Labour Relations Board
Saskatchewan

LORA LOVATT, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION and TOWN OF RAYMORE, Respondents

LRB File Nos. 306-04 & 310-04; February 2, 2006
Vice-Chairperson, Angela Zborosky; Members: Gloria Cymbalisty and Michael Wainwright

The Applicant:	Lora Lovatt
For the Respondent Union:	Kerry Armbruster-Barrett
For the Respondent Employer:	Gary Semenchuck, Q.C.

Employee – Independent contractor – Janitor controls how work performed, determines when work completed, decides who performs work, can engage in other business activities, bears risk of profit or loss and does not work under conditions similar to those of employees of town - Board determines that janitor not employee within meaning of s. 2(f) of *The Trade Union Act* despite fact of EI deductions and remittances.

Unfair labour practice – Unilateral change – Wage increase – Employer should have negotiated wage increase with union and failed to do so – Evidence did not establish that wage increase part of employer's "business as before" – Board finds employer guilty of unfair labour practice under s. 11(1)(m) of *The Trade Union Act*.

Unfair labour practice – Remedy – Unilateral change – Where employer committed unfair labour practice by unilaterally granting wage increase to bargaining unit employee without negotiating same with union, Board directs employer to post Reasons for Decision and Order in workplace.

Decertification – Interference – Where applicant had credible reasons for bringing application Board declines to exercise discretion under s. 9 of *The Trade Union Act* even though employer found guilty of unfair labour practice – Unfair labour practice did not lead to rescission application nor did it compromise employees' ability to express true wishes in vote.

***The Trade Union Act*, ss. 3, 5(k), 6, 9 and 11(1)(m).**

REASONS FOR DECISION

Background:

[1] Lora Lovatt applied for rescission of the Order of the Board dated January 15, 2004, designating Saskatchewan Government and General Employees' Union (the "Union") as the certified bargaining agent for a unit of employees of the Town of Raymore (the "Employer" or the "Town") in Saskatchewan (LRB File No. 306-04). At the time the application for rescission was made there was no collective agreement in force between the Union and the Employer. The application was filed on December 15, 2004, during the open period mandated by s. 5(k)(ii) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). Ms. Lovatt estimated three employees in the bargaining unit and filed ostensible evidence of employee support for the application.

[2] In response to the application for rescission, the Employer filed a statement of employment listing three individuals in the bargaining unit.

[3] In its reply to the application for rescission, the Union stated that there were four individuals in the bargaining unit and indicated that it became aware of the fourth employee following the filing of the application for rescission by Ms. Lovatt. The Union claimed that Ms. Lovatt had failed to file evidence of majority support for the application for rescission.

[4] At the same time that the Union filed its reply in relation to LRB File No. 306-04, the Union filed an unfair labour practice application (LRB File No. 310-04) alleging that the Employer violated ss. 11(1)(a), (b), (g) and (m) of the *Act* by unilaterally changing the terms and conditions of employment for new employees, thereby coercing employees into supporting the rescission application.

[5] In response to the Union's application in LRB File No. 310-04, the Employer filed a reply stating that any changes to terms and conditions of employment for new employees were made at the employees' request. The hours of work of the employees were in accordance with the Employer's past practice and the wage increase for one employee was not implemented until the Union was advised of the increase. The Employer denied that the alteration of terms and conditions of work of the employees was done to coerce the employees into filing the rescission application. The

Employer denied that there were four employees in the bargaining unit, explaining the work circumstances of the person in dispute.

[6] Ms. Lovatt, being an interested party to the application in LRB File No. 310-04, also filed a reply denying that the Employer had altered the terms and conditions of employment of new employees and saying that, if the Employer had done so, it had the consent of the Union. The Applicant also denied that the Employer had in any way influenced or coerced her into bringing the application for rescission. She also denied that there were four employees in the bargaining unit.

[7] The application in LRB File No. 306-04 initially came before the Board for hearing on January 10, 2005. At the hearing the Union asked that the unfair labour practice application in LRB File No. 310-04 be heard and determined prior to the rescission application. As it was apparent that the unfair labour practice application essentially raised the issue of whether the rescission application was made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the Employer or Employer's agent, pursuant to s. 9 of the *Act*, the Board determined it appropriate that the applications be heard at the same time. Both applications were heard on March 21 and May 16 and 17, 2005.

Evidence:

[8] At the time of the filing of the applications, the Union and the Employer were engaged in negotiations for a first collective agreement. Doug Blanc, an employee of the Union, was assigned to the unit of employees of the Employer following issuance of the certification Order. In approximately June 2004, another employee of the Union, Kerry Armbruster-Barrett, was assigned to the unit. Both Mr. Blanc and Mr. Armbruster-Barrett testified at the hearing.

[9] Ms. Lovatt testified at the hearing in support of the application for rescission. She commenced employment with the Employer on July 19, 2004 and works as an assistant to the town administrator approximately three days per week. Her general duties include filing, answering the phone, sending out water bills and tax notices and other secretarial duties. She stated that she was told at the time of her

hiring that it was a condition of her employment that she join the Union and she therefore signed a membership card.

[10] In the application for rescission Ms. Lovatt estimated that there were three employees in the bargaining unit. In the statement of employment filed by the Employer, three employees were listed: Ms. Lovatt, Keith Haus and Mervyn Keleman. The Union, in its reply to the rescission application, alleged that there were four employees in the bargaining unit. Following the filing of the rescission application, the Union discovered that Marlene Purdue had been employed as the janitor at the Town's library since 1993 or 1994 and the Union therefore had Ms. Purdue sign a membership card. The Union asserted that the Employer's annual deduction and remittance of employment insurance ("EI") premiums on behalf of Ms. Purdue was evidence of an employment relationship and took the position that Ms. Purdue should be permitted to participate in the rescission application having provided evidence of her support for the Union by signing a membership card.

[11] In its application for certification (LRB File No. 214-03), the Union sought to include four employees in its proposed bargaining unit, including the town administrator. The Employer filed a statement of employment listing three employees in the proposed bargaining unit, claiming that the town administrator should be excluded from the scope of the proposed bargaining unit. Neither Ms. Purdue nor the position of library janitor was listed on the statement of employment. Following a hearing, the Board issued the Order certifying a bargaining unit of "all employees" of the Employer, excluding the town administrator. Reasons for Decision have not yet been issued by the Board on the application for certification, however, the parties agree that the issue of the inclusion of Ms. Purdue or the library janitor position was not raised or dealt with at that hearing. Mr. Blanc testified that, when he was assigned to this bargaining unit following certification, he was given a list of the names of three employees. He had not seen the statement of employment filed in relation to the certification application.

[12] In her reply to the Union's unfair labour practice application, Ms. Lovatt asserted that Ms. Purdue was contracted by the Town to clean the library. Ms. Lovatt indicated that, when she was doing the Employer's accounts payable in December 2004, she deducted and remitted employment insurance premiums on behalf of Ms. Purdue,

noticing that the same was first done for the December 2003 year by the prior administrator, Elaine Perry, through an amendment to Ms. Purdue's T-4 slip, even though Ms. Purdue had held the contract to clean the library for approximately nine years.

[13] Ms. Perry, the former administrator for the Town, testified on behalf of the Union. She indicated that she was the administrator from 1994 until the time she quit that employment on June 8, 2004. During her tenure, the current administrator, Gail Braman, worked as Ms. Perry's assistant administrator, having been hired prior to Ms. Perry. Ms. Perry testified that Colleen Van Ham held the library janitor contract prior to Ms. Purdue. In 1994 Ms. Van Ham decided to run for a seat on council and therefore ended the janitorial contract. The janitor position was then advertised and Ms. Purdue was hired through a resolution of town council. Ms. Perry testified that there was no written contract in place and that the contract has not been posted or tendered since Ms. Purdue first began performing the work in 1994. From 1994 until she left her employment with the Town, Ms. Perry was responsible for completing Ms. Purdue's T-4 slip. It was Ms. Perry's understanding that the relationship with Ms. Purdue was a contractual one and that Ms. Purdue was not an employee and therefore Ms. Perry made no statutory deductions from Ms. Purdue's pay and noted no deductions on Ms. Purdue's T-4. Ms. Perry's practice was to indicate in the comment box of the T-4 slip "janitorial work" or "contracted janitorial work." She expected she might hear from Revenue Canada concerning that issue. This process carried on for a few years until, in 1998, Revenue Canada changed the T-4 form such that it no longer contained a comment box. Ms. Perry continued to issue T-4's to Ms. Purdue without deductions through to the end of 2003. In early 2004, the Town received a letter from Revenue Canada indicating that EI premiums should be remitted on behalf of Ms. Purdue. Ms. Perry stated that she contacted Revenue Canada by phone, answered some of their questions and was sent a brochure to review to help determine whether Ms. Purdue was in an employment relationship with the Town. Based on these discussions and the brochure, Revenue Canada suggested and Ms. Perry thought that it might be an employment relationship on the basis that the Town was providing the equipment and cleaning materials and was deciding when the work had to be done, thereby suggesting that the Town had most of the control in the relationship. Ms. Perry did not consult with anyone concerning this determination and did not contact the library board for input into

the determination. It does not appear that a formal ruling from Revenue Canada was requested. Ms. Perry stated that she advised council of the issue at a regular meeting in March 2004.

