The Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. TEMPLE GARDENS MINERAL SPA and DEB THORN, Respondents

LRB File No. 217-05; June 15, 2006
Vice-Chairperson, Angela Zborosky; Members: Mike Carr and Gloria Cymbalisty

For the Applicant:	Larry Kowalchuk
For the Respondent, Temple Gardens Mineral Spa:	Larry LeBlanc, Q.C.
For the Respondent, Deb Thorn:	Kevin Mellor

Practice and procedure – Witness – Where witness refuses to answer question and refuses to comply with Board's order to answer question, Board determines consequences to witness personally and to party leading evidence through witness – Board strikes certain exculpatory evidence led by party, indicates intention to draw adverse inference from refusal to answer question and issues written order to be filed and/or enforced in Court of Queen's Bench.

Remedy – Contempt – Board reviews law relating to contempt in Board proceedings – Board concludes that, at minimum, Board has power of contempt *in facie* and may exercise that power where witness refuses to answer question – Under circumstances of case, Board declines to exercise power of contempt.

***The Trade Union Act*. ss. 5(e), 13, 14, 15, 18(c), 18(k), 18.1 and 42.**

REASONS FOR DECISION

Background:

[1] Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union" or the "Applicant") filed an application alleging a violation of s. 11(1)(b) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act")* by Temple Gardens Mineral Spa (hereinafter the "Employer") and its chief executive officer, Deb Thorn (the Employer and Ms. Thorn collectively referred to as the "Respondents"). The Union alleged that Ms. Thorn, on behalf of the Employer, communicated directly with bargaining unit members about fines levied by the Union on those of its members who crossed the picket line during a strike in 2005.

[2] The Employer filed a reply which indicated that, following the strike by the Union, the Union levied penalties against certain of the employees who returned to work during the strike and that this caused turmoil, discord and animosity in the workplace. The Employer took the position that all of the communications with the employees concerning the Union's disciplinary hearings and the issuance of fines were lawful and not in violation of the *Act*.

[3] Ms. Thorn did not file a reply with the Board.

[4] The Board scheduled the hearing of the application for March 20 and 21, 2006. Toward the end of the hearing day on March 20, 2006, Ms. Thorn, testifying on behalf of the Employer, was asked certain questions in cross-examination by counsel for the Union. Ms. Thorn refused to answer those questions and continued to refuse to answer those questions when ordered to do so by the Board. These Reasons for Decision deal with Ms. Thorn's refusal to answer those questions and to comply with the Board's order to do so.

Facts:

[5] The Union and Employer were parties to a collective bargaining agreement that expired on June 30, 2005. Negotiations for a new collective bargaining agreement, which commenced prior to June 30, 2005, broke down and the Union commenced a lawful strike against the Employer on July 1, 2005. A revised collective agreement was entered into on July 15, 2005 and was ratified by the members of the Union on approximately July 19, 2005 at which time the strike ended. The strike included a complete withdrawal of labour and the erection of a picket line at the Employer's workplace. During the course of the strike, some of the Union’s members crossed the picket line and worked for the Employer. The Employer stated that, by the end of the strike, approximately 73 out of 170 bargaining unit employees had crossed the picket line during the strike to return to work for the Employer and that it was through these employees, along with management employees and replacement workers, that the operation was able to carry on during the strike. The Union indicated that it had conveyed to its members that any member who crossed the picket line and worked for the Employer could be subject to discipline by the Union that could result in a fine equal to the net earnings earned by the employee during the strike. Following the conclusion of the strike, in an approximately October 2005, the Union did in fact take proceedings under its constitution and bylaws and the *Act* to

discipline employees who crossed the picket line during the strike. Several employees were fined by the Union as a result of those proceedings.

[6] This application by the Union alleged unlawful activity by the Employer and Ms. Thorn with respect to those employees who crossed the picket line and worked for the Employer during the strike. As part of the application, the Union alleges that it was told by some of the members who crossed the picket line that Ms. Thorn promised that she would pay any fines levied by the Union that resulted from the members working during the strike. The Union further alleged that Ms. Thorn asked the employees who received notice of discipline hearings to provide her with copies of the same and she advised those employees not to attend the hearings, saying that she would do everything she could to fight the Union on their behalf. In its application, the Union also alleged that Ms. Thorn called a meeting with an employee and a shop steward in late October 2005 allegedly to discuss a classification dispute but, in fact, at the meeting handed out a copy of a memorandum of settlement (containing the terms upon which the labour dispute was resolved) and berated the shop steward for pursuing fines against the employees. The Union also alleged that Ms. Thorn told the shop steward that neither the Union nor any other union in Saskatchewan had levied such fines against members and that the Union's decision to pursue the fines was like a "terrorist act, like in Iraq, a terrorist bomb going off in the middle of the Spa." The Union also alleged that Ms. Thorn stated that she would fight the Union's decision "all the way, 100%," doing everything in her power to interfere with disciplinary proceedings by the Union. In its application, the Union alleged that Ms. Thorn called an "emergency meeting" with housekeepers to discuss workplace matters however, when the housekeepers attended the meeting, Ms. Thorn discussed with the housekeepers the issues of the strike, the memorandum of settlement and the employees who crossed the picket line.

[7] In the Union's application, the Union expressed its understanding that Ms. Thorn was taking the position that the Union, as a condition of the settlement of the labour dispute, had agreed not to pursue fines against its members. The Union claims that, during negotiations for the resolution of the labour dispute, the Employer had attempted to offer the Union a monetary settlement if the Union agreed not to pursue fines against its members. The Union indicated that it had refused the Employer's offer and advised the Employer that it considered it an unfair labour practice for the Employer to attempt to interfere in the administration of the Union.

[8] In the Employer's reply to the application, the Employer denied that it had engaged in an unfair labour practice or other violation of the *Act* as alleged by the Union. The Employer stated that the levying of penalties by the Union, including both fines and loss of seniority, generated hostile discussion among the employees and that it produced "considerable stress, anxiety and potential resignations" giving “rise to substantial turmoil, discord and animosity in the workplace." The Employer stated that it was in this context that Ms. Thorn “attempted to put the penalized employees at ease by advising them that she would do all she could to support them in resisting the penalties.” In response to the Union’s allegations concerning the meeting over the classification issue, the Employer acknowledged that Ms. Thorn attempted to dissuade the shop steward from proceeding with the enforcement of penalties against those employees who crossed the picket line during the strike. With respect to the Union’s allegations of impropriety during the meeting with the housekeepers, the Employer indicated that a number of issues were discussed in the meetings "ranging from lack of supplies to storage constraints to continued hard feelings over the strike."

[9] At the hearing of the application on March 20, 2006, the Union led evidence concerning the allegations in the preceding paragraphs through four witnesses – three employees of the Employer and the Union’s representative, Mark Hollyoak.

[10] Following the conclusion of the Union's case, the Employer led the evidence of Ms. Thorn. Ms. Thorn was questioned by legal counsel concerning the allegations made by the Union and the contents of the reply filed by the Employer (sworn by Ms. Thorn on behalf of the Employer). As part of that testimony, Ms. Thorn stated that a member of the management team in charge of human resources had met with members of the Union who had crossed the picket line and had received copies of the notices of hearing sent by the Union to them. Ms. Thorn also testified that she had met with a number of the employees who had been fined by the Union and had indicated to them that she was going to do everything she could to support them and would do everything in her power to see that the fines were not implemented. In her cross-examination by counsel for the Union, Ms. Thorn was asked for more details of those discussions, including the identity of those employees who met with her to discuss the fines. Ms. Thorn refused to answer the question.

[11] When Ms. Thorn refused to answer the question posed by counsel for the Union, the Board directed her to answer the question. Ms. Thorn advised the Board that she was not going to answer. The Board took a brief recess asking Ms. Thorn to think about her position. Upon the resumption of the hearing, legal counsel for the Employer raised an objection to the relevance of the Union's question. He argued that the identity of the employees was irrelevant and was merely a fishing expedition as Ms. Thorn had admitted that she had discussions with a handful of employees who were upset about the fines. Any basis for disclosure of the employees' names, he argued, was outweighed by Ms. Thorn's concerns and by Ms. Thorn having to listen to the Union's counsel repeatedly refer to her daughter as a "scab." The Board ruled that the question was relevant and was within the proper scope of cross-examination. At the hearing, the Board explained that the question arose in direct response to both Ms. Thorn's testimony in her examination in chief and the reply she swore on behalf of the Employer. The reply states, in part, as follows:

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> *(f) In October 2005 certain of the employees who work during the strike received notices from the Union stating they had been penalized by the imposition of fines and by a loss of seniority.*
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> *(g) The levying of these penalties and hostile discussions among employees concerning the enforcement of the penalties produced considerable stress, anxiety and potential resignations on the part of those who were penalized and gave rise to substantial turmoil, discord and animosity in the workplace.*
>
> *(h) In this context**, the Employer's CEO attempted to put the penalized employees at ease by conveying to them, in so many words, her intention to do all she can to support them in resisting the penalties**.* [***emphasis added***]

[12] In the Board's view, the answer to the question asked by the Union in Ms. Thorn's cross-examination was not only required to test the veracity of the statements made by Ms. Thorn in her testimony, and sworn to in her reply, but was obviously relevant to the question of whether Ms. Thorn engaged in an unfair labour practice by interfering with the penalized employees' relationship with the Union in matters which should be of no concern to

the Employer. Ms. Thorn admitted to having these types of conversations with the penalized employees and attempted to justify her involvement in supporting these employees to resist the fines. Ms. Thorn would not, however, elaborate on the type of "support" she was giving the employees to resist the penalties levied by the Union. The type of "support," or what Ms. Thorn told the employees in response to what they told her, is directly relevant to the question of whether she and/or the Employer engaged in an unfair labour practice or a violation of the *Act*. The provision of the names of the employees would allow the Union to test the veracity of Ms. Thorn's statements, through speaking to the employees involved and/or subpoenaing them as witnesses. This is particularly so where Ms. Thorn did not outline the nature of the conversations in detail and stated that the only type of support she offered was "moral" in the sense of asking the employees not to quit their jobs and saying that she would do all she could to support them and everything in her power to stop the Union from implementing the fines.

[13] After giving its ruling on the relevance of the question, the Board advised Ms. Thorn that it was directing her to answer the question, failing which it would issue an order to that effect. Ms. Thorn proceeded to provide her rationale for her refusal to answer the question wherein she stated that she had been truthful and honest about meeting with the employees when she could have easily said she had never met with them. In her opinion, if she disclosed the names of the employees who met with her in a confidential and trusting relationship, they would be "picked on" by the Union. She was prepared to answer only if she could do it in a confidential manner to the Board. The Board proceeded to order Ms. Thorn to answer the question and then adjourned the proceedings to the next hearing day in order to provide Ms. Thorn with the opportunity to reconsider her position and to speak to legal counsel about the effect of the Board's order and her obligations. The Board granted permission to Mr. LeBlanc to speak to Ms. Thorn for these purposes, even though she was under cross-examination.

[14] At the outset of the hearing on March 21, 2006, the Board advised the parties that it was considering the possibility of striking some of Ms. Thorn's evidence if there was a continued refusal by her to answer the question in issue and the Board offered counsel for the Employer further time to discuss the matter with Ms. Thorn. Counsel advised that they had had ample time for discussion and did not require an adjournment. In order to clear up any possible confusion in terms of the precise question that Ms. Thorn was being asked in cross-examination and because counsel for the Union had been "cut-off" in his question by Ms. Thorn's refusal, the Board called upon counsel for the Union to repeat the question asked in cross-examination.

Counsel for the Union concisely repeated the question in words to the effect: "Ms. Thorn, you testified you had had discussions with a number of employees around the issue of fines and your support for those employees. Could you please give us the names of those employees and, for each one, can you tell us when you talked to them and where, [and] the nature of a conversation?" In response, Ms. Thorn indicated that she had talked to a couple of employees but that she was otherwise not prepared to answer counsel's question. For clarification, the Board asked Ms. Thorn whether she was refusing to answer the question concerning the names of the employees she spoke to about the fines and where and when those discussions took place, as well as the nature of the conversations she had with those employees. Ms. Thorn responded that she was refusing and that she honestly believed that answering the question "would jeopardize our situation." The Board then directed Ms. Thorn to answer the question at which time Ms. Thorn indicated she still refused to answer the question.

[15] Before the Board took an adjournment to determine how it would further proceed with the matter of Ms. Thorn's refusals, counsel for the Union indicated that the Union wished to make submissions on the consequences of Ms. Thorn's refusals to answer the question and comply with the Board's order. The Union then proceeded to make submissions concerning the appropriate Board response – arguing that it should not be limited to striking portions of the evidence and that it could include both enforcing the Board's order through the Board citing Ms. Thorn for contempt and penalizing her and/or through the Board filing an order with the Court of Queen's Bench for enforcement through the court system. During the Union's submissions, counsel for the Employer objected to the nature of the submissions and indicated that the Employer wished to argue the issue of compellability to answer the questions. After counsel for the Employer acknowledged that he had made such submissions the day prior, the Board reiterated its ruling on the relevance of the question in issue. Although the Union was also asking for the details of and the circumstances surrounding Ms. Thorn's conversations with the employees, it was clear that all of the question was relevant to the proceedings for the same reasons as the portion of the question relating to disclosure the names, that is, it goes directly to the issue of whether there was interference by the Employer in the administration of the Union. Prior to the conclusion of the Union's submissions, counsel for the Employer suggested that a date be set aside to address the question of remedy for Ms. Thorn's failure to answer a proper question and the Board's order directing her to answer that question.

[16] The Board took a brief recess to consider how to further proceed. When the Board returned to the hearing room, counsel for the Employer advised that the Employer had made a proposal to the Union to permit Ms. Thorn to testify *in camera*, off the record, but that the Union had refused the Employer's proposal. Upon reconvening the hearing, the Board stated on the record that the proposal the Employer made to the Union to permit Ms. Thorn to testify *in camera*, off the record, was not acceptable to the Board and that the Board had already ruled that the question was proper and relevant and that it was necessary that it be asked and answered on the record. If Ms. Thorn was permitted to give her answers *in camera*, off the record, it would give rise to all sorts of difficulties, including the extent to which the Board could utilize her answers in its determination of the application given the fact that its decisions are published and are therefore available to the public. It would also give rise to a further difficulty with respect to the extent to which the Union could utilize the information, whether it be to cross-examine Ms. Thorn further in relation to the nature of the conversations and whether that evidence would also be *in camera*, off the record, and, most importantly, whether the Union could use the information to conduct further inquiries concerning the issue and lead rebuttal or reply evidence utilizing the disclosure of the names. In light of this, the Board, having found the question to be proper, determined to follow its usual procedure of conducting the hearing in public. We note that, if the intention of the Employer was that Ms. Thorn would simply answer the question *in camera* but *on the record* (although this was not the Board's understanding of the Employer's request), there would be no substantive difference, in the opinion of the Board, between the procedure proposed by the Employer and the Board's usual procedure of holding the hearing in public.

[17] Following the Board's determination that the question and answer must be on the record, the Board advised the parties that it considered the matter of Ms. Thorn's failure to answer the question in issue, following the Board's order to that effect, to be an extremely serious matter for the Board and the labour relations community and therefore the Board would grant the Employer's request to set aside a separate date "to hear the submissions of the parties concerning the issue of the appropriate Board response to Ms. Thorn's refusal to answer Union counsel's questions, and her refusal to comply with the Board's order to answer those questions." With the consent of the parties, the date for hearing those submissions was set for April 18, 2006.

