, where the Board concluded that the fact that the relationship of the key organizer of the decertification campaign was the son of the employer's lawyer was not in itself sufficient to establish employer influence where there was no evidence that suggested that the organizer was assisted in his efforts by the lawyer. Also, in that case, the Board held that the fact that some of the card signing took place in the office used by managers was insufficient to establish employer influence because managers were not generally on the

premises when the student employees were on duty and the managers were not aware that card signing took place in the workplace.

[71] The second argument concerning the relationship of the Employer to Partners in Planning appears to suggest that the Union believes there is an element of the apprehension of betrayal on the part of employees who went to Partners in Planning to swear the statutory declarations. In the *James Walters* case, *supra*, the Board commented on the apprehension of betrayal in the following terms at 96 and 97:

> *[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:*
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> > *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.*

[72] In our view, there is no element of an apprehension of betrayal. Based on the evidence as a whole, we cannot draw the conclusion that the employees would reasonably have believed that Ms. Zmetana would advise the Employer of their attendance at her office to support the application for decertification nor that they felt they had to attend or face negative consequences from the Employer. In the end, however, even if we were to conclude that there might have been a degree of apprehension of betrayal in the employees' attendance at Partners in Planning, it was

not to the extent that it compromised the wishes of the employees. The form of support evidence signed at Partners in Planning was not ultimately used in support of the application. New support evidence was gathered by the Applicant and submitted on the application. That form of support evidence was individually signed cards each expressing the employee's wish to decertify. There was nothing about the gathering of that support evidence that would suggest to us that any apprehension of betrayal in the first instance tainted the support evidence actually filed in support of the application. This fact alone distinguishes this case from the situation in *Arnold*, *supra*, where the apprehension was found to exist, although we note that, in *Arnold*, the apprehension of betrayal was only one factor of many that led the Board to conclude that the application had been made on the advice of or as a result of the influence of the employer. There are simply no other circumstances in this case that would support the drawing of an inference that the application was influenced or interfered with by the Employer.

[73] The second aspect of the Union's argument that the fact that the employees swore statutory declarations at Partners in Planning suggested that the support evidence is not a true reflection of the wishes of the employees because of the public and formal nature of such signing, also fails. The Union relied on the *Berner* case, *supra*, to suggest that the swearing of several applications for rescission in the presence of the same notary public was akin to filing petition-style evidence, which is routinely rejected by the Board. In Berner, the Board stated at 782 and 783:

> *[28] In any application to the Board for certification or rescission, the Board strives to maintain the confidentiality of the employees who support the application. This practice is adopted to prevent employers from discriminating against employees who support the union and to permit employees to have the freedom to support or not support an application for certification or rescission without fear of consequences. In a rescission setting, confidentiality is maintained for two purposes: (1) to allow employees to freely choose to support a campaign in opposition to the union; and (2) to allow employees to freely chose to support the union, without fear, in either case, of retaliation from the employer or the union.*
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> *[29] In this case, the method of applying for rescission violated the principle of confidentiality by disclosing to the Employer the names of all of the employees who purported to support the application for rescission. This approach also identifies those employees who do not support the application and places*

> *employees in the rather vulnerable position of knowing that if they do not sign an application for rescission, the Employer will know that they support the Union. The method of gathering support for the applications filed, that is, by having employees publicly declare their support for the rescission application, places undue pressure on employees to support the application for fear of employer reprisal. It is an untenable practice.*

[74] In the *Berner* case, *supra*, a majority of employees in a bargaining unit filed applications for rescission. The Board compared the public nature of this method of support to that of filing petition-style evidence which was typically rejected by the Board and the Board concluded at 783:

> *[32] For similar reasons, the Board is not confident that the applications filed in the present case are a true reflection of the wishes of the employees given the manner in which the support was garnered through the public filing of individual applications for rescission. As a result, the Board does not accept the evidence filed and dismisses the applications.*

[75] The present situation is distinguishable from that in the *Berner* case in that here, only one application for rescission was ultimately filed, the, Board having earlier rejected the filing of several applications sworn by the employees. While the initial gathering of support evidence may be considered more public in nature, that form of support was not actually used on the application and, therefore, the danger to be prevented, as stated in the *Berner* case, that it would be apparent to the Employer who did or did not support the application, did not arise in these circumstances. Even if we concluded that the gathering of that support lacked confidentiality and was therefore not representative of the wishes of the employees, the signed statutory declarations do not, in our view, invalidate the support evidence that was properly obtained by the Applicant and filed in a confidential manner with the application. There was no challenge by the Union to the form of support evidence actually filed with the application. For the same reasons, the fact that the statutory declarations were all sworn in the presence of the same notary who had a connection to the Employer does not, in our view, taint the actual support that was filed on the application.

[76] In our view, the relationship between the Union and the Employer does not cause us to conclude that the Employer has created an environment where a

decertification application might thrive. There was some evidence that suggested that the beginnings of the relationship between the Employer and the Union may not have been entirely smooth. The Employer was not pleased that the Union became certified in 2003 and made inquiries of the employees as to who was responsible for the organizing effort. In addition, there was a grievance filed by the Union in 2004 as a result of the Employer improperly assigning work and failing to remit dues. While this might be evidence that the Employer has not been an exemplar of neutrality and detachment regarding the issue of trade union representation, on a consideration of the whole of the evidence we are not satisfied that that the application was made on the advice of or as a result of the influence of or interference or intimidation by the Employer. These events occurred some time ago and the grievance that was filed in 2004 was resolved between the parties. While the evidence was somewhat sketchy at the hearing, there may have been occasions when the Employer failed to remit proper dues, although the Employer explained that this occurred as a result of errors by the payroll company and the Board has no reason to reject this explanation. The only recent evidence suggestive of any problems with the relationship pertains to the situation involving the Employer's assignment of piece work to Mr. Burns and the failure to remit dues in relation to Mr. Burns' wages.