[14] The March 9, 2004 minutes of a council meeting indicate the approval of payment of several of the Town's accounts, including two cheques to Canada Customs and Revenue Agency, one of which Ms. Perry testified related to the payment of EI remittances on behalf of Ms. Purdue. Ms. Perry, however, recalled that she specifically pointed these payments out to council and explained what had occurred. Ms. Perry was responsible for preparation of the minutes of the council meeting and it was established in cross-examination that there were no notes or comments in the minutes that reflected that this issue was discussed, that a resolution was made concerning these matters or that an identification was made that one of the cheques issued to Revenue Canada related specifically to Ms. Purdue.

[15] Ms. Perry felt that the Revenue Canada determination raised other issues concerning Ms. Purdue's status as an employee such as Ms. Purdue's entitlement to benefits through the Saskatchewan Urban Municipalities Association, registration in the pension plan and the right to holiday pay. Ms. Perry did not address these issues, as she felt that raising the Revenue Canada issue with council was sufficient to bring the matter of Ms. Purdue's status to the Town's notice. Ms. Perry testified that she told Ms. Purdue that, as an employee, Ms. Purdue would have the right to join the Union but Ms. Perry also indicated to Ms. Purdue that Ms. Purdue may not want to do so because Ms. Perry thought that Ms. Purdue might lose her job or be required to supply her own equipment in order to have a contractual relationship with the Town. Ms. Perry did not advise the Union of the determination of Ms. Purdue's status with Revenue Canada.

[16] The Union also called Gail Braman, the current administrator for the Employer, to testify. Ms. Braman was previously employed as the assistant administrator for approximately twelve years before becoming the administrator upon Ms. Perry's departure at the beginning of June 2004. When Ms. Braman was the assistant administrator she was a member of the Union. Ms. Braman stated that the matter of the EI deduction came to her attention when, in November 2004, Ms. Purdue came into the office and asked Ms. Braman if she would be making such a deduction

again that year. Ms. Braman stated that she was not familiar with the situation and asked Ms. Purdue to explain what had occurred in relation to her last T-4. Ms. Purdue indicated to Ms. Braman that she did not know why the EI deduction had been made and that, if possible, she did not want it made again. Ms. Braman decided to contact Revenue Canada to determine whether she had to make the deduction. When Ms. Braman contacted Revenue Canada, she was told that the file had been "flagged" because of a previous inquiry made by the Employer but the Revenue Canada representative could not advise what the inquiry had been. When Ms. Braman asked the Revenue Canada representative whether she should make the deduction again, she was advised that she should do so and that, if Revenue Canada later determined that Ms. Purdue had made an overpayment, a refund would be issued. At the time Ms. Braman made the EI deduction (for the 2004 year) she had no idea of the implications that it might have on Ms. Purdue's status as an employee or contractor. Ms. Braman stated that, if Ms. Purdue really was an employee, she would have received employee benefits through the Saskatchewan Urban Municipalities Association, been registered with the Municipal Employees Pension Plan and been entitled to holiday pay.

[17] Jim Braman testified on behalf of the Employer. Mr. Braman has been a councilor for the Town since 1997 and, along with Ms. Van Ham, a spokesperson for the Town's collective bargaining committee. With respect to the EI deduction made on Ms. Purdue's behalf, Mr. Braman stated that, in his experience, an account given to council was always approved and the administrator would bring to council's attention any account that was out of the ordinary. Mr. Braman testified about the council meeting held on March 9, 2004 at which time several accounts were approved. He did not recall there being any discussion at all about a payment to Revenue Canada for EI remittances on behalf of Ms. Purdue and he did not recall that Ms. Perry raised the issue of Ms. Purdue's status as an employee.

[18] Ms. Van Ham testified on behalf of the Employer. Ms. Van Ham has been a member of council for the time periods 1994 – 2000 and 2003 to present. She was also the library janitor from 1992 to 1994. Ms. Van Ham testified that, at the council meeting on March 9, 2004, Ms. Perry did not bring the issue of the EI deduction for Ms. Purdue or the change to Ms. Purdue's status to the attention of council. She stated that

a payment to Revenue Canada would not stand out on the list of accounts to be approved because payments are often made by the Town to Revenue Canada.

[19] Ms. Lovatt testified that she is a member of the local library board and that it is the Town and not the library board that pays for the services of the janitor. She indicated that the building in which the library is housed is owned by the Town and, as such, the Town pays for cleaning the building. Ms. Lovatt also indicated that the local library is considered a branch of the Parkland Regional Library and that the librarian for the library is contracted for and paid by Parkland Regional Library. The local library board can only afford basic monthly expenses such as the telephone bill and these expenses are covered through fundraising. Ms. Lovatt has not seen a written contract covering the janitorial services in the Employer's files and she does not have access to the library board's files.

[20] With respect to the direction of work for the janitor, Ms. Lovatt indicated that the library board requires that the library be cleaned at some time prior to each of the days it is open: Monday afternoons, Tuesday afternoons and evenings, and Thursday mornings and afternoons. This was confirmed by other testimony, including Ms. Perry's. In November 2003, the library board wrote a letter to the Town specifying cleaning tasks required on a daily, weekly, monthly and semi-annual basis. These requirements were communicated by the Town to the janitor in May 2005 after a second request made by the library board to the Town asking the Town to ensure that Ms. Purdue was aware of the tasks the library board required to be done. Ms. Lovatt testified that the janitor receives $120 per month for her services but does not receive the same benefits as the three employees of the Employer. Neither the library board nor the Town directs the janitor concerning specific work times, the length of time the janitor must work or who actually does the work. Ms. Perry confirmed that the issue of whether Ms. Purdue was required to perform the work personally or if she could have a helper was never addressed. The employees of the Town receive benefits including coverage for eye care, health care and dental care as well as pension benefits, while the janitor receives none of these.

[21] Ms. Braman also testified concerning the letter from the library board in November 2003 which outlined certain tasks required of the janitor, Ms. Purdue. It was

Ms. Braman's understanding that the library had been dissatisfied with the work being done and therefore wished to clarify the tasks required. In response to questioning by the Union, Ms. Braman expressed her view that the Town's relationship with Ms. Purdue was a contractual one and that the Town was not the employer but could be considered the "payer." Under cross-examination by Ms. Lovatt, Ms. Braman confirmed that there was no signed contract in place for Ms. Purdue, that Ms. Purdue had always been considered to be on contract and not an employee, and that it was expected that the contract would continue indefinitely until Ms. Purdue quits. Under cross-examination by counsel for the Employer, Ms. Braman testified that Ms. Purdue is not required to submit time cards. She indicated that Ms. Purdue has no fixed hours of work and it was never specified that the work must be completed by Ms. Purdue personally. It is Ms. Braman's belief that Ms. Purdue has had family members assisting her with the janitorial work from time to time.

[22] Ms. Van Ham testified that when she was the library janitor she could perform the janitorial duties at any time she wished as long as the library was cleaned prior to its next opening day. She received a flat monthly fee for her services with no deductions and no benefits and she believes she did not receive a T-4 in relation to the payment she received from the Town. Ms. Van Ham believes that Ms. Purdue works under the same terms as she had and that there are no restrictions regarding who actually performs the work. Ms. Van Ham stated that she has seen members of Ms. Purdue's family perform the work. Ms. Van Ham testified that there was no council approval given when the library clarified the tasks required of the janitor. She acknowledged that the janitor has been given pay increases over the years but the contract was never really re-negotiated. Ms. Purdue has simply held it since she was awarded it in 1994.

[23] Mr. Braman testified that Ms. Purdue was not required to perform the janitorial work personally and that family members could and have assisted her in the performance of those duties.

[24] Rita Morrow, also a councilor, testified that she was present at the March 9, 2004 meeting and also does not recall any discussion about Ms. Purdue and the EI deduction, or any change to Ms. Purdue's circumstances. She supported the evidence

given by Ms. Braman and Ms. Van Ham concerning the terms of Ms. Purdue's relationship with the Town. She also stated that she has seen Ms. Purdue's daughter exit the library after hours.

[25] Keith Bentz, who is currently the mayor and has been a councilor for several years, testified that he was at the March 9, 2004 council meeting and he does not recall any discussion about the deduction of EI for Ms. Purdue, Ms. Purdue's status, or any discussion about the accounts, as testified to by Ms. Perry. He also supported the evidence given by Ms. Braman, Ms. Van Ham and Ms. Morrow concerning the terms of Ms. Purdue's contract. He always felt that Ms. Purdue was hired under contract and was not an employee.

[26] Mervyn Keleman testified on behalf of the Union. Mr. Keleman is the maintenance supervisor and currently the shop steward. He testified that, following the filing of this rescission application, Ms. Perry disclosed to him what had occurred with Revenue Canada and suggested that a final decision should be made concerning Ms. Purdue's status as an employee.

[27] In its unfair labour practice application, the Union alleged that two employees of the Employer, Ms. Lovatt and Mr. Haus, commenced employment after the date the Union was certified and that the Employer had modified their hours of work and increased their rates of pay without advising the Union or negotiating the same with the Union, in violation of s. 11(1)(m) of the *Act*. The Union also asserted that, through the alteration of the terms and conditions of employment for these two employees, the employees were coerced into submitting the application for rescission, in violation of ss. 11(1)(a), (b) and (g).