[18] It may also be noted that, at the outset of the hearing on March 21, 2006, Ms. Thorn was asked questions about the names of employees who left copies of the Union's notices of hearing with Carole Remple, another member of management. The Union also requested production of those documents outlining the fines assessed to those employees which were left with Ms. Remple. Ms. Thorn was not aware whether the documents were still in the Employer's possession and indicated she would have to check. Counsel for the Employer objected to the production of these documents. The Board indicated that it would be following its usual procedure with respect to subpoenaed documents and orders for production, where the Board would order that the documents be produced for the next hearing day and, if the Employer objected to the disclosure of the documents to the party opposite or use of the documents in the hearing, the Employer could make an objection after producing the documents to the Board, at which time the Board would review the documents and make its ruling. The Board therefore ordered the production of any documents in the possession of the Employer concerning the notices of trial and the notices of fines. These Reasons for Decision do not deal with that order for production because the Employer has not yet had the opportunity to produce those documents and the Board has not yet ruled on their admissibility. That issue will be dealt with when the main application resumes for hearing.

[19] In addition, at the outset of the hearing on March 21 2006, the Board indicated to the parties that it had had sufficient opportunity to consider a non-suit motion raised by the Employer at the end of the Union's case on March 20, 2006. The Board advised the parties that it had come to the conclusion that the non-suit motion should be dismissed and indicated that reasons for this decision would follow. The Board's reasons for its determination of the non-suit motion will be set out in the Reasons for Decision on the main application.

[20] At some point between March 21, 2006 and April 18, 2006, Ms. Thorn retained independent legal counsel, Kevin Mellor. Mr. Mellor sought an adjournment of the date set, through the consent of the parties, for hearing the parties' submissions and, after failing to obtain consent to the same, made an application to the Board's Executive Officer. Mr. Mellor said that he required an adjournment in order to obtain the transcripts of the entire proceedings before the Board to date. The Board's Executive Officer denied the request for an adjournment on the basis that a whole transcript was not necessary in order for Mr. Mellor to properly represent Ms. Thorn at the April 18, 2006 hearing date as the only issue to be argued on that date was the consequences for Ms. Thorn's failure to answer a certain question and comply

with the Board's order to answer that question. The Executive Officer, however, directed that a portion of the transcript be prepared prior to the April 18, 2006 hearing date. The portion directed to be produced would contain the question that Ms. Thorn had refused to answer, her refusal, the Board's order directing her to answer the question, and the scope of submissions required by the parties on April 18, 2006. This transcript was in fact prepared and delivered to the parties prior to April 18, 2006.

[21] On April 18, 2006, the parties attended the hearing to make submissions. Mr. Kowalchuk was present on behalf of the Union and Mr. LeBlanc was present on behalf of the Employer who now had a member of the board of directors of the Employer as his instructor. Mr. Mellor appeared on behalf of Ms. Thorn. Prior to hearing the parties' submissions, the Board provided Ms. Thorn with an additional opportunity to answer the question in issue however, counsel for Ms. Thorn indicated she continues to refuse to do so.

[22] Ms. Thorn's counsel renewed his request for an adjournment of the proceedings in order that he could obtain a transcript of the entire proceedings to date. He stated that without the transcript he was not adequately prepared and would be unable to appropriately represent Ms. Thorn. Mr. Mellor maintained that it was necessary for him to understand what was said by the Board and by legal counsel and Ms. Thorn's response. In his view, this was necessary because there was a question of Ms. Thorn's liberty at stake, Charter issues were involved, and Ms. Thorn had a right to know the specific offence she was charged with given that the Board may be deciding whether to cite her for contempt. He also suggested that the portion of the transcript that he had received to date was nearly unusable because in many places the testimony and proceedings were "inaudible."

[23] The Union opposed the request for an adjournment, pointing out that Ms. Thorn had able counsel (Mr. LeBlanc) representing her at the hearing and that no suggestion had been made that she was not properly advised by that legal counsel. The Union's counsel maintained that Ms. Thorn's legal counsel should be able to rely on another lawyer's record of the proceedings and Ms. Thorn's instructions to him and that, in any event, the proceedings up to the point where Ms. Thorn refused to answer the question were not relevant to the submissions to be made to the Board on April 18, 2006. The portion of the transcript that was made available in advance of the hearing contained sufficient information for Mr. Mellor to represent Ms. Thorn in relation to the subject matter at hand. Counsel for the Employer

indicated his view that, with the specter of contempt on the horizon, Ms. Thorn, as an individual, should receive representation and the advice of separate legal counsel and he also suggested that the context in which the question was asked and answered might modify or mitigate the Board's approach to dealing with this issue. At the conclusion of the submissions, the Board indicated that it was denying Mr. Mellor's request for an adjournment with written reasons for that ruling to follow. These Reasons for Decision include the Board's reasons for its decision to deny the request for an adjournment.

[24] While the Board invited counsel for Ms. Thorn to make submissions first, counsel for Ms. Thorn indicated that he was present to make submissions concerning the issue of why the Board should not cite Ms. Thorn for contempt and stated that he and counsel for the Employer had agreed that the Employer would proceed first in argument. In light of this agreement, the Board allowed counsel for the Employer to make submissions first. Following submissions by counsel for the Employer, the Board heard submissions from counsel for Ms. Thorn and then counsel for the Union, with the opportunity for the parties to provide reply argument. All parties made extensive arguments, the details of which are set out below. During the course of argument, counsel for the Employer and counsel for Ms. Thorn indicated that they did not understand that the scope of issues the Board wished to have argued before it included the possibility that the Respondents might be held in contempt of the Board and sentenced, without a further hearing. While the Board did not accept that these parties misunderstood the scope of submissions required (at a minimum that should have been apparent from the portion of the transcript made available to the parties in advance of the April 18, 2006 hearing date), the Board proceeded with caution and allowed each of counsel for the Employer and counsel for Ms. Thorn to provide written submissions to the Board on the matters in question within two weeks of the date of the hearing. The Board also ordered that the Union would have a further week to respond to those written submissions. All parties provided the Board with their written submissions within the time mandated by the Board. The Board has carefully reviewed the parties' written submissions.

Relevant statutory provisions:

[25] The relevant provisions of the *Act* include the following:

5. The board may make orders:

(e) requiring any person to do any of the following:

(i) to refrain from violations of this Act or from engaging in any unfair labour practice;
(ii) subject to section 5.1, to do anything for the purpose of rectifying a violation of this Act, the regulations or decision of the board;

13 A certified copy of any order or decision of the board shall be filed in the office of a local registrar of the Court of Queen's Bench and shall thereupon be enforceable as a judgment or order of the court, and in the same manner as any other judgment or order of the court, but the board may nevertheless rescind or vary any such order.

14(1) In an application to the court arising out of the failure of any person to comply with the terms of an order filed pursuant to section 13, the court may refer to the board any question as to the compliance or noncompliance of such person or persons with the order of the board.

(2) The application to enforce an order of the board may be made to the court by and in the name of the board, any trade union affected or any interested person, and upon such application being heard the court shall be bound absolutely by the findings of the board and shall make such order or orders as may be necessary to cause every party with respect to whom the application is made to comply with the order of the board.

(3) The board may in its own name appeal from any judgment, decision or order of any court affecting any of its orders or decisions.

15(1) Any person who takes part in, aids, abets, counsels or procures any unfair labour practice or contravenes any provision of this Act is, in addition to any other penalty imposed on him pursuant to this Act, guilty of an offence and liable on summary conviction:

(a) for a first offence:

(i) in the case of an individual, to a fine of not less than $50 and not more than $1000;

(ii) in the case of a corporation or trade union, to a fine of not less than $1000 and not more than $10,000;

(b) for a second or subsequent offence, to a fine in the amount set out in clause (a) and to imprisonment for a term of not longer than one year.

(2) Any person who fails to comply with any order of the board, whether made prior to or after the coming into force of this section, is, in addition to any other penalty imposed on him under this Act, guilty of an offence and liable on summary conviction:

(a) in the case of an individual, to a fine of $50;

(b) in the case of a corporation or trade union, to a fine of $250;

for each day or part of a day during which the non-compliance continues.

18 The board has, for any matter before it, the power:

(c) that is vested in the Court of Queen's Bench for the trial of civil actions to:

(i) summon and enforce the attendance of witnesses
(ii) compel witnesses to give evidence on oath or otherwise; and
(iii) compel witnesses to produce documents or things;

(k) to adjourn or postpone the proceeding;

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18.1 The members of the board shall have the same privileges and immunities as a judge of the Court of Queen's Bench.

42 The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders require compliance with provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.

Employer's arguments:

[26] The Employer took the position that Ms. Thorn should not be cited for contempt, even if the Board has the power to do so. The Employer submitted that nothing would be gained if the Board cited Ms. Thorn for contempt and that the only Board response to her refusals should be to disregard certain evidence of the Employer, preclude the Employer from calling further evidence and/or strike certain portions of the Employer's reply. The appropriate response should be measured by what the Employer might gain from Ms. Thorn's refusal to answer the questions in issue. In this regard, the Employer's counsel indicated that the Employer understood that such a remedy could negatively affect its defence to the Union's application and indicated that the Employer specifically waived any application of the *audi alteram partem* rule.

[27] The Employer relied on *Scheidt v. Retail, Wholesale and Department Store Union and Pineland Co-op*, [1995] 1st Quarter Sask. Labour Rep. 251 and 256, LRB File No. 239-94 where the union was granted a mid-hearing adjournment, in order to produce certain evidence, on the condition that the union would provide details concerning the identity of employees and management involved in certain alleged conversations, the time period when these events occurred and the subject matter of the conversations. The union failed to provide that information to the Board, without explanation and the Board disallowed the union's proposed evidence. Counsel for the Employer also pointed out that, in a similar situation in *Durie Tile and Marble Ltd*., [2005] O.L.R.D. No. 867, the Ontario Labour Relations Board came to a similar conclusion and ordered the preclusion of certain evidence and drew an adverse inference concerning unproduced documents. The Employer also cited *United Food and Commercial Workers Union v. Retail, Wholesale and Department Store Union,* [1980] Aug. Sask. Labour Rep. 43, LRB File Nos. 103-80 & 092-80, in support of the proposition that the power to cite for contempt should be used sparingly and only to prevent undue interference or address non-compliance by a party and noted that the Board stopped short of citing the union for contempt in that case despite the fact that the Board deplored the conduct used by the union which it found was intended to influence the Board's decision. The Employer also made reference to *Dreher v. Watergroup Canada Ltd. and Retail, Wholesale and Department Store Union*, [1993] 3rd Quarter, Sask. Labour Rep. 131, LRB File No. 033-93.

[28] In urging the Board not to cite Ms. Thorn for contempt, the Employer expressed the view that Ms. Thorn's refusal was not a public one and not intended to deprecate the authority of the Board. Counsel for the Employer submitted that Ms. Thorn showed respect for the Board and that there was no "evasiveness, obfuscation, insolence, unruly conduct" or anything similar on her part. She merely had concerns over disclosing the identity over the employees in question. The Employer argued that the questions in issue were not relevant because the main substance of the discussions were not in dispute. Even if the information sought was of marginal interest, that interest is outweighed by Ms. Thorn's concerns in disclosing the information, that is, her desire to protect the employees from repercussions by the Union.

[29] The Employer pointed to certain mitigating factors that the Board should take into account. In the Employer's view, Ms. Thorn's conduct did not approach the level of disrespect which warrants a citation for contempt. Counsel for the Employer argued that Ms. Thorn's intent was not to frustrate the process and pointed to her offer to answer the questions *in camera* as evidence of this. He suggested that Ms. Thorn's offer to give the evidence in confidence and not as part of the public proceedings evidenced her desire not to frustrate the process. The Employer also pointed to the fact that the Union, in continually referring to those employees who crossed the picket line as "scabs," knowing that Ms. Thorn's daughter was one of those employees, was contemptuous of Ms. Thorn. The Employer argued that "scab" is a term of abuse or contempt that might be appropriate on a picket line but not in the workplace and certainly not in a public hearing. In this regard the Employer relied on *Russell and Treasury Board (Employment and Immigration),* [1992] C.P.S.S.R.B. No. 165 (P.S.S.R.B.); *Western Plywood (Alta.) Ltd. v. International Woodworkers of America, Local 1-207 and Ewaschuk*, [1965] 54 W.W.R. 210 (Alta. C.A.); *Circuit Graphics Ltd. v. Canadian Association of Industrial Mechanical and Allied Workers, Local 1 and Jef Keighley* (1981), 31 B.C.L.R. 5 (B.C.S.C.); and *Doyle v. International Association of Machinists and Aerospace Workers, Local 1681* (1991), 110 A.R. 222 (Alta. Q.B.).

[30] The Employer also made submissions concerning the appropriate procedure should the Board determine that it has the power of contempt. The Employer argued that the Board must first properly cite Ms. Thorn for contempt and that "citing" is the method by which notice is given that the conduct is contemptuous and the individual will be required to "show cause" why he or she should not be held in contempt. Relying on *R. v. K(B),* [1995] 4 S.C.R. 186 (S.C.C.) and *Gariano v. Texture Will Travel (Edmonton) Ltd.,* [2004] A.J. 433 (Alta. Q.B.), the Employer submitted that, even if summary proceedings are warranted, the individual must be put on notice that he or she faces a show cause hearing to answer to the "specific charge of contempt" and that, if contempt is found, the individual must have the opportunity to make submissions. The charge itself must be distinctly and specifically stated and according to *R. v. Fizell*, [2001] M.J. No. 22 (Man. Prov. Ct.), a person charged with contempt is entitled to a fair trial and all other protections afforded by the principles of natural justice.

Ms. Thorn's arguments:

[31] At the hearing, counsel for Ms. Thorn submitted that the appropriate Board response was as argued by counsel for the Employer, that is, to disregard certain evidence or attach less weight to certain evidence. He argued that the Board could not or should not cite Ms. Thorn for contempt and that it could not find Ms. Thorn in contempt through the current proceeding.

[32] Counsel for Ms. Thorn disputed the Board's jurisdiction to cite Ms. Thorn for contempt. Firstly, he argued, that the Board is not a s. 96 court and is therefore without the authority to undertake contempt proceedings. He argued that only superior courts have that power. It was also argued that, because the Board is not a "court of record" and because the *Act* does not specifically vest in the Board the power to cite for contempt, either *in facie* or *ex facie*, the Board cannot make a finding of contempt against Ms. Thorn. In this regard counsel pointed out that the legislation governing the Provincial Court for Saskatchewan, the Saskatchewan Court of Queen's Bench and the Saskatchewan Court of Appeal, specifically states that they are each a "court of record" while *The Trade Union Act* contains no such express provision. In addition, the *Act* does not otherwise expressly provide the Board with the power to cite for contempt. In support of these propositions, counsel for Ms. Thorn referenced the work of three learned authors and the Supreme Court of Canada's decision in *C.B.C. v. Quebec Police Comm.,* [1979] 2 S.C. R. 618.

[33] At the hearing on April 18, 2006, counsel for Ms. Thorn submitted that the appropriate course of action for the Board was to file a copy of its order in the Court of Queen's Bench. This would allow the Court to review the Board's decision and make a determination whether Ms. Thorn should be cited for contempt.

[34] Counsel for Ms. Thorn argued that, even if the Board had the power to cite for contempt, the proper procedure for citing for contempt had not been followed by the Board. He relied on *R. v. K(B), supra*, as well as a family law decision of the Saskatchewan Court of Queen's Bench (for which he gave no name or citation) and submitted that the Union must first bring a motion before the Board to have Ms. Thorn cited for contempt at which point the Board must schedule a "show cause" hearing and provide notice to Ms. Thorn. The grounds for the motion and the charging motion itself must be clear. A summary hearing is then held to

determine whether Ms. Thorn should be cited for contempt with the burden of proof being that of "beyond a reasonable doubt." At that point the Board would determine whether an actual contempt had occurred and, if so, would set a hearing date to determine the appropriate penalty for that contempt.