[77] The Union argued that the Board's conclusions in the *Clayton Walters* case, *supra*, should apply here and that the Board should therefore dismiss the application pursuant to s. 9. The issue of the Employer violating the collective agreement through the payment of monetary compensation higher than that provided for in the collective agreement was dealt with in *Matychuk*, *supra*. We find the circumstances of the case before us to be more similar to those in the *Matychuk* case rather than those in the *Clayton Walters* case, *supra*, and agree with the Board's analysis in *Matychuk*, *supra*, where the Board stated at 14:

> *[30] With respect to the fact that the Applicant was paid wages at some times that were in excess of those prescribed under the collective agreement, we accept her evidence that she was not aware of the fact and that it had no influence on her decision to make the present application. Likewise, there is not sufficient evidence from which we are prepared to impute an improper motive to the Employer. In part because of the equivalency payment provided for in the first year of the wage grid in the collective agreement, the wage scheme is somewhat complex.*

> *Given a learning curve for all parties to and affected by the agreement, we do not find there is evidence that the wage anomalies were probably more than a simple mistake. Unlike the situation in Walters, supra, there is no evidence of secret individual negotiation of a wage significantly in excess of that provided for under the collective agreement.*

[78] In the present case, it appears that, through the negotiations between the Employer and Mr. White, there was either an agreement to allow the Employer to assign piece work and pay a certain rate for that work not provided for in the collective agreement or, at a minimum, an acquiescence by the Union to this arrangement. The Employer's failure to remit dues was, in our view, a result of confusion concerning the amount to be paid rather than an attempt to avoid payment altogether.

[79] The situation in the *Clayton Walters* case, *supra*, is further distinguishable. In that case, the Board concluded that, while the union had no knowledge of the higher wage rate paid to the applicant, the employees did have such knowledge and this undermined the union because the other employees obviously wanted to negotiate a higher wage rate just like the applicant had. This would lead the employees to the conclusion that they did not need the union. In addition, other factors suggestive of employer influence in the *Clayton Walters* case were that the employer had referred the applicant to the Board and that it was simply luck that brought him to file his application in the open period. Here the Union was not undermined as a result of the piece work assignment to Mr. Burns - the Union (at least Mr. White) was aware of the assignment of such work and, while the local may not have been aware that dues had not been remitted, there was no evidence that the employees had been aware of this fact, nor that the employees wanted a piece work arrangement in order that they could avoid payment of dues to the Union. Mr. Woodley was also clear that he did not intend to change the employees' basis of payment from hourly wages to piece work and provided a believable rationale for his position.

[80] A final issue raised by the Union concerns the completion of the statement of employment by the Employer. The Union referred the Board to its decision in *Vision Security*, *supra*, and expressed concerns that the Employer had sworn the statement of employment prior to the employees signing the same and that the Employer had added Mr. Eistetter's name after the document had been sworn. While we

agree with the Union that we cannot stress strongly enough that employers need to file proper statements of employment which include properly taken specimen signatures, we note that the addition of Mr. Eistetter's name to the statement of employment after it was sworn, while technically inappropriate, was done with a view to providing the Board with a completely accurate statement of employment. With respect to the fact that the employees provided their specimen signatures following the swearing of the document by Mr. Wiens, it is at least arguable on a reading of Sask. Reg. 163/72, as amended in s. 21, and the wording on the statement of employment form prescribed by the Regulations, that employee signatures are not necessarily required prior to the swearing of the document. In any event, we decline to make a finding with regard to either of these alleged deficiencies given that the Union accepted the composition of the statement of employment. Likewise, we decline to make any findings with regard to whether the Employer could have done anything more to allow for the presence of the Union's representative at the taking of the specimen signatures. One of the purposes for having a union representative present is to allow the union to confirm that the persons listed as employees are, in fact, employees. Here, the Union accepted the composition of the statement of employment and the issue is therefore moot.

[81] In conclusion, the Board finds that there is no evidence upon which it can base an inference that the application was influenced or interfered with by the Employer to warrant dismissal pursuant to s. 9 of the *Act*. As the application was filed in the open period and the Applicant has filed majority support with the application, the Board will order a secret ballot vote among employees in the bargaining unit who were employed on the date that the application was filed with the Board and who remain so employed on the date of the vote.

[82] As a final note, none of our conclusions concerning the effect of the Employer's failure to remit dues and other payments to the Union (in relation to the work performed by Mr. Burns) on the question of whether there was employer influence in this case should be considered as our approval of the Employer's actions or as a statement one way or the other concerning the Employer's liability for the same. Even if the Applicant is successful with this application following the vote, the Employer's obligations under the collective agreement during the time period prior to the rescission of the certification Order remain enforceable by the Union.

DATED at Regina, Saskatchewan this **14th** day of **August, 2006.**

LABOUR RELATIONS BOARD

Angela Zborosky
Vice-Chairperson