[28] In her reply to the unfair labour practice application and in her testimony, Ms. Lovatt explained the circumstances of her hiring by the Employer. She stated that, at the time she was hired for her current position with the Employer, the Employer understood that Ms. Lovatt intended to continue to work in a casual and temporary position with another employer and that she had certain family commitments to meet. As such, it was agreed that an appropriate work schedule would have to be developed with the administrator to accommodate Ms. Lovatt's other job and family commitments,

while ensuring the required work of the Town was completed. Such a schedule was developed and there were occasions when Ms. Lovatt missed work due to these other commitments. At the time of her hiring, the Employer offered Ms. Lovatt the rate of pay of $9.00 per hour, which she accepted. She stated that there have been no changes to her rate of pay since that time, nor does she expect any changes to be made. Mr. Braman confirmed that this was Ms. Lovatt's arrangement at the time of her hiring and that the Town has always attempted to accommodate other employment held by its employees. He stated that it is not unusual for people in small towns to have more than one job. In his view, hiring Ms. Lovatt on these terms was maintaining status quo with respect to accommodating other employment held by employees.

[29] Ms. Van Ham testified that it was her understanding when Ms. Lovatt was hired that Ms. Lovatt could keep her other job and the Town would work around it. Ms. Van Ham stated that such an arrangement was standard practice.

[30] Also in her reply and in her testimony at the hearing, Ms. Lovatt relayed the circumstances involving changes to Mr. Haus' schedule and rate of pay. Mr. Haus testified at the hearing on behalf of Ms. Lovatt. Mr. Haus commenced employment with the Employer on March 27, 2004 in the position of maintenance employee. He indicated that his starting wage was $9.50 per hour and that at the time of his hiring he advised council that he drove a school bus and intended to continue to do so. His hours of work were set at 9:00 a.m. to 6:00 p.m. to allow him to drive the school bus in the mornings. Mr. Haus stated that the minutes of the council meeting of March 19, 2004 reflect this arrangement.

[31] With respect to Mr. Haus's hours of work, Mr. Haus testified his hours varied depending on the work required to be done. He was usually scheduled for an eight-hour day, with two hours on call every Saturday and Sunday. His hours, including the on call weekend hours, could be banked. Other evidence established that, prior to hiring an afternoon school bus driver, Mr. Haus would leave work for part of the afternoons to drive the school bus.

[32] Mr. Keleman, who testified on behalf of the Union, worked for the Town full-time from 1979 to 1995, part-time between 1995 and 2000 and again full-time from

September 2000 to the present. Mr. Keleman is currently the Town's maintenance supervisor. After the workplace was certified, Mr. Keleman was chosen as shop steward and continues to hold that position. He has been involved in collective bargaining on behalf of the Union. Mr. Keleman's general hours of work are 8:00 a.m. until 5:00 p.m., and include a requirement to be on call on certain weekends. It appears that a dispute arose between Mr. Keleman and Mr. Haus concerning Mr. Haus' hours of work. Commencing in or about October of 2004, Mr. Keleman stopped initialing Mr. Haus' time sheets as Mr. Keleman felt that he could not be responsible for the hours Mr. Haus worked. He provided as an example the fact that Mr. Haus was performing non-emergency work on weekends. Mr. Keleman testified that he was concerned that Mr. Haus was taking time off in the middle of the day (akin to working a "split shift") to drive the bus when he should have been working for the Town. Instead of remaining at work all day, Mr. Haus drove the bus in the afternoons (absenting himself from approximately 2:55 p.m. until 4:30 p.m.) thereby deflecting regular work (as opposed to emergency work) to the weekends. It appeared to Mr. Keleman that Mr. Haus was choosing to work his own schedule, not a schedule of the Town. Mr. Keleman did acknowledge that there were occasions where Mr. Haus returned to work after driving his afternoon bus route and worked past 6:00 p.m. Mr. Keleman recalls the council meeting in March 2004 at which Mr. Haus' hiring was discussed and it was his understanding that, while Mr. Haus informed council he intended to continue to drive the school bus, he would either give up his bus route or find a driver commencing in the fall of the next school year and would be able to work 9:00 a.m. through to 6:00 p.m. Mr. Keleman understood that working around Mr. Haus' bus schedule was temporary and only to continue during the current school year. It was following his hiring that Mr. Haus expressed to Mr. Keleman that it was not worthwhile for him to hire a bus driver because of the limited number of hours the Town required him to work. A review of Mr. Haus' time sheets indicated that, commencing in or about November 2004, Mr. Haus often worked less than a full eight-hour day.

[33] In cross-examination, Mr. Keleman acknowledged that he had not been advised by council of the hours of work arrangement it had with Mr. Haus. Also in cross-examination, Mr. Keleman admitted that he took time off from work, using banked time or holidays to perform work on his farm. While he insisted that it was necessary for him to make a request in order to receive the time off, he acknowledged that in emergency

situations such a cow calving, his request would be more in the nature of simply informing the Town he would not be attending work. Mr. Keleman stated that he always attempted to take time off for farming at the beginning or end of the day, usually the afternoons. He stated that the Town's work came first and that he could always come back to work later when he needed time off during the day for farming activities.

[34] Mr. Braman testified that he was present at the council meeting March 19, 2004 at which time Mr. Haus was hired. The terms that were discussed and recorded in the minutes were that Mr. Haus be appointed as soon as possible as the town maintenance labourer at $9.50 per hour with a customary three-month probationary period, working six to eight hours per day. Ms. Van Ham also confirmed Mr. Braman's testimony in this regard and acknowledged in cross-examination by Ms. Lovatt that Ms. Van Ham understood that Mr. Haus was going to continue to drive the bus but that he would hire a driver if it got busy and he needed to work the whole eight hours for the Town. She stated that there were times he had to hire a driver because he was busy and she believed that this occurred on a sporadic basis. Ms. Morrow and Mr. Bentz also confirmed that the minutes of that meeting of council reflected Mr. Haus' hiring arrangement.

[35] Ms. Van Ham believed that Mr. Haus worked additional hours on weekends to make up for time lost during the week due to driving the bus. When questioned by the Union as to whether Mr. Noble and Mr. Keleman were permitted this same arrangement, Ms. Van Ham responded that Mr. Keleman was permitted time off for farming. When asked if Mr. Keleman was permitted to make up additional hours on the weekends, she stated that she was not aware that he could.

[36] Through the Board's questioning Mr. Blanc clarified that, at the time of his hiring, Mr. Haus' situation for the school year commencing the fall of 2004 was up in the air – he might hire a driver for the morning route or the afternoon route, quit driving the bus, or modify his hours of work. At a later time, it was Mr. Blanc's understanding that Mr. Haus had hired someone to perform the afternoon bus driving and that that arrangement would continue on – he would start at 8:30 or 9:00 a.m. and work eight straight hours with no "split shift" or time away from the Town's work to perform afternoon bus driving duties.

[37] Mr. Haus testified concerning his wage increase. He stated that, in approximately May 2004, the employees had a meeting with their union representative, Mr. Blanc, to discuss proposals for the purpose of collective bargaining. Mr. Haus believed that the wage rate of approximately $13.75 was going to be proposed for him. The testimony given by a number of witnesses was that the Union's proposals for a first collective agreement were presented to the Employer at a meeting in approximately May 2004 and, although it was unclear in the evidence whether a wage proposal was provided at that time, a specific wage proposal was sent by Mr. Blanc to the Employer on July 12, 2004. (This letter, which was entered into evidence, established that for an employee in Mr. Haus' position, "municipal maintenance employee," the Union proposed a beginning wage rate of $12.44, with increases to $12.96 after three months, $13.50 after six months, and a further increase in January, 2005 to $14.04 per hour). Mr. Haus testified that, in the spring and summer of 2004, he was finding that the work of the Town had increased to the point where he felt he had to hire a driver to perform his school bus route in the afternoons. He therefore telephoned Mr. Blanc to advise him that he needed a wage increase (presumably to help him meet this expense) and he stated that Mr. Blanc responded by telling him not to "sell [himself] too cheap." Mr. Haus stated that he had discussed this with Mr. Blanc because it was his understanding that the employees could not negotiate directly with council and that he needed Mr. Blanc's permission in order to do so. Mr. Haus believed he had that permission from Mr. Blanc. Mr. Haus recollected that, following his three month probationary period, he advised Ms. Braman that he wanted an increase to his wage rate. He requested an increase to $12.25 per hour, feeling that what the Union was proposing for him was too much to ask for at that point. Mr. Haus believes that he may also have told Mr. Keleman that he could not remain in the job unless he had a wage increase. It was the understanding of Mr. Haus that Ms. Braman took his request to council and it was granted.

[38] With respect to Mr. Haus's request for a wage increase, Mr. Keleman testified that Mr. Haus spoke to him about it and he passed the request on to council. In cross-examination he acknowledged that at that particular time he supported Mr. Haus's request. He was also aware at that time that Mr. Haus had spoken to Mr. Blanc although he was not aware of what was said. In Mr. Keleman's view, it has not been the

usual practice to give a raise after the probationary period and he does not recall receiving a raise when he completed his probation.

[39] Mr. Blanc testified that Ms. Braman contacted him and advised that Mr. Haus had completed his probationary period and that they were looking at giving him a raise. Mr. Blanc stated that he replied to Ms. Braman that he would not object to it and Ms. Braman indicated that council would get back to him. Mr. Blanc testified that he was agreeable to looking at what council offered and asked to be advised what council decided. He did not recall receiving a response back, although this was approximately the same time as he was reassigned and Mr. Armbruster-Barrett was assigned to the bargaining unit. Mr. Blanc acknowledged that throughout the time he was assigned to the unit, Mr. Keleman was the shop steward.