[35] In his written submission to the Board, counsel for Ms. Thorn proposed an alternative course of action for the Board to consider in disposing of the matter. He submitted that the Board should allow him the opportunity to provide full written submissions on the relevance of the disclosure of the employees' names. In his view, the issue of Ms. Thorn's refusal arose upon the determination by the Board that the subject question was relevant "without adequate submissions regarding the relevancy or more importantly the privileged and confidential nature of the discussions that Deb Thorn had with employees" which is protected by the *Wigmore* test as discussed in the Supreme Court of Canada's decision in *R. v. Gruenke* (1991) S.C.R. 263. Once the Board reviews these full written submissions, if it still finds the conversations relevant and not privileged, the Board should proceed to hear Ms. Thorn's answers *in camera*. Counsel argued that this process would allow the Board to render a decision on the unfair labour practice based on its merits and after considering all the evidence the Board heard and would also allow Ms. Thorn to fully explain the reasons for her refusal. Counsel took the position that Ms. Thorn was not previously permitted the right to provide a full answer for her refusal before the Board and the Board required this information in order to determine the relevance of the question and to determine sanctions for contempt, if warranted. (Counsel for Ms. Thorn had, earlier in his written brief, outlined Ms. Thorn's reasons for her refusal to answer the question in issue. Ms. Thorn claims the conversations were privileged and made in confidence to her and that disclosing their names would cause the employees to be subject to reprisals by the Union's membership that would make it unbearable for them to continue to work for the Employer.)

[36] In the further alternative, counsel for Ms. Thorn, in his written submissions argued that the appropriate consequence was to strike evidence but only that rationally connected to Ms. Thorn's refusal to answer the question in issue. The Board should not strike the entire reply or the evidence that the Board accepted as proven, as that would not assist the process of the Board and its objective to render a correct decision.

[37] At the hearing on April 18, 2006, the Board posed a question to counsel for Ms. Thorn -- should the Board determine that it had the power to find Ms. Thorn in contempt *in facie*, did counsel have any submission as to what the appropriate penalty might be? Counsel for Ms. Thorn refused to answer that question stating that it was simply impossible for the Board to make such a decision at this point in the process. The Board asked counsel for Ms. Thorn to address that issue in written argument, however counsel for Ms. Thorn did not take the opportunity to do so.

Union's arguments:

[38] Counsel for the Union argued that s. 5(e) of the *Act* provides the Board with the broad power to do anything to rectify any violation of a decision of the Board. The Union also argued that s. 13 of the *Act* requires the Board to file its order with the Court of Queen's Bench in order that it may be enforceable as any other judgment or order of the court and that there is no discretion not to do so. With respect to s. 14(1), counsel for the Union submitted that this provision allows the Court to refer any question as to non-compliance with a Board order back to the Board for a determination while s. 14(2) of the *Act* allows the Board or a party to make an application to the Court to enforce an order of the Board necessary to ensure compliance with the order of the Board.

[39] The Union relied on s. 18(c)(ii) for the proposition that the Board had the power to enforce compliance with its order to Ms. Thorn to answer the question in issue. Otherwise, Ms. Thorn would not be "compelled to give evidence." The Union also pointed to s. 42 of the *Act* to suggest that it gives the power to the Board to make any orders incidental to the attainment of the objects of the *Act* including the making of orders for compliance with the *Act* and of decisions of the Board.

[40] During oral submissions, the Union took the position that the responsibility to enforce Board orders lies with the Board, not with the Applicant. The Union urged the Board to file its order and take enforcement proceedings on the Board's initiative. In its written submission the Union urged the Board to file its order directing Ms. Thorn to answer the question in issue in order that it could take enforcement proceedings in the Court of Queen's Bench.

[41] The Union argued that the appropriate Board response should include an action against both the Employer and Ms. Thorn – that, by reason of the position that the Employer was taking in the proceedings, it was "taking part in, aiding, abetting, counseling" the continued refusal by Ms. Thorn to answer the question in issue. The Union took the position that Ms. Thorn was not before the Board in her personal capacity but rather on behalf of the Employer. It was the Employer that filed a reply to the application that Ms. Thorn signed on its behalf. The Union argued that, unless the Employer's Board of Directors had indicated that it had instructed Ms. Thorn to answer the question, the Employer was also responsible for Ms. Thorn's continued refusals. The Union referred to s. 12 of the *Act* which, in its view, makes an employer liable for an employee who does not do what he or she is instructed to do (s. 12 states that "no person shall take part in, aid, abet, counsel or procure any unfair labour practice or any violation of the Act"). The Union proposed that the Board find the Employer and Ms. Thorn guilty of an offence for their failure to comply with an order of the Board and, under s. 15(1), fine the Employer $10,000.00 and, under s. 15(2), impose a continuing daily fine of $250.00 for each day the non-compliance continues, as well as similar fines against Ms. Thorn under ss. 15(1) and (2).

[42] The Union argued that it was entitled to the answer to the question it had asked and urged the Board to compel that answer through a daily and continuing fine until the answer is given. An alternative to an order imposing a fine is an order that Ms. Thorn pay compensation to the Union. The Union argued against the Employer's proposition that there is nothing to be gained by citing Ms. Thorn for contempt. By failing to enforce compliance with the Board's order and simply disregarding the evidence given by Ms. Thorn, the Board would be allowing the Employer to avoid cross-examination on the reply filed by it. Ms. Thorn and the Employer should know the consequences of putting this information in a sworn reply – they cannot allege certain facts and not be tested on those facts. The Union took the position that the Board had followed proper procedure to find Ms. Thorn in contempt and that nothing could be gained by holding another hearing. Ms. Thorn was given several opportunities to answer the question in issue and adjournments to consider her refusal and to obtain legal advice on the consequences of her refusal. Her actions could only be characterized as continuous defiance of the Board.

[43] The Union referred to several cases in support of the proposition that there has been an increasing trend in the lack of respect for labour relations boards and that the courts are bound by and will enforce the orders of a labour relations board. They include, among others: *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. (c.o.b.*

Woolco), [1992] 4th Quarter Sask. Labour Rep. 50, (1992) 106 Sask. R. 1 (Sask. Q.B.); *United Food and Commercial Workers, Local 1400 v. F. W. Woolworth Co. (c.o.b. Woolco)*, [1992] 4th Quarter Sask. Labour Rep. 67, (1992), 107 Sask. R. 253 (Sask. Q.B.); *Ontario Hospital Association v. Public Service Employees' Union*, [2004] O.L.R.D. No. 2752 (O.L.R.B.); *Toronto Transit Commission,* [2001] O.L.R.D. No. 3015 (O.L.R.B.) jud. rev. allowed (2003), 233 D.L.R. (4th) 80 (Ont. S.C.); and *United Nurses of Alberta v. Attorney General of Alberta, Attorney General of Canada, Attorney General for Quebec, and Attorney General of British Columbia*, [1992] Alta. L.R.B.R. 137 (S.C.C.).

[44] The Union argued that the Board's hearings are public, Ms. Thorn had experience before the Board, Ms. Thorn was a public figure in the province and the Employer was a prominent business. In assessing the appropriate penalty for contempt, the Union argued that a number of factors were relevant, including the history of the Employer and Ms. Thorn before the Board. In *McCartney v. Crescent Venture Capital Corp. o/a Harwoods Restaurant and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [2001] Sask. L.R.B.R. 332, LRB File No. 235-00, a rescission application was dismissed because of improper interference by the Employer. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc.*, [2002] Sask. L.R.B.R. 235, LRB File No. 172-00, an application involving the failure to bargain in good faith, the Board commented on Ms. Thorn's evidence that she did not disclose the Employer's plans to expand the operations because of her mistrust of the Union's representative and her concern that the Union might misuse the information to harm the Employer. The Board noted that Ms. Thorn's statement was a bald assertion with no details in support of it, that there was no excuse for not providing this information to the Union, and that "the real motivation for withholding both the expansion plan and employee information was Ms. Thorn's personal dislike for Mr. Hollyoak and an intention to be uncooperative with him." In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc.,* [2001] Sask. L.R.B.R. 320, LRB File Nos. 032-00 & 033-00 dealing with the discipline of union supporters, the Board commented that it appeared that the Employer "was trying to send a message to these three union activists to curtail their enthusiasm for the Union" and determined that the Employer was motivated by anti-union animus concerning the discipline it imposed on the employees.

[45] In addition to the consequences of a fine for contempt (or payment to the Union of compensation), the filing of the Board's order in the Court of Queen's Bench for enforcement though the Court, and the Board finding the Employer and Ms. Thorn guilty of an offence pursuant to s. 15 of the *Act*, the Union also submitted that it should be entitled to the costs of the proceedings (including all wages, staff wages and benefits, expenses and preparation time for the proceedings) and that payment should be made by the Employer to cover the Board's costs.

[46] In addressing the cases cited by counsel for the Employer, the Union noted that in *Scheidt, supra*, none of the parties asked for a remedy other than that ordered by the Board. In *U.F.C.W. v. R.W.D.S.U., supra*, the Board noted that there would be sanctions if the subject conduct reoccurred. The Union pointed out that, despite the fact that the *U.F.C.W. v. R.W.D.S.U.* case was decided before changes to the *Act* were made in 2005, the Board found it had the power to issue sanctions. The Union also noted that, in *Durie Tile, supra*, the Ontario Board's order was solely directed at addressing an attempt by a party to delay the proceedings.

[47] With respect to the submission that a mitigating factor for Ms. Thorn should be the fact that the Union referred to those crossing the picket line as "scabs" and that that justified her refusal to answer the Union's question in cross-examination, the Union pointed out that the Board ruled on the issue and permitted the use of the term and that there appeared to be no suggestion that the Board was being contemptuous of Ms. Thorn.

[48] The Union pointed out the unusualness of the position taken by counsel for the Employer and counsel for Ms. Thorn. It seemed odd to the Union that counsel for Ms. Thorn would comment on a remedy that related to the reply filed by the Employer and that the Employer would accept the striking of its evidence on the main application when such a remedy would affect only the Employer and not Ms. Thorn.

[49] In its written submission the Union pointed out that Ms. Thorn's motives or reasons for refusing to answer the question in issue did not vitiate the contempt and, while it may go to a sanction imposed by the Board, it must be weighed against Ms. Thorn's history with the Board. The Union argued that the question in issue was determined by the Board to be relevant, that the *Wigmore* test did not apply to make it privileged, that no privilege was claimed or pleaded by Ms. Thorn during the hearing and that, in any event, such privilege was waived

by the fact that Ms. Thorn swore in the reply to the subject conversations being held with the employees.

[50] In its written submission, the Union requested, in addition to all of the above remedies, that the Board pursue jail for contempt and the maximum fines by initiating its own prosecution in the Court of Queen's Bench.

Employer's Arguments in Reply:

[51] The Employer argued that s. 5(e)(ii) was a remedial power used only to deal with a substantive order of the Board. With respect to s.15 of the *Act*, the Board has no power to find the Employer guilty of an offence as these are penalties that a convicting provincial court judge might impose. The Employer also argued that s. 42 was a general power of the Board and was not sufficient to give the Board the power to cite for contempt.

Analysis:

Denial of Request for Adjournment

[52] With respect to the Board's denial of the request for an adjournment made by counsel for Ms. Thorn on April 18, 2006, the Board agreed with the decision of its Executive Officer to deny the request for adjournment. The April 18, 2006 hearing date was set on the request of counsel for the Employer (who also was advising Ms. Thorn) to hear submissions regarding, in the words of the Board, the appropriate Board response to Ms. Thorn's failure to answer the question in issue and her failure to comply with the Board's order regarding the same. At the time the Executive Officer made his decision, he directed that that portion of the transcript dealing with the question asked of Ms. Thorn, the Board's order directing her to answer, her refusals to answer or comply with the Board's order, and the Board's direction as to the scope of submissions required at the hearing of April 18, 2006 be provided to the parties in advance of April 18, 2006. This was done. The Board finds that that portion of the transcript was sufficient to allow counsel for Ms. Thorn to adequately represent Ms. Thorn at the hearing on April 18, 2006. In addition, we note that counsel for Ms. Thorn could also have been advised by his client as to the matters in question and that he likely had available to him the record of counsel for the Employer who was advising Ms. Thorn at the hearing on March 20 and 21,

2006. In our view, the entire transcript of the proceedings to date was unnecessary to make argument to the Board on the issue of the appropriate consequences for Ms. Thorn's non-compliance and refusals, including the possible consequences of a finding of contempt. The issue of the relevance of the question the Board required Ms. Thorn to answer was not before the Board on April 18, 2006 – relevance had been argued and ruled on at the hearings on March 20 and 21, 2006. Further, there was no suggestion that Ms. Thorn had been improperly or inadequately advised by counsel representing her and the Employer on March 20 and 21, 2006. We also note that the Board is one of few (or perhaps the only) labour relations boards in Canada that tape records its proceedings and it does so merely for the convenience of the Board and the parties. It is not available as a matter of right as suggested by counsel for Ms. Thorn.

Consequences for Refusal to Answer Question and Refusal to Comply with Board's Order

(i) The Board's Power of Contempt

[53] One of the primary issues on this application is whether the Board has the power of contempt and, if so, the proper procedure to follow to hold someone in contempt. While counsel for Ms. Thorn and for the Employer were expected to address this issue, specifically as it applies to administrative tribunals, during the course of their submissions on April 18, 2006 and were invited to address this issue in their written arguments, they failed to adequately do so and the Board therefore had to research this issue in order to complete these Reasons for Decision.

[54] The Union argued that, given the changes to the Board's procedural powers through the amendments to the *Act* in 2005, it is clear that the Board has the power to enforce its own orders. The Union submitted that the Board's power to enforce its own orders includes the power to cite for contempt.

[55] When examining this issue, it is important to make a distinction between contempt *in facie curiae* and contempt *ex facie curiae*. *In facie* contempt refers to contempt

committed "in the face of the court" or, in this case, the Board. *Ex facie* contempt refers to contempt committed outside the presence of the Board. In our view, it is abundantly clear that the Board possesses the power to find a person or a party in contempt *in facie*. In *Pyramid Corporation v. International Brotherhood of Electrical Workers, Local 529*, [2001] Sask. L.R.B.R. c-19, the Saskatchewan Court of Queen's Bench heard a judicial review application by an employer to set aside a decision of the Board on various grounds, including the ground that the Board breached the rules of natural justice when it struck the employer's reply and refused to let it further participate in proceedings before the Board. The Court set aside the Board's decision on the basis of a breach of natural justice in that the Board violated the *audi alteram partem* rule when it struck the employer's reply and barred the employer from further participation in the proceedings thereby effectively denying the employer the opportunity to answer the case against it, there being nothing in the Regulations to the *Act* that would give the Board the right to strike a reply or deny a party the ability to participate. Regarding the judicial function of the Board, the Court quoted from the decision of the Supreme Court of Canada in *Canadian Pacific Airlines Ltd. et al. v. Canadian Air Line Pilots Association et al.,* [1993] 3 S.C.R. 724 as follows (in *Pyramid, supra*) at c-29:

> *[19] The Board is a statutory tribunal, and as noted per Gonthier J. in C.A.L.P.A., supra, at p.23:*
>
> > *. . . has no inherent jurisdiction, unlike superior courts whose powers of coercion find their origins in the inherent jurisdiction of those courts.*
>
> *While the Board has certain administrative functions to perform, when a panel of the Board is engaged in a Hearing involving a "lis" between parties, it is acting in a judicial capacity. In this respect, as noted per Gonthier J. in C.A.L.P.A., supra at p.27:*
>
> > *. . . The Board is required to act in the manner of a court of law in assessing legal arguments in relation to complex factual circumstances . . .*
>
> *While the Board has its own practices, procedures, and policies, all of the same must be consistent with its statutory authority, and the common law rules applicable to all bodies charged with the exercise of a judicial function, including that of impartiality, and the principle of audi alteram partem.*

[56] When examining the Board's power of subpoena to compel attendance of witnesses and the production of documents, the Court in *Pyramid, supra*, went on to say at c-30 and c-31:

> *[22] As a body charged with exercising a judicial function, s. 18 of the Act, supra, gives each member of the Board the power of a Commissioner under The Public Inquiries Act. The powers of the commissioner under s. 3 of that Act include the summoning of witnesses, the requiring of them to give evidence on oath or on affirmation and requiring them to produce such documents and things as the commissioners deem requisite to the full investigation of the matters. This section of The Public Inquiries Act has existed in this province since at least 1930, and the power is one routinely granted to any tribunal charged with conducting judicial proceedings. However, it is worth noting, that a commission of public inquiry operates under the terms of reference establishing the inquiry. A tribunal of the Board is required to operate within the mandates set out in the Act.*
>
> *[23] **Section 4 of The Public Inquiries Act gives a commissioner the power to enforce the attendance of witnesses, and to "compel them to give evidence as is vested in any court of record in civil cases." A court of record has the power to cite witnesses for contempt should a witness appearing before it refuse to give evidence or refuse to answer proper questions.** (Canadian Broadcasting Corporation et al. v. Cordeau et al. (1980), 101 D.L.R. (3d) 24 (S.C.C.); Re: Hawkins and Halifax County Residential Tenancies Board (1974), 47 D.L.R. (3d) 117 (N.S.S.C.); Re Diamond and the Ontario Municipal Board (1962), 32 D.L.R. (2d) 103). As far as I am aware, **the power to cite for contempt in the face of the court is the only method of compulsion available to the statutory court of record with respect to witnesses**, unless the governing legislation grants a broader jurisdiction or broader remedies. The Act does not do so.* [***emphasis added***]

[57] In our view, the Board's power to cite for contempt *in facie* has not changed following amendments to the Board's powers in 2005. While the power to enforce the attendance of witnesses and compel them to give evidence "as is vested in any court of record" is no longer possessed through reference to *The Public Inquiries Act*, R.S.S. 1978, c. P-38, the amendments to the *Act* in 2005 state that the Board has the same power “that is vested in the Court of Queen’s Bench for the trial of civil actions to: (i) summon and enforce the attendance of witnesses [and] (ii) to compel witnesses to give evidence on oath or otherwise.” The *Act* also now states that all members of the Board enjoy “the same privileges and immunities of a judge of the Court of Queen's Bench.” If anything, the amended provisions strengthen the position

that the Board possesses the common law power of contempt enjoyed by the Court of Queen's Bench (and not simply any “court of record”) that is necessary to compel the giving of evidence.

[58] In *Re: Diamond, supra*, referred to in *Pyramid* above *supra*, the Ontario Court of Appeal was faced with legislative provisions similar to those in the Saskatchewan *Act*. There, *The Ontario Municipal Board Act* stated that the board, "for all purposes of this Act has all the powers of a court of record" and that the board "for the due exercise of its jurisdiction and powers . . . has all such powers, rights and privileges as are vested in the Supreme Court with respect to . . . attendance and examination of witnesses.” At 106-107, the Court stated:

> *The power to fine or imprison for a contempt committed in the face of the Court is a necessary incident to every Court of Justice and a witness who refuses to be sworn or to affirm (as the case may be) or who, having been sworn or having affirmed, refuses to answer, is guilty of contempt and may be fined or imprisoned.*
>
> *. . .*
>
> *It is necessary in many cases for the Board, in discharging its functions, to ascertain the facts with which it has to deal,* ***and in the conduct of its enquiries it is essential that it possess incidental powers commonly associated with a Court of justice. If it were not invested with the power to punish a witness*** *who refuses to be sworn or to affirm (as the case may be)* ***or who, having been sworn or having affirmed, refuses to answer a question when directed to do so, the administrative machinery of the Board would soon grind to a halt, for the most effective direct sanction commonly available to compel obedience to such an order or direction is the power to hold a recalcitrant witness in contempt and, as a means of coercion, to commit him to prison.*** *The necessity of conferring such power upon the Board was recognized by the Legislature, and it was doubtless the appreciation of this particular need which led to the enactment of sections 33 and 37 of the Ontario Municipal Board Act . . .* [***emphasis added***]

[59] Although our legislation suggests that the Board has the same powers as are vested in the Court of Queen's Bench and not simply a "court of record," which was the term under consideration in *Re: Diamond, supra*, at a minimum, the Board has the power of an “inferior tribunal” according to the distinction made in that case. The Ontario Court of Appeal in *Re: Diamond, supra*, commented on the broad nature of the legislation under consideration but noted its restrictions as applied to an inferior tribunal, at 110-111:

This language is admittedly very broad and reasonably construed it must be held to include by necessary implication such powers as are vested in the Supreme Court for the punishment of disobedience of its orders but subject to the restrictions mentioned later. That would, in my opinion, carry with it the authority to fine or commit to prison, or both, for contempt committed in the face of the tribunal.

The practical reason for conferring contempt power is the Board's need, if its machinery is to function smoothly and efficiently. It is a power which is indispensable to the proper conduct of the proceedings before it. But notwithstanding the general language used in s. 37, since those essential powers are given to that body only to facilitate the procedure before it to the extent of its reasonable requirements, they are not unrestricted in scope. The words are capable of a wide and a narrow construction, but I would consider that the principal to be deduced from the judgment of Bowen, L.J., in Wandsworth Bd. of Works v. United Telephone Co. (1884), 13 Q.B.D. 904, can appropriately be applied here. That learned jurist stated at page 920:

> *. . . if a word in its popular sense, and read in its ordinary way, is capable of two constructions, it is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give such power as was necessary for carrying out the objects of the Act and not to give any unnecessary powers.*

The power to fine or commit for contempt should be restricted to a degree adequate to the end intended to be served by the legislation, for although the powers, rights and privileges which are vested in the Supreme Court are, as to certain aspects of procedure and enforcement, conferred upon the Board and it has been given the powers of a Court of Record, it is nevertheless an inferior tribunal, *and its administrative processes are subject to the general supervisory and appellate powers of the Supreme Court of Ontario.* ***At common law, an inferior Court of Record may commit to prison or fine for a contempt committed in facie curiae, but not for a contempt not committed in the Courts presence. That power is possessed only by superior Courts of Record.*** *If the Board's contempt power is held to be equal to that possessed by an inferior Court of Record the real object of the enactment will be adequately met and its effectiveness not impaired. The words should, in my view, be construed accordingly.*

. . .

If should be remembered that while the power to punish summarily for contempt is considered necessary for the proper administration of justice, it is a power which, as has been said, should be used cautiously and sparingly; from a sense of duty and under the pressure of the public necessity, and not to vindicate the Judge or administrative officer as a

> *person, but rather to prevent undue interference with the administration of justice. [**emphasis added**]*

[60] In *Canadian Broadcasting Corp. v. Quebec (Police Commission),* [1979] 2 S.C.R. 618, the Supreme Court of Canada considered the powers of the Québec Police Commission, an inferior tribunal, to punish for contempt committed *ex facie* in circumstances where the Canadian Broadcasting Corporation had broadcast a photograph of a witness despite an order by the Commission prohibiting such. While the Court found that the Commission did not have the common law power to conduct an inquiry and punish for *ex facie* contempt as such power is only enjoyed by superior courts, the Court commented on the common-law power of contempt enjoyed by inferior tribunals as follows:

> *Nonetheless, it would appear that inferior courts of record were invested with an inherent but limited power to punish for contempt, a power which they had to exercise under the supervision of the Queen's Bench Division: see Ex parte Pater [(1964), 5 B. & S. Q.B. 299], which involved a contempt in facie.*
>
> *The clearest decision on the matter is R. Lefroy [(1973), 8 L.R.Q.B. 134]. In a case before a county court, a lawyer taking part in the trial had published a letter in a newspaper virulently criticizing the conduct of the judge presiding over the court, and was summoned by the latter to appear before it to explain his contempt. This was an inferior court of record, empowered by statute to punish for contempt committed before it by a fine not exceeding L5 or imprisonment not exceeding seven days. Counsel obtained from the Queen's Bench Division a writ of prohibition directing the county court not to proceed because it lacked jurisdiction. Cockburn C.J., speaking for the unanimous Court, said at pp. 137 and 138:*
>
> > *The rule must be made absolute. I think that the judge of the county court has no authority to punish for contempt not committed in the face of the Court. It is perfectly true that it is laid down by authority, and reason shews the correctness of the rule, that all courts of record have power to fine and imprison for contempt committed in the face of the court; for the power is necessary for the due administration of justice, to prevent the Court being interrupted. But it is quite another thing to say that every inferior court of record shall have power to fine or imprison for contempt of court when the contempt is committed out of court, as the writing or publication of articles reflecting on the conduct of the judge.*

. . .

> *Finally, the author perhaps most often referred to in cases of contempt, James Francis Oswald, Contempt of Court, in his third edition, 1911, at pp. 1-21, takes it as established that: (1) only the superior courts have an inherent power to punish for contempt committed ex facie; (2) inferior courts of record have an inherent power to punish for contempt committed in facie, and (3) inferior courts which are not courts of record have no power to punish for contempt unless such a power is given to them by statute: they only have the power to maintain order by expelling disorderly persons.*
> *Canadian courts have followed the English decisions.*

[61] In *Re: Hawkins and Halifax County Residential Tenancies Board* (1974) 19 N.S.R. (2d) 327 (N.S.S.C.), the Nova Scotia Supreme Court considered an application for judicial review where a statutory tribunal established to adjudicate matters between landlords and tenants arrested a landlord who was avoiding service of a subpoena in order to bring the landlord before the tribunal. The tribunal subsequently found the landlord guilty of contempt for both avoiding service and for failing to appear before the tribunal. The tribunal sentenced him to two days in jail. The legislation under consideration in that case was similar to that before us and it stated the board had "the powers of a commissioner appointed under the *Public Inquiries Act*" which were as follows:

> *3. The commissioner or commissioners shall have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath orally or in writing (or on solemn affirmation if they are entitled to affirm in civil matters), and to produce such documents and things as the commissioner or commissioners deem requisite to the full investigation of the matters into which he or they are appointed to inquire.*
>
> ***4. The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme Court of Nova Scotia. [emphasis added]***

[62] In *Re: Hawkins*, the Court interpreted these powers as follows at paragraphs 28 and 29:

> *I am satisfied that the Halifax County Residential Tenancies Board and each member of the Board has the power of a Judge of the Supreme Court of Nova Scotia with regard to the enforcement of attendance of witnesses and the compelling of witnesses to give evidence in matters which are in the jurisdiction of the Board.*
>
> *It must therefore follow that implicit in this power is the right to charge for contempt. The exercise of this power, of course, must be handled with discretion.*

[63] In *Re: Hawkins*, the Court determined that the board was justified in subpoenaing the landlord as well as in apprehending him. The Court followed *Re: Diamond* and determined that the board had acted within its powers up to the point in time where the landlord was apprehended but, because the alleged contempt of the landlord in avoiding service of the subpoena and failing to appear before the board was not contempt *in the face of the court*, the Court concluded that the sentence to two days imprisonment for the contempt exceeded the board's jurisdiction and that part of the board's order was therefore quashed. It may be noted that in the discussion of this case in the *CBC* case, *supra*, the Supreme Court of Canada characterized the landlord's contempt "not that he had not been present before the tribunal when he should have been, but that he had deliberately avoided the service of a subpoena" and indicated that in the view of the Supreme Court of Canada, a mere failure to appear before a tribunal is considered to be contempt *in facie*.

[64] In *Chrysler Canada Ltd. v. Canada (Competition Tribunal),* [1992] 2 S.C.R. 394, the Supreme Court of Canada considered the jurisdiction of the Competition Tribunal (a statutory tribunal) to enforce breaches of its orders or, in other words, to commit for contempt committed *ex facie curiae*. In analyzing the subject legislation to make that determination, the Court started with the proposition that all statutory tribunals have the power to commit for contempt *in facie curiae*. At 412, the Court stated:

> *. . . While section 8(3) CTA makes express reference to contempt, this reference as such is not indicative of the powers of the Tribunal, since all inferior courts have power over contempt in facie. . . Inferior tribunals, whose members are seldom all lawyers or judges, may generally find persons in contempt in facie and punish them without need for judicial endorsement (this is implicit in CBC, supra). It would seem somewhat*

> *incongruence that the Tribunal be subject to such a unique requirement if it only had power over contempt in facie, like others. Section 8(3), because of this unique requirement, is indicative of the intention of Parliament to give the Tribunal contempt powers going beyond those which an inferior tribunal would ordinarily exercise.*

[65] A review of the legislation under consideration in *Chrysler Canada, supra*, makes it clear that the real debate concerning the Board's new procedural powers is whether the Board also has the power to commit for contempt *ex facie*, however, because such a situation is not before the Board in this case, it is not necessary for us to deal with that issue.

[66] On the basis of the above, it is abundantly clear that the Board has the power to hold a party or a witness in contempt *in facie*. The Board, enjoying the same privileges and immunities as a judge of the Court of Queen's Bench and having the power of a judge of the Court of Queen's Bench for the trial of civil actions to compel witnesses to give testimony, is clearly a "court of record" that has the power to make an order for contempt *in facie* in order to maintain orderly proceedings in the exercise of its judicial functions. It is also clear that a witness's failure to answer a question when ordered to do so by the Board is considered contempt in the face of the Board, and that the individual or party refusing to comply with the Board's order may therefore be found to be in contempt *in facie* and punished accordingly.

[67] Given our finding that the Board possesses the power to find an individual or party in contempt *in facie*, it is necessary to address the issue of the Board's procedure for making such a determination. One of the primary objections made by counsel for Ms. Thorn and counsel for the Employer to the Board finding Ms. Thorn in contempt and penalizing her was that the Board had failed to follow the proper procedure for doing so.

[68] In our view, there is no specific procedure that the Board is required to follow in making a determination to hold a witness or party in contempt *in facie*. There is obvious rationale for engaging in a defined procedure for *ex facie* contempt because, by the very nature of that contempt, a hearing is required to determine whether the contempt has in fact been committed. Such is not the case with *in facie* contempt – a contempt committed in the presence of the Board where the contempt is obvious and apparent and requires no further proof. As such, a "show cause" hearing where a party has the opportunity to establish that it did not commit the alleged contempt is not necessary. In our view, it is only necessary that procedures followed by the Board comply with the principles of natural justice.

[69] A review of certain decisions of the Ontario Labour Relations Board illustrates the summary nature of contempt proceedings before an administrative tribunal such as the Board. In *Bricklayers, Masons Independent Union of Canada, Local 1 v. Crestview Masonry Co. Ltd.* [1992] OLRB Rep. October 1068, the Ontario Labour Relations Board was adjudicating a construction industry grievance arbitration where the employer had failed to attend the hearing and to produce subpoenaed documents. The Ontario Board issued a warrant for the employer's representative's arrest. The arrest warrant was executed and the individual was brought before the Ontario Board, however, when he failed to bring with him the documents necessary to the case, the Ontario Board ordered him to produce the documents in question and adjourned the proceedings to allow him to do so. The individual then failed to deliver all the required documents to the union and again failed to appear for the hearing. At the hearing that was the subject of the decision, the union requested that the Ontario Board cite the individual for contempt and have him arrested and held in police custody until the subpoenaed documents were produced. The Ontario Board determined that the individual was clearly in contempt of its orders to provide the subpoenaed documents and attend the hearing. The Ontario Board determined that it was appropriate and necessary to issue a further warrant for the individual's arrest to compel his attendance at the next hearing before it. The warrant included a direction to provide the subpoenaed documents. Relying on *Re: Hawkins, Re: Diamond,* and *Chrysler Canada,* all *supra*, the Ontario Board determined that, at the next hearing date, the parties would have a further opportunity to address the characterization of the individual's failures to comply with the directives of the Ontario Board and any appropriate penalty. The decision also acted as notice that, if the individual failed to provide the subpoenaed records at the next day of hearing, he could be cited for contempt in the face of the tribunal.