[40] Ms. Braman was questioned in cross-examination by counsel for the Employer regarding her involvement with Mr. Haus' wage increase. She testified that Mr. Keleman approached her and indicated that Mr. Haus was not happy with his wage rate and that, if the Town wanted to keep Mr. Haus around, it should give him a wage increase. Ms. Braman asked Mr. Keleman to have Mr. Haus see her. She asked Mr. Keleman if he had spoken to the Union about it and he said that Mr. Haus had. Ms. Braman stated that she then spoke to Mr. Haus to ask the amount of the increase he was requesting and she took his request to council. Ms. Braman stated that she did not speak to Mr. Blanc about the issue at any time and that she would have written him a letter had he asked her to.

[41] Mr. Braman stated that he was present when council dealt with a change to Mr. Haus' rate of pay. Mr. Haus was not present at the meeting. It was Mr. Braman's understanding that Mr. Keleman had approached Ms. Braman about the possibility of losing Mr. Haus because his rate of pay was too low. The Town did not want to lose him because he had proved to be an excellent employee. Council approved Mr. Haus' request for an increase. It was Mr. Braman's understanding that Mr. Haus had advised the Union and had the Union's permission to request the increase. In cross-examination by the Union, Mr. Braman was asked what proof he had of the Union' permission and Mr. Braman stated he relied on Mr. Haus' word in this regard. Mr. Braman understood that Mr. Haus was the intermediary between the Union and council for the negotiation of

his wage increase. Mr. Braman did not correspond with the Union because he thought Mr. Haus would take care of that and because council was not asked for a written reply. In cross-examination by Ms. Lovatt, Mr. Braman indicated that it was his understanding that until a collective agreement was in place the Town was to maintain the status quo and the status quo included reviewing wages after a probationary period. No specific evidence was led concerning whether such an increase had been awarded before to other employees. Mr. Braman only referred to an example where, in the summer of 2004, a summer employee was given a small increase for doing exceptional work.

[42] Ms. Van Ham was also present at the council meeting where an increase to Mr. Haus' wage was discussed. She recalled that Ms. Braman advised council that Mr. Haus would like a wage increase now that he had completed his probationary period. Ms. Van Ham stated that, because council had done this in the past, it did the same with Mr. Haus, understanding that Mr. Haus had spoken to the Union and it was acceptable. Ms. Van Ham admitted in cross-examination by the Union that Ms. Lovatt did not receive a wage increase after passing a probationary period. Ms. Van Ham distinguished Mr. Haus' situation by stating that he had asked for a raise and Ms. Lovatt had not. In re-examination, Ms. Van Ham, with reference to the minutes of the council meeting at which Ms. Lovatt's hiring was discussed, indicated that Ms. Lovatt was not subject to a probationary period.

[43] Ms. Morrow was also present at the meeting where Mr. Haus was given a wage increase. She understood that the request came through Mr. Keleman to Ms. Braman who brought it forward to council. It was Ms. Morrow's understanding that Mr. Haus could not live on his current wage and felt that he had earned a raise. She stated that it was not out of the ordinary to give an employee a raise after completion of a probationary period, although she was not sure whether every employee received an increase at the end of their probation. Ms. Morrow felt that the increase Mr. Haus requested would place him at the level he should be at for the type of work he performed. In cross-examination by the Union, Ms. Morrow was asked whether it was a fair increase when Allan Noble, who had been employed three or four years in the same position, had been earning approximately $11.50 per hour. Ms. Morrow responded that the cost of living had increased and Mr. Haus' circumstances were different. It was her understanding that Mr. Haus had spoken to the Union to make sure that it was

appropriate to give him a raise while they were in the process of negotiating an agreement.

[44] Mr. Bentz stated that Mr. Haus' request for a wage increase came through Ms. Braman and Ms. Braman indicated that Mr. Haus needed an increase in order to continue working for the Town. Mr. Bentz stated that he could not remember whether there was any discussion about the Union's knowledge or position regarding Mr. Haus' request. When, in cross-examination by the Union, Mr. Bentz was asked whether it was typical for an employee to receive a raise of nearly $3.00 per hour upon completion of probation, Mr. Bentz stated that that was in the discretion of council and that is what council had to do to keep Mr. Haus. Mr. Bentz acknowledged that he does not believe any other employee had received that much of an increase after probation. Mr. Bentz was unsure whether Ms. Lovatt was hired with a probationary period but, in any event, he did not believe that Ms. Lovatt received a wage increase after completing a probationary period.

[45] Ms. Lovatt recalled a meeting the employees had with Mr. Armbruster-Barrett in approximately August 2004 to discuss collective bargaining. Ms. Lovatt stated that Mr. Haus mentioned at this meeting that he had received the pay raise he had requested and indicated the amount of that raise. The Union did not provide any evidence to contradict this statement.

[46] Mr. Keleman provided some testimony concerning the terms and conditions of work in the workplace before it was certified by the Union. Mr. Keleman observed that Mr. Haus was not only performing work that he assigned to him as his foreman but was performing work which must have been assigned by others, not in accordance with the Town's usual practice. The practice had been for the work to be assigned to Mr. Keleman who in turn assigned work to the maintenance employee. Other evidence established that, if work was assigned by a council member to the maintenance employee, Mr. Keleman would have at least been informed of the assignment. Mr. Keleman stated that, since Mr. Haus was hired, council has at times been assigning work directly to Mr. Haus without advising Mr. Keleman of the assignments. Mr. Keleman feels that he does not have the same authority he once had.

He also stated that, if he requires an hour change, he now must first ask the permission of the mayor. In the past, when Mr. Keleman was required to perform work before 8:00 a.m., he continued to work through to his usual end time of 5:00 p.m.; however, he stated that he is now limited to working only eight hours from the time he starts. He finds this to be a disadvantage because under the previous practice he would continue to work until 5:00 p.m. and bank the additional hours worked to use when he chose to take time off. With respect to wage increases prior to certification, Mr. Keleman stated that wage increases were usually negotiated in January of each year. He stated that the usual practice was for each employee to receive the same percentage increase. Mr. Keleman stated that he feels that Mr. Haus does not respect him as the foreman, little information is passed on to him from council and that he has to watch his back at work.

[47] Ms. Lovatt stated in her reply and her testimony that she does not believe that the Employer influenced her in any way to bring the application for rescission and described herself as somebody who was not easily influenced. She stated that when she was hired she was forced to sign a union membership card and felt that she had been given no say regarding the issue of union representation. The rescission application provides her with a means to choose whether to be represented by a union. She does not understand why the Union would assert that she was influenced to bring the rescission application, speculating that the only reasons may be due to comments she made at a union meeting to the effect that, if the Employer decided to eliminate a position for financial reasons, it would likely be her position as the administrator could perform the duties she regularly performed. Ms. Lovatt does not believe that any changes were made to her terms and conditions of employment from the date she was hired and took the position that any changes to the terms and conditions of Mr. Haus' employment were made at his instigation with the knowledge of the Union.

[48] Ms. Lovatt testified concerning the circumstances leading up to the filing of the rescission application. She believes that it was in approximately August 2004 that she and other employees first met with Mr. Armbruster–Barrett to discuss proposals for an upcoming bargaining meeting with the Employer. Prior to this meeting, Ms. Lovatt had reviewed some papers about bargaining and had located a provision, presumably in the *Act*, which indicated that there was a time frame involving 30 and 60 days prior to the certification date to make changes to the collective bargaining agreement or for

decertification. At the meeting, Ms. Lovatt asked Mr. Armbruster-Barrett about the process of decertification to which he responded that the Union would not assist her with a rescission application. As the date for making an application for rescission drew nearer (she filed her application on December 15, 2004), Ms. Lovatt reviewed the Employer's union file, to which she believed she had access as part of her job, and found various documents in the file, including a letter from the Board which stated the Board's website address. She accessed the Board's website and obtained a form for the application for rescission. She knew that she required majority support for the application and she therefore contacted one employee who she thought might be interested in supporting the application. The individual she spoke to agreed to support the application and Ms. Lovatt prepared a letter of support for the individual to sign. This letter of support was filed along with Ms. Lovatt's letter of support with the application for rescission.

[49] In response to questioning by the Board concerning the Employer's union file that Ms. Lovatt accessed when preparing to make the rescission application, Ms. Lovatt indicated that the file contained everything the Employer had that related to the Union, including union membership cards signed by the employees at the time of the application for certification. Ms. Lovatt stated that, prior to making the rescission application, she copied these cards as well as several other documents in the file, including letters from the Board, a document concerning the certification process and a single sheet which was an excerpt from the *Act* and containing several provisions of the *Act*, including s. 5(k), which Ms. Lovatt understood concerned rescission and which she quoted in her rescission application. Ms. Lovatt stated that she asked Ms. Braman if she could take the Town's file home with her and Ms. Braman stated that the file should remain in the office. Ms. Lovatt therefore stayed late at work one night to make photocopies of all the documents she wanted for the rescission application.

[50] Ms. Braman testified that she had not given her permission for the Applicant to photocopy the Employer's union file. When asked why there would be an excerpt of s. 5(k) of the *Act* in that file, Ms. Braman stated that she did not know why there was but that she was not the only person who had charge of the file. She stated that she only gave Ms. Lovatt permission to review the file after the first bargaining meeting with the Union because Ms. Lovatt told Ms. Braman she believed she had the

wrong contract proposal from the Union. Ms. Lovatt had asked to take the file home and Ms. Braman indicated that the file had to remain in the office. She gave Ms. Lovatt permission to copy the contract, thinking that, if the Town and the Union had the contract proposal, it was acceptable for Ms. Lovatt to have a copy. Ms. Braman stated that the only documents in the file were letters, most of which were entered into evidence at the hearing. She stated that the two councilors who were bargaining on behalf of the Town kept all their information at home and not in the Town's files. Later, in response to questions posed by the Applicant, Ms. Braman stated that only she and Ms. Lovatt had access to the Town's files. Ms. Braman stated that she was not aware that a rescission application was being made until she received the same from the Board.