[70] It is clear that, in the *Crestview Masonry* case, *supra*, the Ontario Board had not and did not intend to engage in any elaborate procedure to make a finding of contempt and issue an appropriate penalty. The Ontario Board merely advised the parties that it wished to hear submissions concerning the issue of whether the individual's failures to comply with its directives should be characterized as contempt and, if so, the appropriate penalty for that contempt. The procedure followed by the Ontario Board is the very procedure that was followed by this Board in this case.

[71] In *International Union of Operating Engineers, Local 793 v. Core-Crete Ltd.* [2005] O.L.R.D. No. 2630, the Ontario Labour Relations Board made an order for the production of certain documents, which the employer was to produce at a hearing, however the employer neither produced the documents nor attended at the scheduled hearing. The Ontario Board issued a warrant for the individual's arrest to compel his attendance at the next scheduled hearing date and once again ordered the individual to bring certain documents with him. The individual appeared at the next hearing date, however, without the documents. Upon hearing from the individual as to his explanation for his failure to bring the documents with him to the hearing, the Ontario Board made an oral ruling indicating that it found the individual in contempt of the Board by failing to comply with the orders of the Board without lawful excuse. The Ontario Board offered the individual the opportunity to purge his contempt by providing the subject documents at the next hearing date but indicated that, if the documents were not produced at that time, that hearing would be used to determine what penalty would follow from the contempt.

[72] Further support for the proposition that a summary type of procedure is more appropriate for *in facie* contempt in the presence of an administrative tribunal rather than the rules and procedures used when an individual is charged with the offence of contempt under the *Criminal Code* may be found in *C.B.C., supra*. In that case, the Supreme Court of Canada, in rejecting the proposition that because the *Criminal Code* contains offences of contempt the court's powers of contempt should be abrogated, referred to the common law power of contempt and its difference from *Criminal Code* proceedings as follows at 635:

> *In Ex parte Lunan [[1951] 2 D.L.R. 589], the facts were similar to the preceding case, although the contempt there was committed before a county court with criminal jurisdiction. Gale, J. of the Supreme Court of Ontario -- as he then was -- stated the following opinion at p. 590:*
>
> > *Contempt of Court may properly be regarded in two aspects. In the first place* ***all Courts of record possess an inherent and venerable jurisdiction to discipline at once and without formality any contempt committed in the face of the Court*** *and superior Courts have the right to deal with a contempt committed out of the presence of a Court. Those principles have been expressed many times over but specific reference may be made to Carus Wilson's Case (1845), 7 Q.B. 984, 115 E.R. 759. That the jurisdiction does not rest upon statutory authority is made clear by Chief Justice Rinfret in Re Gerson, Re*

> *Nightingale, 87 C.C.C. 143 at pp. 147-8, [1946] S.C.R. 538 at p.544. [**emphasis added**]*

[73] Ms. Thorn was provided with several opportunities both to answer the question in issue and comply with the Board's order and to seek advice from legal counsel. On March 20, 2006, immediately following the order of the Board directing Ms. Thorn to answer the question, the Board adjourned the hearing after instructing Ms. Thorn to further consider her refusal and to consider seeking advice from the Employer's legal counsel. The granting of permission to a witness to speak privately with legal counsel while in the midst of cross-examination was a highly unusual step taken by the Board on the basis of the gravity of the potential consequences for Ms. Thorn's refusal to comply with a Board order. When Ms. Thorn continued to refuse to answer the question and comply with the Board's order, the hearing was adjourned to the next day to afford Ms. Thorn a further opportunity to consider her position and seek legal advice. On March 21, 2006 Ms. Thorn was given a further opportunity to comply with the Board's order but she refused to do so. In our view, those opportunities were sufficient to accord with the principles of natural justice in this case and to permit the Board to proceed with a determination as to the consequences of Ms. Thorn's failure to comply with the Board's order, which could include a finding of contempt. On March 21, 2006, after the Union began to make submissions concerning the consequences of Ms. Thorn's failure to comply with the Board's order and urging the Board to find Ms. Thorn in contempt and compel her to answer the questions and/or penalize her, the Board accepted the suggestion of counsel for the Employer that the proceedings be adjourned to another date in order that the parties could make more complete submissions on the issues. Although, in our view, such a step was not necessary when the contempt was committed *in facie*, it seemed prudent in the circumstances given that the Board had not previously dealt with the issue. We note therefore that Ms. Thorn was provided with a further opportunity to consider her position, to obtain independent legal counsel (which she in fact did) and to make submissions on the appropriate consequences to her. At the hearing of submissions Ms. Thorn was again asked by the Board whether she had reconsidered and would now comply with the Board's order, however, her counsel indicated that she would not be answering the question in issue. In the Board's view, the procedure the Board followed was more than adequate for it to make a determination on the consequences of Ms. Thorn's non-compliance, which includes a possible finding of contempt with appropriate sanctions. Ms. Thorn had several opportunities to comply with the Board's order, to seek the advice of legal counsel, and to make submissions concerning the consequences to her.

[74] One other aspect which we must address is the argument of counsel for Ms. Thorn that there was no “contempt motion” before the Board and it could not therefore consider finding her in contempt. He suggested that the submissions of the Union’s counsel at the hearing on March 21, 2006 confirmed that there was no contempt application before the Board but that the Board understood the Union to be asking the Board to consider taking the steps that would lead to contempt proceedings. Counsel also suggested that on April 18, 2006 it was made clear that there was no formal “application” before the Board on contempt. With respect, we disagree. In our view, it was clear, both at the time of the hearing on March 21, 2006 and on April 18, 2006, that the Board wanted to hear submissions on the issue of whether the Board could and should cite Ms. Thorn and/or the Employer for contempt and impose a penalty accordingly. The Board was not convinced that any particular process would be required to make a finding of contempt *in facie* but asked the parties to address that issue in their submissions. In our view, it should have been abundantly clear to counsel for the Employer and counsel for Ms. Thorn that the Board was considering the consequence of finding Ms. Thorn and/or the Employer in contempt following the parties’ submissions on April 18, 2006, if it were determined that the Board had the power to do so and that a proceeding of a summary nature was appropriate.

[75] Counsel for the Employer and for Ms. Thorn argued that the Board should follow the procedure utilized in certain criminal law cases. In *R. v. B.K.*, [1995] 4 S.C.R. 186 (S.C.C.), an individual was subpoenaed as a crown witness at a preliminary inquiry involving a charge of attempted murder. The individual acted in a manner that was insolent and abusive to the judge and refused to be sworn. With respect to the insolent and abusive behavior, the judge convicted the witness of contempt of court *instanter* without providing notice to the individual that he must "show cause" why he should not be held in contempt and without providing any reasonable opportunity for the individual to speak to a lawyer. On appeal to the Supreme Court of Canada, the contempt conviction was quashed. The Court held that, while a judge may use summary contempt procedures instead of holding a criminal trial, in this case there were no circumstances which made it urgent and imperative to act immediately to convict and sentence for contempt of court *instanter*. Natural justice required certain steps to be taken including putting the witness on notice to show cause why he should not be found in contempt of court, followed by a brief adjournment to afford the individual the opportunity to be advised and/or represented by counsel and to make submissions on an appropriate sentence. This case is

distinguishable from that before the Board. Firstly, the judge in *R. v. B.K.* was exercising the power of contempt pursuant to a provision of the *Criminal Code*. Secondly, it appears that the contempt was characterized as criminal in nature (rather than civil) and was found by the Supreme Court of Canada to be contempt for the witness's insolent and abusive behaviour toward the judge, rather than his refusal to testify. In our view, the case is simply not analogous to that before us.

[76] In *R v. Fizell* [2001] M.J. No. 22, the Manitoba Provincial Court considered a case where a trial judge of the Provincial Court cited an accused for contempt and had him removed from the courtroom following his inappropriate behavior in court. The contempt matter came on for hearing and disposition before another judge of the Manitoba Provincial Court who gave an opportunity to the accused to purge his contempt, which he declined to do, and who then provided counsel the opportunity to make submissions on sentence. The judge reviewed the transcript of the prior proceedings and determined that the citation for contempt was the equivalent of a notice to show cause why the person should not be found in contempt. Because the accused was being charged with an offence, he became entitled to common law protections and the protection of the Charter. The judge concluded that, while proof beyond a reasonable doubt was essential to a conviction for contempt, the citation for contempt was itself proof of the contempt because the conduct occurred before the judge who cited the accused. The only way for an accused to avoid conviction for contempt would be to offer evidence that afforded a proper defence. The judge determined that it was appropriate to conduct a trial for the contempt before a judge other than the citing judge because the alleged contempt involved insolent conduct before the first judge who was trying the accused on other criminal charges. In our view, this case is also distinguishable. *R. v. Fizell, supra,* also deals with criminal contempt and a criminal offence. Also, in the present case, we are dealing with the refusal to answer a question or, in other words, a refusal to testify, and not abusive behaviour before the Board.

[77] In the event that we are incorrect with respect to our conclusion that the criminal law cases referenced by counsel for Ms. Thorn and for the Employer simply do not apply to a civil *in facie* contempt in the presence of an administrative tribunal, we take the view that proper protections have been afforded Ms. Thorn throughout these proceedings. In our opinion, based on the series of events of March 20 and March 21, 2006 - including the submissions of the Union's counsel, the comments of the Board and presumably the advice of Ms. Thorn's legal counsel - it would have been abundantly clear to Ms. Thorn that she could be held in contempt

for her refusal to comply with the Board's order to answer the questions in issue. Whether one uses the word “cite" or "find" in contempt does not matter in the circumstances of this case. In our view, Ms. Thorn knew the potential jeopardy she faced as a result of her refusal to comply with the Board's order, she had the opportunity to “show cause” why she should not be held in contempt (and did so by explaining her reasons for refusal to comply with the Board's order both at the hearing on March 21, 2006 and through her independent legal counsel's written submissions to the Board following the April 18, 2006 hearing), she had several opportunities to consult with legal counsel for the Employer on March 20 and 21, 2006 and with independent legal counsel prior to the April 18, 2006 hearing date and she had opportunity to make submissions to the Board as to why she should not be held in contempt and as to the matter of penalty (we note that Ms. Thorn chose not to make complete submissions on this latter issue, even after the Board requested that she, through her counsel, do so). Therefore, even if the Board was required to follow the procedures utilized by the criminal courts on a criminal charge of contempt (which we do not accept as applicable), those procedures have been followed to the extent necessary to protect Ms. Thorn and comply with the principles of natural justice.

[78] We also note that, during submissions on April 18, 2006, counsel for the Employer suggested that Ms. Thorn expressed respect for the Board and referred to her concerns over disclosing the identities of the employees. Counsel for the Employer and for Ms. Thorn suggested that, because Ms. Thorn was not afforded the opportunity to provide reasons for her refusals, the Board had not followed proper procedure and could not, at this stage of the proceedings, find Ms. Thorn in contempt and issue appropriate sanctions. Firstly, we do not believe that Ms. Thorn’s reasons are relevant to whether a finding of contempt may be made against her in the circumstances of this case. An objection to the questions was made by counsel for the Employer. The Board then determined that the questions were lawful and within the proper scope of cross-examination. At that point, Ms. Thorn was compelled to answer the questions – her reasons thereafter for not wishing to answer are irrelevant. In our view, Ms. Thorn’s reasons are also irrelevant to the question of the appropriate penalty should we find her in contempt. The Board cannot conceive of a possible lawful reason for Ms. Thorn’s refusal to answer the questions in issue, in particular because the questions explore the basis for an assertion made by her on behalf of the Employer in the pleadings and in her examination in chief.

[79] We do note, however, that there is some authority for considering an explanation for contempt. In *Core-Crete Ltd., supra*, the employer's representative was questioned as to why he did not bring certain documents, that he was ordered to produce, to a hearing before the Ontario Labour Relations Board. The individual advised the Ontario Board that he was unable to bring the subject documents because the documents were in the hands of his accountant to whom he owed money and who would not provide the documents to him. With respect to the documents in the possession of the individual and not the accountant, the individual indicated "he would not turn them over to the union because it would bring him further trouble." The oral ruling of the Board stated as follows at paragraph 9:

> *We have listened to your explanations for your failure to produce documents as repeatedly required by the Board.*
>
> ***We find your explanations generally disingenuous and without merit. We are of the view that your failure to produce documents is for the very reason you said in response to Mr. Haward's question that is, you do not want to turn them over and get in more trouble with the union. That explanation is completely inappropriate.***
>
> *Accordingly, we find that you are in contempt of the Board. You have deliberately failed to comply with orders of the Board without lawful [excuse].*
>
> *While you have given us no comfort that you will ever comply with the Board's orders, we are prepared to give you an opportunity to either purge the contempt by complying with the Board's orders or seek advice from a criminal lawyer.*
>
> *Accordingly, the Board orders you to appear in front of the Board on July 4, 2005. You must bring with you the documents which the Board has by its decision dated May 13, 2005 and June 3, 2005 ordered you to produce. If you do not bring the documents on July 4, 2005 or appear at the hearing, as ordered, the purpose of the hearing will be to determine what penalty will follow your contempt. We repeat, that penalty may be that you will go to jail.* [***emphasis added***]

[80] In the event that Ms. Thorn is entitled to offer an explanation for her refusals and contemptuous actions (a proposition which we do not accept), we find that Ms. Thorn was in fact afforded and took the opportunity to provide the reasons for her refusal, both at the hearing and within the written brief filed by her independent counsel. Her counsel was also provided with the opportunity to indicate her reasons for her refusal when the Board heard submissions on the issue of whether she should be found in contempt and, if so, what the appropriate

penalty should be. While her counsel did not avail himself of that opportunity during oral submissions, he did so within the context of his brief (although he failed to address the issue of a specific penalty even after being asked by the Board to do so). Ms. Thorn's reasons, as she stated at the hearing, were that she did not want to disclose the identities of the employees because she was concerned what action the Union might take against those employees. She also stated that disclosing the names "jeopardize our situation." In her counsel's written brief, Ms. Thorn outlines her reasons for her refusal as follows:

> *Deb Thorne [sic] has refused to provide the names of the employees because the conversations were privileged and made in confidence to her and because these employees would be subject to reprisals by the union membership that would make it unbearable for them to work at Respondents place of business.*

[81] If it is necessary for the Board to consider the reasons advanced by Ms. Thorn, it is our view that the reasons do not justify her refusal to answer the questions in issue or her refusal to comply with the Board's order directing her to answer those questions. Counsel for Ms. Thorn argued that he should be permitted to make submissions on the relevance of the subject questions and, in particular, the Board should consider the argument that the employee/employer communications were privileged and were thereby protected under the *Wigmore* test as considered by the Supreme Court of Canada in *Gruenke, supra*. Setting aside the fact that the Board has already ruled on the relevance of the subject questions, we find that the *Gruneke* case and the *Wigmore* test for privilege cited therein are inapplicable to the circumstances of this case. In addition, there is no employee/employer privilege known at law that would justify a failure to disclose the identities of employees or the content of Ms. Thorn's conversations with them. In fact, such conversations are often in issue in unfair labour practice proceedings and decertification proceedings before the Board, where certain employer communications are considered unlawful. This case is no different. The subject matter of the conversations in issue could be unlawful if the conversations are found to be improper interference by the Employer in the administration of the Union, specifically with respect to the Union's right to take proceedings under its constitution against its members. In our view, Ms Thorn's desire to "protect" the employees by not disclosing their names or the nature of their conversations is at the heart of the issue in this application.

[82] In addition, Ms. Thorn's response that disclosing the names of the subject employees could "jeopardize our situation" suggests that part of the reason for her refusal to answer is that the answers would not benefit the Employer before the Board and possibly would contradict the Employer's position on the application. She also offered the startling explanation that she could have lied to the Board and said that she had not met with any of the employees, implying that then the questions of who those employees were and the nature of their conversations would not have arisen before us. Also, her explanation that the Union would "pick on" these employees amounts to a baseless allegation and is highly inappropriate in the terms used in *Core-Crete Ltd., supra*. As found in *Core-Crete Ltd., supra,* these explanations are inappropriate and are far from adequate as support for the proposition that Ms. Thorn was justified in not complying with the Board's orders to answer the question in issue.

[83] Counsel for Ms. Thorn and for the Employer also suggested that Ms. Thorn's offer to answer the question *in camera* should be considered in the Board's determination of this matter, whether on the issue of whether she should be found in contempt at all or as a mitigating factor on a penalty for contempt. That argument fails, for the reasons stated above, as it failed when the Board rejected the offer at the hearing. The offer was to answer the questions *in camera*, off the record. The implication, if the evidence is received in that manner, is that the Board's ability to use the evidence and the Union's ability to fully explore the allegations and statements made in the Employer's reply, are somehow prohibited or restricted. Therefore, answering the questions in that manner does not demonstrate respect for the Board's processes or attempted compliance with the Board's order, such that it should be considered a defence to a finding of contempt or as a mitigating factor.

[84] It is also appropriate to address certain other matters raised by a counsel for the Employer and for Ms. Thorn in their written submissions, which appear to be the reasons why, or an attempt to show cause why, Ms. Thorn should not be held in contempt. Legal counsel appeared to attempt to suggest that Ms. Thorn's contemptuous conduct toward the Board was justified because she was being treated with contempt by counsel for the Union. Specifically, it was submitted that the use of the word "scab" by counsel for the Union, against the objections of counsel for the Employer, justified Ms. Thorn's response of refusing to answer certain questions even after being ordered by the Board to do so.

[85] During the cross-examination of Ms. Thorn by counsel for the Union on March 20, 2006, counsel for the Union, in asking his questions, often referred to those employees who had crossed the picket line during the strike as "scabs." After the term had been used a number of times in the course of questioning, counsel for the Employer objected to its use, framing the objection in terms of “can’t we use a more legal term like ‘replacement workers’.” The Board responded by saying that that was not necessary. Later, following Ms. Thorn’s refusal to answer the questions in issue, counsel for the Employer argued that the use of the term "scab" by counsel for the Union was contemptuous of Ms. Thorn, because the Union knew that Ms. Thorn’s daughter would fall within the definition of that term. We do not accept this reason as a basis for not holding Ms. Thorn in contempt. We note that the term "scab" was used on only eight additional occasions following the Employer’s objections and was never used by Union counsel during the specific questions concerning Ms. Thorn’s daughter. We note that Ms. Thorn herself never objected to the term’s use at any time during her cross-examination and she never put this forward as a rationale for her refusal to answer the question and to comply with the Board's order to answer the question.

[86] We note that the cases cited by counsel for the Employer concerning the use of the term "scab" are inapplicable to the circumstances before us. Two of the cases dealt with arbitration awards where the grievor had used the term "scab" and had been disciplined for same (see *Russell, supra,* and *Western Plywood, supra)*. In the *Russell* case, the grievor was disciplined for referring to certain employees as "scabs" while acting as a trainer on behalf of the employer training new employees. The grievor acknowledged that the use of that term was intended to send a message to the participants in the course that "scabs" were undesirable people. The arbitrator found that in the context in which it was used, the word was offensive and inappropriate in the work environment. In the *Western Plywood* case, which was an application for judicial review of an arbitration award, the circumstances were that, following a strike, the grievor called another employee a "scab" in the workplace, having already been warned against name-calling. Counsel for the Employer referenced an excerpt in the judgment which stated that the word "scab" in that workplace was "provocative," was intended to suggest that a person should be "despised," and "was used as an expression of derision and hatred."

[87] In our view, the context in which the term "scab" was used in these cases is critical. Firstly, we note that the excerpts quoted by counsel for the Employer from the *Western Plywood* case are those of the judge writing the minority opinion. The majority in that decision

held that the arbitrator had not erred in law in concluding that the employer was not entitled to discharge the grievor merely because she had used the word "scab." The majority also had not expressed any view similar to that expressed by the minority judge (the only portion of the arbitrator's award that was quashed was with respect to the determination on monetary loss). In *Russell*, the term "scab" was used by an employee in violation of the workplace code of conduct. The term was used in the course of her employment and specifically in circumstances where the grievor was placed in a position of trust, acting on behalf of the employer in conducting a training course. It was also found that use of the term could have a significant effect on the recent efforts of the employer to boost morale in that workplace following a long and bitter strike. Also of importance is that the grievor acknowledged that her use of the term was to express to her co-workers that "scabs" are undesirable people.

[88] The Employer also relied on the judge's comments in *Circuit Graphics, supra,* for the proposition that "the word "scab" itself is a term of abuse and contempt." Our review of this case reveals that the court was considering an application for an injunction against the union that was picketing during a strike. The question for the court was whether there was a serious issue to be tried concerning various torts, one of those being "intimidation." The term "scab" was used in conjunction with other language and conduct that the court viewed as slanderous and unlawful and it was on that basis that the court determined that there was a serious issue to be tried on the tort of intimidation, which is defined as intimidation of "another person by unlawful threats into doing or obstructing him from doing something he would otherwise have the right to do." The quote must therefore be read in the context of that case, which is significantly different than the context of the case before us. Counsel for the Union was not addressing Ms. Thorn as a scab and there were no accompanying words or actions that would suggest that there was the intent to intimidate; it was neither threatening nor was Ms. Thorn obstructed from doing something she would have the right to do.

[89] The Employer also referred to *Doyle, supra,* arguing that the case stands for the proposition that the term "scab" is defamatory. In this case, a union member brought a defamation action against the union because it referred to him as a "scab" and made other statements about him in a number of issues of the union newsletter. The court reviewed each alleged defamatory statement in detail. The court found that the use of the word "scabs" was "intended to refer to the plaintiff as one of a limited number of replacement workers who had

been rehired by the Airline." The court referred to the definition of scab contained in several dictionaries, as follows:

> **Blacks Law Dictionary (5th ed.):** "*A working man who works for lower wages than or under conditions contrary to those prescribed by a trade union; also one who takes the place of a working man on strike*"
>
> **Concise Oxford Dictionary (7th ed):** ". . . *a person who refuses to join strike or trade union or take striker's place or breaks rules of his trade or group*"
>
> **Webster's Encyclopedic Dictionary (Can. Ed.):** "*. . . a person who works when his fellow workers are on strike and who works in the place of as striking worker*"

[90] While the court found that the mere use of the word "scab" was defamatory as it is a term of derision and intended to hold a person up to hatred, contempt, or ridicule, the court specifically ruled that the union was not liable for defamation because the union's characterization of the plaintiff as a "scab" was, in fact, true. The defendant was held liable for certain other comments made in the union newsletters but not for those comments where the plaintiff was referred to as a "scab." This case therefore does not assist Ms. Thorn to justify her conduct or to provide a basis for the Board to decline to find her in contempt. The case merely stands for the proposition that calling someone a scab may be defamation but it is only actionable if it is untrue. Counsel for the Union did not address Ms. Thorn as a "scab" and, by using the term "scab," he was accurately and truthfully referring to a group of employees who crossed the picket line during the strike.

[91] In summary, the use of the term "scab" at the hearing of this application by counsel for the Union in his questions of Ms. Thorn was merely descriptive in nature. The term referred to those employees who crossed the picket line and worked for the Employer during the strike and it therefore was an accurate use of the term in accordance with the dictionary definitions referred to above. This situation is very different than a situation where an employee calls another employee a name in the workplace, intending to be abusive or to hold the other employee up to contempt by doing so. In other words, the context is so entirely different between the cases cited by counsel and the case before us that a comparison or analogy simply cannot be made or drawn. Had Ms. Thorn herself been incorrectly referred to as a "scab" in a manner or tone suggestive of inappropriate treatment of a witness, that may have been an

appropriate factor for us to consider in determining why Ms. Thorn should not be held in contempt, however, that was not the situation before us.

(ii) Other Possible Consequences for Failure to Comply with Board's Orders

[92] The other possible consequences for Ms. Thorn's failure to answer the subject questions and comply with the Board's orders regarding the same is the striking of evidence, the drawing of an adverse inference, an order prohibiting the Employer from calling further evidence and/or the filing of a Board order with the Court of Queen's Bench pursuant to s.13 of the *Act* to be enforced by the Union under s. 14 of the *Act*.

[93] Counsel for the Employer and counsel for Ms. Thorn urged the Board to consider the striking of the Employer's evidence. At the hearing of the submissions of the parties, the Board expressed some concern that the *audi alteram partem* rule, discussed in *Pyramid, supra*, could pose a problem for the Board should it choose to strike the Employer's evidence for Ms. Thorn's refusal to answer the questions in issue. After questioning counsel for the Employer, who was taking instructions from another director of the Employer at the hearing of submissions on April 18, 2006, the Board was satisfied that the Employer was prepared to accept the consequences of the striking of the Employer's evidence even though it was Ms. Thorn who was refusing to answer the questions. Counsel for the Employer made it clear that the Employer waived the application of the *audi alteram partem* rule.

[94] The Employer relied on the case of *Scheidt, supra*. In that case, the union sought an adjournment of the hearing of a rescission application mid-hearing in order to bring forward certain evidence that it did not have available to it at the hearing. With reluctance, the Board granted an adjournment to the union on the condition that the union disclose, in advance of the next hearing date, the details of its proposed evidence, including the identity of certain employees and management representatives involved in the alleged conversations, the subject matter of those conversations and when those conversations took place. The union failed to comply with the directions of the Board before the next hearing date. The Board noted at 253 and 254:

> *… the Board has made, and will continue to make, considerable efforts to ensure that issues are not decided on the basis of procedural objections, and that the real questions in dispute between the parties formed the basis of our decisions.*
>
> *. . . .*
>
> *. . . the Board, rightly, has given short shrift to attempts by any parties appearing before us to employ points of practice or procedure to obstruct proceedings or to obscure the real issues.*
>
> *. . . .*
>
> *… There must, however, be an onus on the party which benefits from such flexibility to make reasonable efforts to ensure that these mechanisms are used constructively and do not simply prolong or delay the proceedings.*
>
> *In our view, the Union was given ample opportunity to repair whatever damage might have been done by the decision not to call the direct evidence of Employer interference at the first hearing. Though the adjournment was almost a month in length, the Union did not supply the straightforward information which the Board, at the request of counsel for the Applicant, asked them to transmit. Nor did they give any further explanation of why the information was not supplied. The conduct of the Union not only appears to connote disrespect for the Board, and for the very process they wish to invoke. More concretely, the effect of the failure to provide information was to deny the Applicant and the Employer a fair chance to prepare their respective cases in response to the evidence the Union proposed to advance.*

[95] The union's failure to provide particulars of its evidence in the *Scheidt* case, *supra*, led the Board to the logical step of denying the union the opportunity to lead the evidence. In other words, the Board did not allow the union's non-compliance to prejudice the other parties. It could achieve that goal by not allowing the union to benefit from the adjournment it had obtained because it failed to meet a condition for receiving that adjournment.

[96] Counsel for the Employer also relied on *Durie Tile*, *supra*, a decision of the Ontario Labour Relations Board. At the hearing of an application, the Ontario Board issued an oral ruling requiring the employer to produce certain documents and to advise the Board and the applicant of further witnesses the employer intended to call. The employer did not fully comply with the Ontario Board's direction within the time granted and, when the Board extended the deadline for full compliance and full compliance was not made, the Board invited submissions on the action it should take for the non-compliance. The union in that case asked

the Ontario Board to state a case for contempt to the Ontario courts or, alternatively, to: determine the application on the basis of the union's pleadings alone; refuse to permit the Employer to adduce any additional evidence; draw adverse inferences for the failure to call certain witnesses; and disregard evidence that was not properly produced or produced in a timely manner. The Ontario Board noted that there could be no question that the Employer was in violation of its orders and determined as follows at paragraphs 19 through 22:

> *The Board's remedy must be responsive to concerns of practicality, fairness and efficiency. It appears to the Board that little would be gained by stating a case for contempt in the circumstances. Durson has now largely complied with the order for document production. Durson's non-compliance is with respect to one group of documents and the order to provide names of witnesses. While this non-compliance cannot be condoned, it does not amount to a failure to accept the Board's jurisdiction or failure to participate in this proceeding. Accordingly, the Board rejects the applicant's request that the Board decide this matter only with regard to the applicant's pleadings.*
>
> *But an effective remedy is required so that Durson does not gain an advantage from flouting the Board's orders. With respect to the missing documents, the appropriate remedy is that the Board draws an adverse inference against Durson for its failure to produce them. This approach is consistent with the well-established principle that the failure of a party to adduce evidence which was in its power to give and by which facts may have been elucidated, justifies an inference that the evidence would have been unfavorable to that party:*
>
> *With respect to the failure of Durson to identify its witnesses, the appropriate remedy is to deny Durson the right to call further witnesses. Durson has already adduced evidence consistent with its pleadings. There is no gain to any party from permitting Durson to call further witnesses simply to confirm matters already in evidence. There is no benefit to the Board and distinct prejudice to the applicant from allowing Durson to engage in a game of hide and seek with the identity of its witnesses. This will not be permitted.*
>
> *The applicant shall complete its cross-examination of Ms. Duri on the basis of the documents produced to date. The parties shall then proceed directly to argument.*

[97] If one were to apply the reasoning of *Scheidt, supra*, and *Durie Tile*, *supra*, to the case before us, a possible logical result would be to prohibit the Employer from calling any further related evidence, to deny the Employer the ability to rely on any evidence that relates to the questions Ms. Thorn refused to answer (i.e. strike that evidence) and to draw an adverse inference from Ms. Thorn's refusal to answer the question in issue.

[98] The Employer and Ms. Thorn urged the Board to simply strike the evidence of the Employer to the extent it had gained an advantage from Ms. Thorn's refusal to answer the subject question. We do note, however, that such an order would not address an additional aspect of the present case not involved in the situation in *Scheidt, supra*. There the prejudice to the party opposite resulting from the union's failure to comply with the Board's order was that the hearing was delayed by one month. Here the prejudice to the Union is much greater. Firstly, the Union would be unable to rely on those portions of the reply and the evidence of Ms. Thorn that contained admissions. Such a concern could be addressed, however, by striking only those portions of the evidence that were exculpatory for the Employer. Secondly, a matter that cannot be addressed through the simple striking of evidence, is that the Union is unable to conduct a lawful cross-examination (which it is permitted to do by virtue of the right of cross-examination of the deponent of the Employer's reply, Ms. Thorn) which might cast doubt on the Employer's defence, thereby assisting the Union in proving the allegations in its application, and obtaining further evidence which the Union might be able to use in reply. It is also important to note that the circumstances in *Scheidt* are very different than those before us - the non-compliance of the union related to a process the union attempted to invoke to its advantage and the corresponding remedy simply involved the removal of the advantage the union sought to invoke.