[51] Mr. Blanc testified concerning correspondence with the Employer regarding bargaining and the hiring of summer students. It appeared that, due to the change in assignments from Mr. Blanc to Mr. Armbruster-Barrett, it took some time for the Union to arrange bargaining dates. Aside from the presentation of the Union's bargaining proposals in approximately May 2004, and the provision of wage proposals sent by fax to the Employer in July 2004, the first meeting for actual negotiations did not take place until November 2004.

[52] Ms. Braman testified that she received a letter from the Union in October 2004 requesting that all employees sign union membership and dues check-off cards and that the Employer begin deducting and remitting union dues. The Employer complied with this request.

[53] Mr. Keleman testified concerning the first bargaining meeting held between the Employer and the Union in approximately November 2004. Present at the meeting were the mayor and all council members, Mr. Armbruster-Barrett, Mr. Keleman, Mr. Haus and Ms. Lovatt. Mr. Keleman recalled that Mr. Braman asked what was so terrible at work that the employees would put themselves at risk by joining a union. Mr. Keleman stated that he replied that they joined the Union because there were no policies and procedures in the workplace, no clear chain of command, employees had little input into policies, low wages and because he felt the employees were used in campaigning. Mr. Keleman also testified that Ms. Lovatt made comments at this bargaining meeting to the effect that she felt a union was unnecessary in such a small workplace and that she

and Mr. Haus would like to have a re-vote about the Union. Mr. Keleman stated that Ms. Lovatt asked Mr. Armbruster-Barrett how to go about getting a re-vote and that he replied that that information was in *The Trade Union Act.* During cross-examination, Mr. Keleman acknowledged that he could not say if Ms. Lovatt made these comments in the presence of council members or privately to the employees and Mr. Armbruster-Barrett.

[54] Mr. Braman testified that, after the Town received notification that the employees had applied for certification, the administrator gave council a list of "do's and don'ts" and this included a direction not to coerce employees, which included asking them why they joined the Union. Although curious, as far as he was aware no one had done so. He thought that at the first bargaining meeting in November 2004 it was acceptable to ask why the employees had joined a union because the union representative was present. He denies asking the question in the manner testified to by Mr. Keleman. Mr. Braman recalls expressing some surprise at the meeting and wondering what the employees had to gain with a union. Mr. Braman did not recall Ms. Lovatt making any comments at this meeting about the Union or having a re-vote. Mr. Braman stated that he was not aware that a rescission application was being made until he received a copy of the same from the Board.

[55] At this same initial bargaining meeting in November 2004, Mr. Braman asked certain questions of the Union about the agreement and the *Act*. He asked who pays for the deduction of union dues and stated that he was informed by Mr. Armbruster-Barrett that, by legislation, the Employer was responsible for the administration costs associated with dues deduction. He also asked why, "in this free country of ours," would employees have to be members of the Union, if it was not to their liking. He felt the Union should understand that he and Ms. Van Ham were new to the collective bargaining process and were not sure what they needed to do, but that they genuinely attempted to bargain a collective agreement.

[56] Ms. Van Ham testified that she believed that there had been four bargaining meetings with the Union. The first was in May 2004 where the Union presented its proposals. The next meetings were November 10 and 14, 2004 and then December 15, 2004. She believes that at the meeting in May 2004, all of council was present along with Mr. Blanc and Mr. Keleman. At the subsequent meetings, Ms. Van

Ham thought that the Employer's representatives were herself, Mr. Braman and councilor Chamberlain. Ms. Van Ham, Ms. Morrow and Mr. Bentz recalled that at one of the meetings Ms. Lovatt was present and they stated that they do not recall any mention by her of the possibility of a re-vote. Ms. Van Ham, Ms. Morrow and Mr. Bentz all testified that they had no knowledge of a rescission application coming about until the Town received the application. Ms. Van Ham stated that it was her understanding that, until a collective agreement was reached, the Town was to maintain the status quo.

[57] At the time of the hearing, the parties had not reached a collective agreement and the Employer had not accepted the Union's proposal concerning wages.

Relevant Statutory Provisions

[58] Relevant statutory provisions include ss. 3, 5(k), 6(1), 9 and 11(1)(a),(b), (g) and (m) of the *Act*, which provide as follows:

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

days before the anniversary date of the order to be rescinded or amended;

notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;

. . .

6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.

. . .

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

11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

(a) in any manner, including by communication, to interfere with, restrain, intimate, threaten or coerce and employee in the exercise of any right conferred by this Act;

(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions of wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purpose of such trade union;

. . .

> *(g) to interfere in the selection of a trade union as a representative of employees for the purpose of bargaining collectively;*
>
> *. . .*
>
> *(m) where no collective bargaining agreement is in force, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in an appropriate unit without bargaining collectively respecting the change with the trade union representing the majority of employees in the appropriate unit;*

Argument:

Ms. Lovatt

[59] Ms. Lovatt argued that she had properly filed support for the application for rescission and a vote should be granted. Ms. Lovatt took the position that Ms. Purdue was not an employee of the Town, but rather a contractor, and Ms. Purdue should not be permitted to vote on the decertification of the Union, the Union having only discovered Ms. Purdue following the filing of the rescission application. Ms. Lovatt argued that the fact that the Town remitted EI premiums on Ms. Purdue's behalf on two occasions should not qualify Ms. Purdue as an employee. Ms. Lovatt did not agree with the Union's assertion that the Employer had made changes to the terms and conditions of her employment and/or Mr. Haus' employment. When Ms. Lovatt was hired for the position of assistant administrator she advised the Employer of her alternate employment and the Employer agreed to accommodate Ms. Lovatt in this regard. Ms. Lovatt had not received a pay increase since she became employed by the Employer and Mr. Haus had received what would be considered a normal wage increase following his probationary period, an increase which he had the Union's permission to request.

[60] Ms. Lovatt also argued that there was no evidence to indicate employer involvement/influence with the rescission application. She could not see how the Employer could influence her to make the application and indicated she never spoke to any of the Employer's representatives about the application. She brought the application because when she became employed there was only one employee in the bargaining

unit who had been there at the time of certification and she wanted the opportunity to vote on whether to be represented by the Union.

The Union

[61] The Union took the position that there should be four employees on the statement of employment: Mervyn Keleman, Lora Lovatt, Keith Haus and Marlene Purdue. The Union asserted that the Applicant did not enjoy majority support for the application for rescission. The Union relied on Ms. Perry's evidence concerning the EI remittances and council's approval of the same, in support of its position that Ms. Purdue should be considered an employee. The Union also pointed to the fact that Ms. Purdue had no written contract, the contract had not been tendered and it had no expiry date. The Union asserted that the fact that it did not discover Ms. Purdue until the rescission application was filed should not bar a decision that Ms. Purdue is an employee and member of the bargaining unit.

[62] The Union submitted that the Employer is guilty of an unfair labour practice because it unilaterally changed the employees' terms and conditions of work in violation of s. 11(1)(m) of the *Act*. The Employer deviated from the status quo by giving Mr. Haus a wage increase. Even though Mr. Haus stated that he had the permission of the Union to request the increase, the Employer, and Ms. Braman in particular who deals with various laws and statutes, should have contacted the Union or sought advice.

[63] The Union asserted that the Employer's unilateral change of the terms and conditions of employment, particularly in relation to Mr. Haus, amounted to coercion of the employees into bringing and supporting the application for rescission in violation of ss. 11(1)(a), (b) and (g) of the *Act*. The Union saw Mr. Haus' 25 per cent increase as suspicious given that no other employee had received such a generous increase.

[64] The Union also took the position that the application should be dismissed because of employer influence/involvement/interference with the application. It asserted that the Employer created an environment where a reasonable inference could be drawn that the Employer influenced the application. The Union pointed to Mr. Braman's comments at the bargaining table as suggestive to new employees that there should be no union in the workplace. In addition, Ms. Lovatt's photocopying of the Employer's

Union file and her discovery of an excerpt containing s. 5(k) of the *Act* in that file was suspicious.

The Employer

[65] The Employer filed a written brief which the Board has reviewed. With respect to the statement of employment, the Employer maintained that there were three employees employed with the Town and that Ms. Purdue was not an employee but rather had been contracted to clean the Raymore Regional Library since 1994. The Employer's basis for this argument was that Ms. Purdue received a fixed monthly fee; she was required to clean the library any time prior to the three days on which it was open without the Town providing any direction with respect to how the work was done, how many hours she must work, or who performed the work; she had never received any of the usual employee benefits; and this arrangement was the same as for Ms. Purdue's predecessors. With respect to the EI deduction first made by Ms. Perry in 2004, the Employer argued that this should not be considered a factor indicative of employee status. It was the Employer's position that the deduction was made by Ms. Perry on her own without the necessary approval of council. It was made by Ms. Braman the following year as a result of a direction by Canada Customs and Revenue Agency. The Employer suggested that the Board should draw an adverse inference from the Union's failure to call Ms. Purdue as a witness. The Employer also asserted that the Union knew or ought to have known about Ms. Purdue at the time of its application for certification one year earlier and its failure to address the question of her status at that time barred it from asserting that she was now an employee. Lastly, the Employer argued that the Union had failed to put a proper application before the Board to determine whether Ms. Purdue was an employee, pursuant to s. 5(m) of the *Act* and that only those who have previously been determined to be employees on the date the rescission application was filed should be permitted to be on the statement of employment. In other words, the Board cannot make a retrospective order.