[99] Likewise, the remedies ordered in *Durie Tile, supra*, were based on the Board's finding that Durson had already conceded that it was a successor employer. In the present case, there is no such concession made by the Employer - the Employer has not admitted that it is guilty of an unfair labour practice as alleged by the Union. Therefore, there is "benefit to the board and distinct prejudice" to the Union if the Board does not find Ms. Thorn, and possibly the Employer, in contempt and compel answers to the question. The only method by which the Board could address this concern and attempt to prevent Ms. Thorn and the Employer from gaining some advantage through Ms. Thorn's flouting of the Board's order, short of finding her and/or the Employer in contempt, is through the drawing of an adverse inference from Ms. Thorn's failure to answer a question which was in her "power" to answer and "by which facts may have been elucidated."

[100] In the present case there was also an element of defiance by reason of Ms. Thorn's refusal to answer the question in issue and comply with the Board's order to do so.

If she or the Employer is not penalized in some other fashion, the door is open for employers to assert any manner of defence and facts in their replies but, as soon as they do not wish to answer certain questions in relation to those defenses or facts, they can merely say they will withdraw that portion of the reply or allow the Board to strike certain evidence. Such an approach would not be practical, fair or efficient and cannot be in the interest of justice or the proper functioning of the Board.

[101] A further possible consequence for Ms. Thorn's failure to answer the question in issue and comply with the Board's order is for the Board to file an order with the Court of Queen's Bench pursuant to s. 13 of the *Act* which reads as follows:

> *13 A certified copy of any order or decision of the board shall be filed in the office of a local registrar of the Court of Queen's Bench and shall thereupon be enforceable as a judgment or order of the court, and in the same manner as any to other judgment or order of the court, but the board may nevertheless rescind or vary any such order.*

[102] Once an order is filed with the Court, s. 14 of the *Act* allows the Board, a union or an affected or interested person to seek compliance with that order. It is also possible that the court may refer the question of compliance to the Board for a determination. Section 14 reads as follows:

> *14(1) In an application to the court arising out of the failure of any person to comply with the terms of an order filed pursuant to section 13, the court may refer to the board any question as to the compliance or noncompliance of such person or persons with the order of the board.*
>
> *(2) The application to enforce an order of the board may be made to the court by and in the name of the board, any trade union affected or any interested person, and upon such application being heard the court shall be bound absolutely by the findings of the board and shall make such order or orders as may be necessary to cause every party with respect to whom the application is made to comply with the order of the board.*

[103] The Saskatchewan Court of Queen's Bench had occasion to consider these provisions in the context of contempt proceedings in two decisions involving F.W. Woolworth Co. In the first, rendered October 13, 1992, *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. (c.o.b. Woolco)*, [1992] 4th Quarter Sask. Labour Rep. 50,

(1992) 106 Sask. R. 1 (Sask. Q.B.), the union brought an application before the Saskatchewan Court of Queen's Bench seeking orders related to the alleged breach of an order of the Board. The union had been involved in organizing the employees of the employer and was seeking a certification order from the Board. The Board found that the employer had committed an unfair labour practice and ordered the employer to refrain from engaging in such a violation of *The Trade Union Act* and from discussing the representation issue with its employees until the Board disposed of the application for certification. The primary issue before the Court was whether the employer should be found in contempt of court for its alleged violation of the Board order. In rejecting a defence put forward by the employer that contempt required some proof of "*mens rea*," the Court found that the employer was in violation of the Board's order through the sending of a letter to the employees that discussed the representation issue. The Court found that the employer's actions were "blatant and in defiance of the board's order and there was therefore no lack of intent." A review of the case indicates that the procedure utilized was a motion in chambers for final relief supported by affidavits outlining the nature of the breach of the Board's order. In determining that it was not necessary for the applicant union to file a certificate with the registrar proving the filing of the Board order in the Court of Queen's Bench, the Court commented on the effect of a Board order as follows at 60 :

> *Furthermore, although I accept the certificate as evidence for the purpose for which it was tendered, such evidence is not necessary. The present application is in relation to the very matter in which a proceeding in this Court, i.e. the filing of the June 26 order of the board, took place. The court is entitled to take judicial notice of such filing (equivalent to issuing an order or judgment) without the necessity of formal proofs thereof by affidavit or, as was done in this case by certificate pursuant to section 20 of The Saskatchewan Evidence Act. See Halburys Laws of England, 4th ed. vol 17 p. 74, para 102*
>
> > *The court is entitled to look at its own records and proceedings in any matter and take notice of their contents even though they may not have been formally brought before the court by the parties.*

[104] In response to the argument of the employer that all rules of court must be strictly complied with, relying on the Court's decision in *Re: Retail, Wholesale and Department Store Union, Local 955 v. Morris Rod Weeder Co. Ltd. et al.* (1974), 38 D.L.R. (3d) 421, the Court said the following about the *Morris Rod Weeder* case at 64 through 66:

The applicant sought leave to amend but was refused. With the greatest of respect, the decision might well have ended with that. But Disbery J. went on and after reviewing a goodly number of authorities on the necessity of courts adhering strictly to strictissimi juris, he went on to say, at p. 427:

> *When a party to a civil proceeding seeks to deprive another person of his liberty by having him imprisoned it is not too much to ask that such litigant, when moving for a committal, strictly comply with the Rules and such litigant should not expect the Court on such an application to assist him to get such other person into prison. As has often been said, not only must justice be done but it must appear to be done, and such would not appear to be done, in my opinion, where, at the hearing of a punitive motion, the Judge is seen lending his assistance to the applicant by curing procedural defects and errors in the middle proceedings and thus appear to be assisting the applicant to put the respondent, usually his opponent, in jail. I think that on committal motions, strict application of the doctrine of strictissimi juris is as necessary and desirable in the interest of justice today as it has been in the past.*

Obviously, in Morris Rod Weeder the failure to give grounds for the application as required by Rule 446(1) would very seriously affect the ability of the respondent to defend. Just as obviously, Mr. Justice Disbery concluded that it would not be in the interest of justice in that case to allow the applicants to amend. ***This does not detract from the view that one should look to whether that which is complained of adversely affects one's ability to defend.*** *The Morris Rod Weeder decision does not, in my view, decide for all time in and all cases and in all circumstances that which alone can be seen as being in the interest of justice to the exclusion of anything else. Neither can this case or any other similar decision deprive a court of all discretionary power in respect of a particular matter simply by language which would appear to exercise that discretion once and for all.*

In the same vein I refer to Iron Ore, supra. In that case the contempt was found to be criminal and the contemptors jailed. Chief Justice Furlong said at pp. 33-34:

> *It has been argued by counsel for the appellants that the procedure adopted in bringing these persons before the Court to answer for their contempt has not been in strict accordance with the rules of procedure.* ***But this leads us to the question as to what is the procedural law to be observed in this case. It is clear that such is not defined by any statutory law but is to be found in the books and in the body of judicial decisions and opinions. As the learned trial Judge has found, the governing principle to be observed is to see that the***

> ***accepted rules of natural justice have not been breached.*** *The principal argument directed to us is the failure to serve, with the Notice of Motion which initiated these proceedings, a copy of the Injunction of Mr. Justice Mahoney dated the 10th of February, 1977 which was not included nor were the details of this injunction set out in the Motion. It is asserted that although the affidavits upon which the applicant intended to rely were served with the Notice of Motion this is not sufficient. The point is made that the appellant should not be expected to examine a mass of affidavits in order to arrive at the substance of their conduct which it is alleged, amounted to contempt.*
>
> *The learned trial Judge expressed some disquiet as to the procedure adopted in the failure to serve a copy of the Injunction, which I share, but nonetheless upon consideration I am satisfied that the appellants were provided with all the necessary facts upon which the applicant relied in order to enable them to defend their conduct. (emphasis mine)*

So literal an application of strictissimi juris as was advocated in Morris Rod Weeder would have the courts, even in civil contempt proceedings, require adherence to procedural rules to be more sacrosanct than if it were a prosecution under the Criminal Code, whatever the crime.

. . .

More importantly, again, with the greatest of respect, however Mr. Justice Disbury may have found the situation in Morris Rod Weeder I do not see the present case as one in which "… a party to a civil proceeding seeks to deprive another person of his liberty by having him in prison . . ***.". I see the present case is one in which the applicant seeks to have an order of the Labour Relations Board respected. The applicant seeks fulfillment of what the legislature of Saskatchewan intended -- namely that orders of the Board be meaningful and effective and not simply an exercise in futility. Why else have them enforceable as an order of this Court?***

The orders are intended to be obeyed. An applications such as the present is nonetheless an application to have the rule of law prevail, simply because the rule of law may for the moment, appear to the respondents to work more to the benefit of the applicant than the respondents.

I reject completely the technical defences of the respondents.

I am satisfied well beyond a reasonable doubt that Woolco is in civil contempt of court by reason of acting in contravention of the order of the Board of June 26, 1992. It contravened the order of the Board both in

> *respect of the prohibition against committing an unfair labour practice in breach of ss. 11(1)(a) and (g) of the Act and in breach of the order of the Board that Woolco not discuss the representational issue. Woolco also disparaged the Board but about this the Court can do nothing in the absence of enabling legislation.*

[105] The Court then left the matter of penalty to be spoken to, if necessary, and after hearing further submissions if counsel so wished. Such an application considering the appropriate penalty came before the Court with a decision rendered on December 14, 1992 in *United Food and Commercial Workers, Local 1400 v. F. W. Woolworth Co. (c.o.b. Woolco),* [1992] 4th Quarter Sask. Labour Rep. 67, (1992), 107 Sask. R. 253 (Sask.Q.B.). The Court considered the objectives of contempt of court proceedings and how those may differ depending on the nature of the breach. The Court stated as follows at 67 and 68:

> *One object of contempt of court proceedings in a civil matter is to use it as a means of enforcing performance of a court order by one party for the benefit of another party.*
>
> *The corporate respondent (Woolco) has been found in civil contempt of this court. It is in relation to something about which this court may not have anything more to do. The contempt is for breach of a particular order of the Labour Relations Board. The breach has been committed. The damage done may continue, but the breach is over. In relation to this particular order there is therefore no point in trying as stated in Woolworth's brief, to "fashion a remedy that will most effectively ensure that the [Board] order is obeyed" (underlining added).*
>
> *And so there is no efficacy in a solution, suggested by Woolco, such as in Simpson Lumber Co. (Saskatchewan) Ltd. v. Bonville and International Woodworkers of America, AFL-CLO-CLC, Local 1-184, (1986), 49 Sask. R. 105 (Q.B.), a decision of Mr. Justice Walker of this court. The respondents in that case were employees of the union. They had blocked a rail line spur leading to the plant of the applicant. This was done in defiance of an injunction granted earlier by the court. Mr. Justice Walker found them in civil contempt of court. He find them each $250.00 and sentenced each to jail for a period of three months, but he suspended operation of the sentence to jail of each, "...so long as that individual complies with the interim injunction..." The suspended sentence imposed in the Simpson case was designed to open and keep open the railroad track, that is, to end the continued breach and keep the sentenced individuals from committing another breach. In the present case the breach consisted of an act now long done.*

[106] The Court went on to consider the effect of the filing of a Board order, the public interest element in its breach, and the significance of the public interest element upon sentencing, as follows at 68 and 69:

> *Nor can this court in the present contempt proceedings seek to enforce directly, compliance generally with other orders of the Board. The finding of contempt is contempt in relation to what is in effect an order of this court, the Board order in question having been converted to such by being filed in this court pursuant to section 13 of the Trade Union Act, R.S.S. 1978, c. T-17. . . .*
> *. . . .*
>
> *But this court can, and should act to ensure compliance in the future with courts generally. Just because the contempt is civil does not mean that the court should be concerned only with the situation as between the parties and ignore any effect on the authority of the court generally. The public has an interest in the authority of the court being respected and maintained even though a matter is a dispute between two private individuals.*
>
> *There is a further public interest factor to be considered. There is public involvement in this matter not found in an ordinary lawsuit between private parties.*
>
> *. . . .*
>
> *The technical contempt in the present case arises out of the relations between the Union and Woolco. It was these relations that resulted in a Board order. The Board in a very real sense represents a public interest in the relationship between the applicant and Woolco. There is, accordingly, an element of damage to the public interest.*

[107] In ordering that Woolco pay a fine of $50,000 and awarding costs to the union on a solicitor and client basis, the Court took into consideration the following factors, at 69:

> *The financial information on Woolco and its size are really only relevant in consideration of two factors. The first is ability to pay. The other factor is that the fine to be effective must come to the attention of the offender. There would not be much point in this case in a fine that could be paid out of petty cash in a local store or treated as another item of overhead. Not only must the penalty come to the attention of Woolco, it must be taken seriously. On the need to have it taken seriously, I have considered the response by Woolco to notice of the application. I consider that the material filed by Woolco was a cynical exercise in sophistry.*

[108] While the Court in *Woolco, supra*, was dealing with *ex facie* contempt, that is, contempt not committed in the face of the Board, the effect of the filing of the Board's order is the same. Once it is filed it becomes an order of the Court and can be enforced through a motion for contempt. It is apparent from the *Woolco*, case, *supra*, that a range of consequences could be considered to enforce compliance with the Board's order and to penalize for the failure to comply or for the damage to the public interest.

[109] It may be noted that in the *Woolco* case, *supra*, the Court was only considering contempt committed by the employer and not that of the individual who actually sent the letter to the employees, finding that the individual did not aid and abet the employer because he had nothing to do with the contents of the letter, was not an officer or director of the employer, and did no more than perform "mechanical acts on the instructions from head office in Toronto." In other words, the individual had no choice in the matter of carrying out the instructions of the employer. Such is not the situation in the present case. It is clear to the Board that Ms. Thorn was personally refusing to answer the subject question and comply with the Board's order based upon her own personal convictions and, arguably, the strategy she wished the Employer to take in this case. Her status as CEO of the Employer and the Employer's support for her refusals and non-compliance make it clear that Employer was aiding and abetting Ms. Thorn in her refusal and non-compliance.