[66] The Employer denied that it committed any unfair labour practices. Ms. Lovatt was hired under a flexible hours of work arrangement due to her other employment. There were no changes to Ms. Lovatt's terms and conditions of employment through to the date of the application. Further, there had been no change

to Mr. Haus' hours of work since the commencement of his employment. The Employer maintained that it had carried on its business as usual in accordance with past practice. The Employer relied on *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Off the Wall Productions Ltd.,* [2000] Sask. L.R.B.R. 156, LRB File Nos. 192-98, 193-98 & 194-98 and *The Newspaper Guild Canada/Communications Workers of America v. Sterling Newspapers Group, a division of Hollinger Inc., operating as The Leader Post Leader-Star News Services,* [2000] Sask. L.R.B.R. 558, LRB File Nos. 272-98 & 003-00.

[67] With respect to Mr. Haus' wage increase, the Employer maintained that this wage increase was given following Mr. Haus' probationary period and at Mr. Haus' request made through the shop steward, Mr. Keleman. It was the Employer's understanding that Mr. Haus had the permission of the Union to request the wage increase. Ms. Braman denied any conversation with Mr. Blanc to the effect that she was to get back to Mr. Blanc with respect to a proposal by council and the Employer submitted that we should accept the evidence of Ms. Braman over that of Mr. Blanc as Ms. Braman was called by the Union as its witness. The Employer maintained that the Union was aware of the increase given to Mr. Haus yet chose not to raise it as an issue until the rescission application was filed. In addition, the Employer asserted that granting a wage increase following an assessment of performance upon completion of a probationary period was a continuation of its past practice.

[68] The Employer also took the position that there was no evidence, and for that matter, no allegation, that the application for rescission was made on the advice of, or as a result of influence or interference or intimidation by the Employer, except through the commission of an unfair labour practice, which the Employer denied. The Employer asserted that the Union had the onus of proving that the Employer encouraged or influenced the application in any way. The Employer denied involvement with the application or any knowledge of the application until it was served with the same by the Board. The Employer denied that it created an atmosphere from which the Board could draw an inference that it interfered with or influenced the bringing of the application. The Employer referred to the cases of *Schuba v. Gunnar Industries Ltd. and International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870,* [1997] Sask. L.R.B.R. 829, LRB File No. 127-97; *Leavitt v. Confederation Flag Inn (1989)*

Limited and United Food and Commercial Workers, Local 1400, [1990] Winter Sask. Labour Rep. 64, LRB File No. 225-89*; Matychuk v. Hotel Employees and Restaurant Employees, Local 41 and El Rancho Food and Hospitality Partnership*, [2004] Sask. L.R.B.R. 5, LRB File No. 242-03; and *Cavanagh v. Canadian Union of Public Employees Local 1975 and University of Saskatchewan Students' Union* [2003] Sask. L.R.B.R. 226, LRB File No. 047-03 .

Analysis and Decision:

[69] There are three main issues raised by these applications. Firstly, the parties disagree concerning the composition of the statement of employment, that is, whether there are three or four employees in the bargaining unit. Secondly, the Union alleges that certain unfair labour practices were committed by the Employer which involved the unilateral change of certain terms and conditions of employment of two employees hired subsequent to the issuance of the certification Order. Lastly, the Union, through the allegations contained in its unfair labour practice application, argues that the Employer has improperly influenced or interfered with the rescission application contrary to s. 9 of the *Act*. The Board will address these three issues.

Statement of Employment

[70] It is the position of the Applicant and the Employer that there are three employees in the bargaining unit while the Union asserts that there are four. The position in question is the library janitor position, currently held by Ms. Purdue.

[71] Ms. Lovatt argued that Ms. Purdue's name should not be on the statement of employment for the rescission application because the Union did not "discover" Ms. Purdue until the rescission application was filed and she was not considered an employee at the time of the certification approximately one year earlier. The Employer argued that Ms. Purdue's status as an employee was not properly before the Board, she was not declared an employee at the time the rescission application was filed and the Board does not have the jurisdiction to declare her an employee. These are not tenable positions. At the time of the certification application it was the Employer's responsibility to complete the statement of employment. In certification applications, the

Board relies on the accuracy of a statement of employment in making its decision whether to certify the unit applied for. The Board issued the certification Order on the basis of the statement of employment and the support cards filed with the Union's application. The unit certified was "all employees" of the Employer. The effect of such an order is to include in the bargaining unit all current employees of the Employer as well as any new employees of the Employer. We see the discovery of Ms. Purdue as no different than if the Employer had hired a new employee. Whether the Union knew or should have known she was an employee at the time of certification is not relevant. The statement of employment is in issue before us and the real question for the Board is whether Ms. Purdue is an employee within the meaning of the *Act* and thus falls within the scope of the bargaining unit described in the certification Order.

[72] The Union argued that, because the Employer deducted and remitted EI premiums on behalf of Ms. Purdue for the years 2003 and 2004, the administrator having determined with the guidance of Revenue Canada that Ms. Purdue was an employee for Revenue Canada's purposes, the Board should simply accept that Ms. Purdue is an employee for the purposes of the *Act*. The approach of the Board to this question is not quite so simple, although the Employer's and Revenue Canada's treatment of Ms. Purdue as an employee for the purposes of making EI deductions might be one factor relevant to the determination of her status as an employee under the *Act*. While an individual may be an employee for some purposes (i.e. Revenue Canada), he or she may not be determined so for other purposes. In *Saskatchewan Government and General Employees Union v. Saskatoon Open Door Society*, [2001] Sask. L.R.B.R. 210, LRB File No. 177-99, the Board reviewed its approach to the question of whether an individual was an employee or contractor, at 213 to 217 as follows:

> *[10] In several cases in the past few years, the Board has had occasion to track the evolution of the approach by labour relations tribunals to the employee-contractor dichotomy from the seminal decision by the Privy Council in Montreal v. The Montreal Locomotive Works Ltd., et al., [1947] 1 D.L.R. 161 (P.C.), which enunciated the well-known four-fold test, viz., (1) the degree of control over the method of providing goods and services; (2) ownership of the tools; (3) chance of profit; and, (4) risk of loss; through the "integration test" proposed by Lord Denning in Stevenson Jordan & Harrison Ltd.v. MacDonald & Evans, [1952] 1 TLR 101 (C.A.), which asks the question whether the work in issue is being done as an integral part of the employer's business and,*

therefore, whether the putative contractor is employed as part of the employer's business like other employees; to the addition of two tests to the Montreal Locomotive criteria by the Ontario Labour Relations Board in International Woodworkers of America v. Livingston Transportation Ltd., [1972] OLRB Rep. 488, namely, (1) whether a party is carrying on business on his own behalf or for a superior; and, (2) the statutory purpose test. In International Brotherhood of Electrical Workers, Local 2038 v. Tesco Electric Ltd., [1990] Summer Sask. Labour Rep. 57, LRB File No. 267-89, the Board described the statutory purpose test in the following terms:

> *... the statutory purpose of The Trade Union Act is to protect the rights of employees to organize in trade unions of their own choosing for the purpose of bargaining collectively with their employers. Accordingly, individuals should not be excluded from collective bargaining because the form of their relationship does not coincide with what is generally regarded as "employer-employee", when in substance, they might be just as controlled and dependent on the party using their services as an employee is in relation to his employer. If the substance of the relationship between the individual and the company is essentially similar to that occupied by an employee in relation to his employer, then the individual is in fact an "employee" within the meaning of Section 2(f) of the Act and will be so designated by the Board, notwithstanding the form or nomenclature attached to that relationship.*

[11] In an article entitled "Enterprise Control: The Servant Independent Contractor Distinction" (1987) 37 U.T.L.J. 25, Prof. Robert Flannigan formulated the enterprise control test which emphasized the risk-taking element of entrepreneurial activity as an essential characteristic of control over the enterprise.

[12] This latter test was referred to as the economic control test by the Canada Labour Relations Board in Canada Post Corporation v. Canadian Postmasters and Assistants Association, et al. (1989), 5 CLRBR (2d) 79, which assessed its function as being,

> *. . . to update the concepts of the "fourfold test" and the "integration test" and reconstruct them to suit the modern business milieu. It focuses on the contractor's activities rather than on the employer's business. This is important for the Board as it administers the Code in today's ever-changing business world where corporate takeovers, mergers and practices such as "contracting out" and "privatization" are becoming commonplace.*

[13] The Board has subsequently approved of an economic control analysis as a fundamental part of the determination of employee-contractor status. In Retail, Wholesale and Department Store Union, Locals 539 & 540 v. Federated Co-operatives Limited, [1989] Fall Sask. Labour Rep. 60, LRB File No. 256-88, the Board stated:

> *. . . although it is not the only consideration, entrepreneurial independence or control, in the sense of the latitude to make decisions which determine the financial success or failure of the business, is the most important feature that distinguishes independent contractors from employees.*
>
> *This Board agrees with that analysis. An independent contractor is essentially a business person, an entrepreneur, a risk-taker, who takes chances in the marketplace with a view to making a profit. Success or failure of his enterprise depends upon how well he utilizes the capital and labour that he controls and how well he assesses the marketplace. Regardless of how inferior a businessman's bargaining power may be or how poor his bargain, he is not an employee within the meaning of the Act.*

[14] This approach has been adopted by the Board in several subsequent decisions including, McGavin Foods, supra; United Food and Commercial Workers, Local 241-2 v. Beatrice Foods Ltd., [1994] 3rd Quarter Sask. Labour Rep. 302, LRB File No. 264-93; Retail, Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd., [1996] Sask. L.R.B.R. 337, LRB File No.115-95; Grain Services Union v. AgPro Grain Inc., [1996] Sask. L.R.B.R. 639, LRB File No. 111-96; Regina Musicians Association, Local 446 v. Saskatchewan Gaming Corporation, [1997] Sask. L.R.B.R. 273, LRB File No. 012-97. In the last decision, the Board looked to the following criteria previously identified by the Ontario Board in Algonquin Tavern v. Canada Labour Congress, [1981] 3 Can. LRBR 337, at 360 ff.:

> *1. The use of, or right to use substitutes.*
>
> *...*
>
> *2. Ownership of instruments, tools, equipment, appliances, or the supply of materials.*
>
> *...*
>
> *3. Evidence of entrepreneurial activity.*

...

4. The selling of one's services to the market generally.

...

5. Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.

...

6. Evidence of some variation in the fees charged for the services rendered.

...

7. Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit.

...

8. The degree of specialization, skill, expertise or creativity involved.

...

9. Control of the manner and means of performing the work - especially if there is active interference with the activity.

...

10. The magnitude of the contract amount, terms, and manner of payment.

...

11. Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.

[15] Despite the fact that both the Algonquin Tavern and Saskatchewan Gaming cases defined and considered these criteria in the context of entertainers engaged to perform for the public ancillary to the respective principal's main business, the list, which is not exhaustive, is informative for other situations and industries involving the determination of employee-contractor status.

[16] While the particular facts of McGavin Foods, supra, are not particularly instructive in the present situation in that that case involved a plan by McGavin to franchise or contract out its distribution routes formerly serviced by bargaining unit employees

using company-owned trucks to owner-operators, the Board's description of the operation of s. 2(f) of the Act, at 210, is beneficial:

> *Section 2(f)(i.1) of the Act sets out a purposive test for determining if the relationship between contractors, in the opinion of the Board, could be the subject of collective bargaining. Section 2(f)(iii) of the Act prevents the common law test of "vicarious liability" that was developed to determine the legal liability of a master for the acts of a servant from being determinative of employment status. In Retail Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd., Johnson et al., [1996] Sask. L.R.B.R. 337, LRB File No. 115-95, the Board, at 345, held that the focus of the assessment under s. 2(f)(i.1) and (iii) of the Act is an attempt to "distinguish between persons who are genuinely operating in an entrepreneurial fashion independent of an "employer," and those who, whatever the form their relationship with that putative employer takes, are really employees whose access to the option of bargaining collectively should be protected."*

[17] In McGavin Foods, supra, the work to be performed by the franchisee was an integral part of McGavin's business. The distributorship agreement anticipated that the franchisee would be available to service customer accounts seven days a week and contained a restrictive covenant preventing the franchisee from working for a competitor. McGavin controlled the main customer list and the retail and wholesale prices of the products. The Board found that the use of employees by an owner-operator on a regular basis, as opposed to casual helpers or relief help, may be a "solid indicator of his or her entrepreneurial status in that it demonstrates that he or she will profit not only from his or her own labour, but also from the labour of others." The Board held that franchise distributors working as owner-operators of their own equipment were not independent contractors, but employees within the meaning of the Act; on the other hand, those distributors who employed others to drive franchised routes were held to be independent contractors. The decision is instructive in that it illustrates that one may be considered a contractor even though there is a degree of economic dependence on the principal. Determination of the employee-contractor issue really is a matter of degree; the cases that are obviously black and white rarely come before the Board. As the Board noted in Beatrice Foods Ltd., supra, at 305:

> *There are many details of a relationship which will yield clues as to whether its essential character is closer to employment or contract. As the Ontario Labour Relations Board pointed out in the Livingston Transportation decision, supra, when a tribunal such as ours is asked to make the determination, it is often a sign that the line of demarcation is difficult to discern under the circumstances.*

[73] In *Saskatoon Open Door Society, supra*, the Board determined that the individual in question, a caretaker, was more in the nature of a contractor than of an employee and excluded the individual from the bargaining unit. The factors the Board considered in reaching its conclusion included the individual's ability to fulfill the cleaning contract through his own labour or that of someone else (i.e. he controlled who would do the work); ownership of the tools was split between the individual and the employer (the employer owned the vacuum cleaner and cleaning implements and had to approve the purchase of supplies while the individual supplied the tools used for maintenance work); the work the individual performed was not part of the business in which the employer was engaged; the individual did not work under similar conditions to those already determined to be employees of the employer; the individual was not restricted from pursuing other business interests; the individual could accept or reject additional work offered to him by the employer, negotiating separate remuneration for the same; and the individual assumed the risk of profit and loss (while noting that it mattered not that such a risk was small because of the modest size of the contract -- if he performed the worked efficiently, he could realize a profit). Overall, the Board determined that the individual maintained control over the cleaning and maintenance enterprise. With respect to the determination that the individual also controlled *when* the work would be completed, the Board stated at 217-218:

> *Mr. Gorges also controls when the work will be completed, except for some restriction practically dictated by the public interaction nature of the Society's activities; this is not different than any business owner dealing with the public (and which likely would include most of them) who does not want cleaning and maintenance activities going on underfoot during regular business hours. In the context of the building cleaning trade such a restriction is not informative of anything one way or another as concerns the present issue.*

[74] Although Ms. Purdue has been responsible for cleaning the library for a period in excess of ten years, there has never been a written contract in place. This is not determinative of the issue and it is therefore important to examine the terms and conditions of her relationship with the Town. The best evidence would have come from the incumbent, Ms. Purdue. Unfortunately, Ms. Purdue was not called as a witness at the hearing, making it somewhat difficult for the Board to assess her situation. There was, however, sufficient information presented to us to make such a determination.

[75] The Board finds the *Saskatoon Open Door Society* case, *supra*, on all fours with the case before us. The absence of a specific direction by the Town that Ms. Purdue must personally perform the janitorial work is notable in and of itself. The issue simply has not arisen between Ms. Purdue and the Town. It appears that as long as the work is completed there is no reason for Ms. Purdue, the Town or the library to raise the issue. Again, it would have been far more helpful to the Board had one of the parties called Ms. Purdue to the stand to testify. In light of that failure and the fact that the only evidence before us on this issue was that members of Ms. Purdue's family have performed the required work, the Board concludes that there is no restriction on Ms. Purdue to perform the work personally. There was also no suggestion that the Town is required to find a replacement to perform the janitorial work if Ms. Purdue is unable to do so, such as when she is ill or wishes to take a vacation. The evidence indicated that Ms. Purdue is responsible for the completion of the work. In light of these considerations, we conclude that Ms. Purdue has control over who performs the janitorial work.

[76] Ms. Purdue also has control over how the work is performed. While the library requires her to perform certain tasks, neither the manner nor the means of performing the work is subject to the control of the library or the Town. Ms. Purdue is responsible for the quality of her work and there has been no active interference in how she performs the work. No one from the Town inspects her work and only on one occasion, in 2003, did the library notify the Town of specific tasks it required Ms. Purdue to perform.

[77] Similar to the situation in the *Saskatoon Open Door Society* case, *supra*, Ms. Purdue controls when the required work is completed. The only requirement she has is to complete her work prior to the next day on which the library is open, which is

three regular days per week. As in the *Saskatoon Open Door Society* case, *supra*, the restriction that the work has to be performed outside the library's regular business hours is a practical restriction imposed so that the cleaning does not interfere with the users of the library's services, a restriction that was noted to be common in the building cleaning industry. While the library board did specify certain tasks to be completed on a daily, weekly, monthly or semi-annual basis, Ms. Purdue has control over the hours she chooses to work and the length of time she chooses to work, provided she performs the specified tasks. A statement of required tasks would presumably exist in any building cleaning contract.

[78] The question of whether the work performed by Ms. Purdue is part of the business in which the Town is engaged is somewhat difficult to answer. Ms. Purdue's janitorial work is performed under a somewhat unusual arrangement. It is the Town who advertised for the position and is responsible for her fixed monthly payment, but the services are actually performed for the benefit of the library (which is operated through a non-profit board and is a branch of the Parkland Regional Library) which has direct input into the type of work required to be done by Ms. Purdue. It appears that this arrangement was developed because the Town actually owns the building in which the library is housed and the library board has insufficient funding to pay for the cleaning of the building. There was no evidence concerning who is responsible for the inside cleaning of other buildings owned by the Town except for a brief reference to the arena being cleaned by janitors retained and paid for by the board that governs the operation of the arena. There was no evidence to suggest that any of the three employees in the bargaining unit engages in inside cleaning of other buildings owned by the Town, whether operated by local boards or not. There was no evidence that the Town has assigned the library cleaning work to a replacement, nor has the Town assigned Ms. Purdue to other work of the Town. It is our view that this factor tends to suggest that Ms. Purdue is a contractor rather than an employee on the basis that there is no evidence that the Town is engaged in the business of cleaning buildings and because of the unique relationship the Town has in assisting the library to provide its services.