[110] A similar process for contempt has also been utilized under the legislation governing the Ontario Labour Relations Board. A number of the cases reviewed in this decision out of the Ontario Labour Relations Board involved a request by a party to have the Ontario Labour Relations Board "state a case for contempt" to the court. Section 13 of *The Statutory Powers Procedure Act,* R.S.O. 1980, c. 484, states as follows:

> *13.1 Where any person without lawful excuse,*
>
> *(a) on being duly summoned under section 12 as a witness at a hearing makes default in attending at the hearing; or*
>
> *(b) being in attendance as a witness at an oral hearing or otherwise participating as a witness at an electronic hearing, refuses to take an oath or to make an affirmation legally required by the tribunal to be taken or made, or to produce any document or thing in his or her power or control*

> *legally required by the tribunal to be produced by him or her or to answer any question to which the tribunal may legally require an answer; or*
>
> *(c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,*
>
> *the tribunal may, of its own motion or on the motion of a party to the proceeding, state a case to the Divisional Court setting out the facts and that court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court. R.S.O. 1990, c. S.22, s. 13; 1994, c. 27, s. 56 (27).*

[111] In *United Steelworkers of America v. Sabina Citron, Citron Automotive Division of Plaza Fiberglas Manufacturing Limited, Plaza Electroplating Limited, Citcor Manufacturing Ltd., and the Ontario Labour Relations Board,* [1989] OLRB Rep. May 528, the Ontario High Court of Justice determined that an individual respondent was in breach of the Ontario Board's order to produce certain documents. The Court indicated that, at a prior court appearance, it had entertained argument on the issue of whether the individual had acted with lawful excuse. On the issue of the process for an individual to raise the issue of lawful excuse, the Court stated at 528:

> *Evidence was not called on that occasion, as we concluded that the question of lawful excuse was a question of law for the Court, and after deliberating on the matter and hearing argument, we were satisfied that her refusal had been without lawful excuse, and so stated in our disposition of the matter.*

[112] In the application then before the Court, the individual suggested that she could not disclose documents that contained employees' addresses because they were not relevant and she "had a genuine concern for the safety of employees and their families due to threats which have been reported to her." The Court determined that the employer had not acted in a *bona fide* manner and had engaged in a course of conduct intended to deliberately delay and frustrate the certification process. While the Court acknowledged that the contempt had been purged as of the hearing of the application, the Court believed that that was done only on the advice of the individual's counsel. The Court concluded at 530:

> *Cases have been cited, by judges much revered, which indicate that when the contemner purges contempt that should put an end to the placing of personal liberty in jeopardy. However, as indicated, the public interest requires compliance with the orders of the Ontario Labour Relations Board and it is important that those who willfully embark upon a course such as taken by Mrs. Citron in this case must recognize that the penalty of imprisonment is alive and available to the Court.*
>
> *We have given very serious consideration as to what we should do with Mrs. Citron. Our finding of contempt places upon her a criminal record of sorts, which I think she will have difficulty living with. Her conduct, in our view, warrants a sentence of 30 days' in jail. We have given this matter our very best consideration and have concluded that in the interests of justice, however, that the 30 days' sentence should be suspended.*
>
> *Mrs. Citron, stand up. We sentence you to 30 days in jail. In the circumstances, however, we are suspending sentence upon you being of good behaviour for that period of time. We are awarding costs to the respondent union on a solicitor and client basis.*

[113] In this case the Board made an oral ruling directing Ms. Thorn to answer certain questions, specifically, that she identify the names of the employees she spoke to concerning the fines and where and when those discussions took place, as well as the nature of the conversations she had with those employees. As a matter of practice, the Board files all of the orders it issues with the local registrar of the Court of Queen's Bench in Regina. While the Board does not typically file written orders for oral rulings it makes during the course of a hearing, it may be done upon the request of a party. It is therefore open to the Board to reduce its oral ruling to writing and file the same in accordance with s. 13 of the *Act*.

[114] We wish to make a one final note concerning the range of consequences available to be ordered by the Board for Ms. Thorn's refusals. The Union argued that the Board should utilize s. 15 of the *Act* to fine the Employer and Ms. Thorn by way of a lump sum and a continuing daily fine until Ms. Thorn complies with the order of the Board to answer the question in issue. In our view, such a course of action is not available to the Board. Section 15 deals with offences punishable on summary conviction. It is the Attorney General's office, and not the Board, which has the power to initiate such a prosecution. Accordingly, it is not open to the Board to direct such consequences for Ms. Thorn's refusals.

(iii) Should the Board find Ms. Thorn and/or the Employer in contempt?

[115] As noted above, in *Durie Tile, supra*, the Ontario Labour Relations Board outlined its primary consideration in determining whether to hold an individual in contempt. It bears repeating:

> *The Board's remedy must be responsive to concerns of practicality, fairness and efficiency.*

[116] In *Ontario Hospital Association v. Public Service Employees' Union*, [2004] O.L.R.D. No. 2752, in determining whether to state a case for contempt under the provisions of its governing legislation, the Chairperson of the Ontario Labour Relations Board stated at paragraph 50:

> *The Board's contempt processes should be exercised where there is some real labour relations purpose to be gained in doing so. Whether the purpose is to compel testimony, obtain evidence or information, maintain control over the adjudication process, enforce [an] order or otherwise supervise the conduct of a party, there should probably be some practical utility other than the prickly defence of the Board's honour (RE AJAX & PICKERING GENERAL HOSPITAL ET AL. AND CANADIAN UNION OF PUBLIC EMPLOYEES ET AL, (1981), 132 D.L.R. (3d) 270, leave to appeal to the Supreme Court of Canada refused (Laskin C.J.C., Estey and Chouinard JJ.) March 15, 1982)*

[117] In our view, the primary purpose, in addressing the refusal of Ms. Thorn to answer the question in issue and to comply with the Board's order regarding the same, is to ensure that the Applicant has a fair opportunity to put its best case forward, without delay. A secondary purpose is to ensure that proper respect is shown toward the Board and for its proceedings. In determining how best to meet those purposes, it is appropriate to consider whether the consequence we impose are fair, practical, and efficient.

[118] In order for the Applicant to have an opportunity to put its best case forward, fairness would, at first glance, dictate that the Board take the steps necessary to compel Ms. Thorn to answer the question in issue. Ms. Thorn's refusal to answer the question has prevented the Applicant from conducting a full cross-examination of her and exploring the allegations contained in the Employer's reply, which was sworn by Ms. Thorn. In this respect,

fairness toward the Applicant could only be achieved through the Board holding Ms. Thorn in contempt and imposing sanctions which would tend to compel her testimony, either through a continuing daily fine until the question is answered or through her incarceration.

[119] It is also necessary to consider the practicality of any decision made by the Board. In many of the cases cited in this decision where an individual has committed an *in facie* contempt, the tribunal has had the individual incarcerated. Another possibility, in our view, would be to provide an opportunity to purge the contempt after which a fine would be imposed on a per day basis for the period of time during which the contempt continues. In determining whether this is a practical solution, certain factors must be taken into consideration, including the consideration of the procedure for and enforcement of the fines as well as the compellability of the sheriff or the police to act on a warrant issued by the Board for Ms. Thorn's arrest. Another concern with respect to the practicality of the Board's decision is whether it is likely that Ms. Thorn will answer the question in issue should the Board impose a daily fine. It is apparent to the Board that Ms. Thorn has the support of the Employer in refusing to answer the question in issue. This is evidenced by the fact that the Employer has taken the position that Ms. Thorn should suffer no personal consequences as a result of her refusal to answer the question and that it is quite prepared to accept negative consequences on her behalf, such as the striking of its evidence, even though that could result in a finding of an unfair labour practice against it. In light of this situation (the Employer's support) and considering the behavior of Ms. Thorn at the hearing, including the expressed strength of her personal convictions in refusing to answer the question, there is a likelihood that Ms. Thorn will continue in her refusals despite the imposition of a fine, likely making incarceration necessary to compel her testimony.

[120] That leads us to our third consideration – efficiency. With respect to the efficiency of the Board's proceedings, we must consider the impact of a decision to find Ms. Thorn in contempt (and/or the Employer for aiding and abetting the contempt) and to impose appropriate sanctions on our primary purpose of ensuring that the Applicant has a fair opportunity to put its best case forward, without delay. As of the writing of this decision, Ms. Thorn has brought a mid-hearing judicial review application on various grounds, seeking various forms of relief and, although the same has not yet been heard by the Court of Queen's Bench, it is apparent that she takes issue with the Board's power and procedures and is attempting to prohibit the Board from concluding this application. As it is apparent to the Board that Ms. Thorn is not averse to taking judicial review proceedings, we cannot help but predict that a further

judicial review application would be made should the Board find Ms. Thorn (and possibly the Employer) in contempt. While the Board should not and does not act out of fear of being overruled by a Court when making its decisions, it is appropriate in this case to consider the effect of such judicial review proceedings on the Applicant's ability to proceed with this application. Were we to find Ms. Thorn in contempt and issue sanctions intended to compel her answer to the subject question, the hearing of the application before the Board would need to be held in abeyance until that answer was in fact compelled. Therefore, a finding of contempt and the likely judicial review proceedings would have the obvious effect in this case of delaying these proceedings before the Board such that the Applicant would not have the opportunity to put its best case forward, *without delay*.

[121] Given the obvious difficulties noted above with respect to a finding of contempt and the imposition of penalties against the Respondents, it is necessary for us to consider the fairness, practicality, and efficiency of other possible consequences for Ms. Thorn's refusal to answer the question in issue and comply with the Board's order regarding the same. While the Board is very concerned with the lack of respect for the Board and its proceedings shown by Ms. Thorn in interrupting the proceedings by her unlawful behaviour, the primary purpose, as stated above, is to ensure that the consequences we order allow the Applicant to put its best case forward, without delay.

[122] There are several other options available to the Board to address Ms. Thorn's refusal to answer the question in issue and comply with the Board's order. As noted above, they include the striking of certain evidence of the Employer, the drawing of an adverse inference from the failure to answer the question in issue, an order prohibiting the Employer from calling further evidence, and the filing of a Board order in the Court of Queen's Bench to be enforced by the Union. The question is whether any of these options, alone or in combination, best meet the primary purpose of ensuring they Applicant has a fair opportunity to put its best case forward, without delay, while considering the factors of fairness, practicality and efficiency.

[123] Counsel for both Respondents urged the Board to strike the Employer's evidence as the sole consequence for Ms. Thorn's refusals. In our view, such a solution may pose an element of unfairness to the Applicant in a situation where the Applicant is entitled to rely on the admissions contained in the Employer's reply and to utilize the evidence elicited on cross-examination on that reply filed by the Employer and sworn to by Ms. Thorn. Striking the

evidence of the Employer could result in the exclusion of admissions made by Ms. Thorn. As such, it is not a satisfactory solution. In our view, were we to strike the evidence of the Employer, fairness to the Applicant would dictate that only that evidence which is exculpatory to the Employer should be struck. In addition, it follows that the Board would be permitted to draw an adverse inference from the failure of Ms. Thorn to answer the question in issue (see reasons noted above). We must ensure that the Employer, who we have found is supporting Ms. Thorn's refusal to answer the question and comply with the Board's order, does not gain an advantage on this application through these refusals.

[124] The possible solution of striking exculpatory evidence and drawing an adverse inference rather than finding the Respondents in contempt and compelling Ms. Thorn to answer the question in issue, is still somewhat unsatisfactory due to the potential unfairness toward the Applicant. As previously stated, the Applicant may be prevented from making its case through the evidence of Ms. Thorn, through certain admissions or the receipt of information that allows it to investigate certain matters and lead rebuttal evidence. The Board does have at its disposal, however, the power to file an order with the Court of Queen's Bench, which would permit the Applicant, if it felt it necessary to putting its best case forward, the opportunity to take contempt proceedings in that Court with a view to compelling Ms. Thorn's answer to the question in issue. Therefore, should the Applicant feel that the Board's striking of the Employer's exculpatory evidence and the drawing of an adverse inference from the failure to answer the question in issue is not sufficient for the Applicant to put forward its best case, the Applicant has the option of taking such contempt proceedings and compelling Ms. Thorn's answer.

[125] It is the Board's view that considerations of fairness are met through the striking of exculpatory evidence, drawing an adverse inference from the failure to answer, and filing an order of the Board with the Court of Queen's Bench that could result in contempt proceedings, however, do such solutions also meet the criteria of practicality and efficiency? In our view, these consequences are more practical and efficient than a finding of contempt against the Respondents and the issuance of appropriate sanctions such as fines and incarceration. Counsel for the Employer and counsel for Ms. Thorn have indicated acceptance of the consequence of striking the Employer's evidence. In addition, the drawing of an adverse inference from the failure to answer the question meets the criteria suggested by the Employer that the consequences be limited to taking away any advantage the Employer gains as a result

of Ms. Thorn not complying with the Board's order to answer the subject question. As such, it is more likely that the Applicant will be permitted to proceed to conclude this application before the Board without the delay caused by potential judicial review proceedings. The Applicant does, however, have the option through the filing of the Board's order in the Court of Queen's Bench to take contempt proceedings against the Respondents to compel the answer to the question, should it feel it necessary to do so, in order to put its best case forward. Any delay occasioned as a result of those proceedings is therefore in the Applicant's discretion, rather than as a direct result of an order of the Board. We do not wish to cause further prejudice to the Applicant on this application than has already been caused by Ms. Thorn and her refusal to answer the question in issue.

[126] While there remains the issue of Ms. Thorn's lack of demonstrated respect for the Board and its proceedings, as we have determined that it is secondary in purpose in the determination of the appropriate consequences for her refusals, we leave it as an issue to determined by the Court of Queen's Bench should contempt proceedings be taken by the Applicant, or to be considered as part of the Board's consideration of appropriate remedies should the issue arise on the main application. Several of the cases noted in this decision make it clear that the Court may consider an individual's refusal to answer questions and comply with the orders of a tribunal as criminal contempt or, even if the contempt is determined to be civil in nature, may issue sanctions that punish the individual for his or her contempt and the damage to the public interest, whether or not the contempt has been purged at the time of hearing.

[127] The Board has also given consideration to an order prohibiting the Employer from calling further evidence but has found that such an order would be premature at this stage of the proceedings. There has been no indication from the Employer that it intends to call further evidence. Should it attempt to do so, the Board will rule on the admissibility of such evidence in light of Ms. Thorn's refusal to answer the question in issue and the Board's decision to exclude the exculpatory evidence of the Employer. The Board will at that time consider issues of fairness, which would include a consideration of whether the evidence proffered is an attempt to either exculpate the Employer on matters that are the subject of these proceedings or an attempt to lead evidence through another witness which is similar to that being struck by the Board.

Conclusion:

[128] For the foregoing reasons, the Board has determined that the consequences for Ms. Thorn's refusal to answer the question in issue and comply with the Board's order directing her to answer the question, will be as follows:

1. The Board will strike the Employer's evidence that is exculpatory in relation to the facts and circumstances alleged in paragraphs 4(g) and (h) of its reply and in relation to any discussions held with employees around the issue of fines and support for those employees;

2. The Board will draw an adverse inference from the failure of Ms. Thorn to answer the following question: "With respect to the discussions you held with a number of employees around the issue of fines and your support for those employees, identify the names of those employees, and for each one, indicate when and where you talked to them as well as the nature of your conversation."

3. The Board will file an order with the Court of Queen's Bench pursuant to s. 13 of the *Act* evidencing its oral ruling of March 21, 2006 which will state as follows:

> *The Board hereby orders that Deb Thorn answer the following question: "With respect to the discussions you held with a number of employees around the issue of fines and your support for those employees, identify the names of those employees, and for each one, indicate when and where you talked to them as well as the nature of your conversation*."

[129] At this point the Board is not filing a further order with the Court of Queen's Bench evidencing its oral ruling directing Ms. Thorn to produce certain documents, those being the notices of hearings and fines that were left with Carole Remple. As previously stated, we have not found Ms. Thorn to be in violation of that order as Ms. Thorn has not yet had the opportunity to produce those documents. While the Board expects compliance with that order for production when the application continues for hearing before the Board, we will at that time deal with any objection raised by the Employer as to the admissibility of those

documents before we make a ruling. If Ms. Thorn or the Employer fail to produce those documents to the Board or, if the Board rules the documents admissible and Ms. Thorn or the Employer fail to disclose them, we will entertain the submissions of the parties on the appropriate consequences for such failure(s), which possible consequences include a finding of contempt and the issuance of appropriate sanctions, the striking of evidence, the drawing of an adverse inference, and/or the filing of an order pursuant to s. 13 of the *Act*.

[130] We wish to make the parties aware, and in particular Ms. Thorn, that by issuing the within ruling, we are in no way condoning or accepting the actions of Ms. Thorn in refusing to comply with the Board's order. We also are not condoning or accepting the actions of the Employer, which appear to us to be taken in support of Ms. Thorn's refusals. We find Ms. Thorn's conduct abhorrent and disrespectful to the Board and its proceedings. Fortunately, most individuals and parties who appear before the Board demonstrate respect for the proceedings and conduct themselves in a serious and thoughtful manner. Although in this case our remedy was fashioned to cause the least prejudice to the Applicant as a result of Ms. Thorn's unlawful actions, our decision should not be viewed as a standard response to this type of conduct.

[131] Following the issuance of these Reasons for Decision, the Board Registrar will send the parties scheduling information forms in order that the hearing of the main application may be scheduled to continue.

DATED at Regina, Saskatchewan, this **15th** day of June, 2006.

LABOUR RELATIONS BOARD

Angela Zborosky
Vice-Chairperson