[79] We have also concluded that Ms. Purdue does not work under conditions similar to those of others who have already been determined to be employees of the Town. Her work is not directed by council either directly or through the administrator, as

is the work of the other employees. While the library board did send a letter to the Town indicating the particular tasks that were to be completed in the library, it is apparent that the Town did not communicate these to Ms. Purdue until the library made a second request several months later. A letter from the Town to the library board suggests that the Town did not think it incumbent upon it to inform Ms. Purdue of tasks required by the library. All the employees of the Town are paid an hourly rate while Ms. Purdue is paid a fixed monthly sum regardless of the number of hours worked. Ms. Purdue is not required to account to the Town regarding the number of hours she works or when she works them. In addition, Ms. Purdue has never received the same benefits as other employees, such as health care, vision care, dental and the pension plan.

[80] While there was a significant amount of evidence led concerning the Employer's making of EI deductions and remittances on behalf of Ms. Purdue for the 2003 and 2004 years, as it would for other employees, the whole of the evidence suggests to us that this factor should not be determinative. These two deductions were made after several years of not making such a deduction and in circumstances which make it debatable whether the Town accepted that Ms. Purdue was an employee for Revenue Canada's purposes. For several years the Town issued a T-4 to Ms. Purdue, without deductions, and indicated that she was performing contracted janitorial work. After Ms. Perry, the Town's administrator at that time, was questioned by Revenue Canada in early 2004 regarding Ms. Purdue's status, Ms. Perry filed an amended T-4 for Ms. Purdue and remitted the necessary employee and employer amounts for the EI deduction. Ms. Perry made this determination, without third party assistance or advice, based on a brief conversation with Revenue Canada and the review of a brochure sent to her by Revenue Canada. Unfortunately, the original brochure, in which the administrator had answered a series of questions designed to assist in the determination of whether Ms. Purdue was an employee, was not presented to the Board. In any event, as stated above, we are not bound by a determination of Revenue Canada, if in fact there has actually been such a determination, as it appears that a formal ruling was neither requested of nor made by Revenue Canada. Ms. Perry testified that when she made the determination that Ms. Purdue was an employee she itemized these payments in a list of accounts payable for council to approve at a regular council meeting and that at this meeting she discussed Ms. Purdue's situation and the reason for making the EI remittances. Several members of council who testified at the hearing did not recall any

such discussion or being told that the payments to Revenue Canada that they approved were in relation to Ms. Purdue. On a careful review of the evidence the Board finds that the issue was not discussed at the council meeting or at least not discussed with sufficient clarity that the council members understood that Revenue Canada was treating Ms. Purdue as an employee and that this might have implications with respect to her status as an employee for other purposes. This conclusion is supported by the fact that there is a complete absence of mention of discussion of this issue in the minutes for the council meeting, that the minutes do not reflect that correspondence from Revenue Canada was received on that issue (the minutes having mentioned other correspondence received from Revenue Canada), that the accounts approved listing appended to the minutes simply indicates that a payment of a certain amount was made to Revenue Canada without mention that it was made on behalf of Ms. Purdue (although Ms. Perry testified that a more detailed account listing which would have specified this information was prepared and circulated to council members prior to the meeting, this document apparently no longer exists and was not available for the Board to review), and that payments by the Town were remitted to Revenue Canada on a regular basis and the payment on behalf of Ms. Purdue would therefore not stand out. This finding is also supported by the evidence of the current administrator, Ms. Braman, who testified that, upon being questioned by Ms. Purdue in November 2004 whether an EI deduction would be made again that year, Ms. Purdue did not mention that Ms. Perry and Revenue Canada viewed her as an employee (and, in addition, she at no time mentioned that she wanted to join the Union or receive the benefits the other employees had). It was therefore necessary for Ms. Braman to contact Revenue Canada to determine the reasons for the EI deduction in 2003. When Ms. Braman contacted Revenue Canada the person on the telephone could not provide an explanation as to why the remittance had been made the previous year but noted that the file had been “flagged” because there had been a previous inquiry by the Employer. The Revenue Canada employee suggested that EI should again be deducted and remitted and if there was determined to be an overpayment, the payment would be returned to Ms. Purdue. This conversation also explains why it is of little significance that the EI payment was made again for 2004; Ms. Braman did not appear to have the information necessary to determine why the EI payment should be remitted for 2004 or that Ms. Purdue was being considered an employee by Revenue Canada.

[81] While it was noted in the *Saskatoon Open Door Society* case, *supra*, that no employment deductions were made from the payments to the individual and the individual did not pay into employment insurance, we find that, in the circumstances of this case, the two EI payments made on Ms. Purdue's behalf are not sufficient for us to conclude that they are indicative of the Employer treating Ms. Purdue as an employee. Neither does the fact that the EI deductions were made in 2003 and 2004 provide a sufficient basis for us to adopt the possible conclusion of Revenue Canada that Ms. Purdue is an employee.

[82] There was no evidence to suggest that the Town prevented Ms. Purdue from pursing other business interests while performing janitorial work at the library. In light of the fact that Ms. Purdue did not testify concerning whether she engaged in other business activities or not, we are left to conclude that based on a description of the tasks Ms. Purdue was required to complete at the library, it appears that the frequency and volume of work performed by Ms. Purdue at the library would not limit her from engaging in other business activities.

[83] The ownership of tools is not a significant factor in this case and not determinative of the issue. While the evidence on this point was incomplete, it appeared that the Town was responsible for the supplying the cleaning equipment and supplies, which was similar to the situation in the *Saskatoon Open Door Society* case, *supra*, where the employer was responsible for supplying or paying for those items and the individual was responsible for the supply of tools for the maintenance aspect of his work.

[84] When examining whether Ms. Purdue had a risk of profit or loss or whether such risk was borne by the Town, we find that the risk, if any, was borne to a greater degree by Ms. Purdue. Essentially there was no risk to the Town. While the building in which the library is housed is owned by the Town and the Town has some interest in keeping it clean, it likely would not have engaged someone to perform the cleaning had it not agreed to provide the service for the benefit of the library with no consideration in return. The risk of profit and loss to Ms. Purdue is similar to that borne by the individual in the *Saskatoon Open Door Society* case, *supra*, where the Board determined that there was some risk, albeit minimal due to the modest size of the contract, there was a degree of risk in that if the individual could perform the work

efficiently, he stood to realize a profit, and if he could not perform efficiently, he would suffer a loss.

[85] When considering the several indicia of control in this relationship, for the above stated reasons the Board concludes that the relationship between Ms. Purdue and the Town is more in the nature of a principal/contractor relationship than that of an employer/employee relationship. In our view, Ms. Purdue has more control over the work than does the Town.

Unfair Labour Practices

[86] The Union argued that the Employer unilaterally changed the terms and conditions of employment of Ms. Lovatt and Mr. Haus in violation of the *Act* and that this had a coercive effect on these two employees prompting Ms. Lovatt to bring and other employees to support the rescission application. The Union also, by implication, suggested that the Employer influenced or interfered with the employees to the extent that the application should be dismissed pursuant to s. 9 of the *Act.* The Employer denied it committed any unfair labour practices or in any way coerced or influenced the employees into bringing the rescission application. Ms. Lovatt said that she had not been coerced into bringing the application and took the position that neither she nor Mr. Haus' terms and conditions of work had changed, or had not changed without the knowledge and permission of the Union. We will address the issues of the unfair labour practices and employer coercion/influence separately as a finding that an unfair labour practice has been committed by the Employer does not automatically result in a finding that the Employer coerced the employees into bringing the rescission application. Likewise, a finding that the Employer did not commit any unfair labour practice does not necessarily result in the conclusion that there has been no employer coercion or influence such that the rescission application should be dismissed pursuant to s.9 of the *Act*.

[87] In *The Newspaper Guild Canada/Communications Workers of America v. Sterling Newspapers Group, a division of Hollinger Inc., operating as The Leader Post Leader-Star News Services*, *supra*, the Board undertook an extensive review of case

authorities concerning unilateral change and the violation of s. 11(1)(m). The Board stated at 571 through 575:

> *[50] Section 11(1)(m) of the Act imposes a statutory freeze on the terms and conditions of employment after a union is certified and before a first collective agreement has been concluded.* ***The Board interprets the provision as preserving the pre-certification practices of the employer. These pre-certification practices are determined by applying the "business as before" test*** *which was set out in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Canada Ltd. and Aquafine Water Ltd., [1993] 1st Quarter Sask. Labour Rep. 111, LRB File No. 197-92, at 115:*
>
> > *Using the standard of "business as before" establishes a fairly clear baseline for measuring employer conduct during the negotiation of a first collective agreement. It means that the employer is entitled to continue to make business decisions, but must not change the terms and conditions of employment which were in existence at the time of certification. The employer cannot alter terms and conditions in a way which may be seen as punishing employees for choosing to support the certification of a trade union; equally, this standard prevents an employer from selecting the post-certification period to demonstrate that employees may enjoy positive changes without having to obtain them through collective bargaining. Though this way of looking at the post-certification period should indicate to the prudent employer that it is necessary to be cautious about making changes which may be characterized as undermining collective bargaining, it does not hamstring the employer completely.*
>
> *[51] The Board has found that a refusal to grant wage increases in accordance with the employer's pre-certification practice constitutes a violation of s. 11(1)(m): see Brekmar Industries Ltd., supra, Brandt Industries Ltd., supra, and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Off the Wall Productions Ltd., [2000] Sask. L.R.B.R. 156, LRB File No. 192-98 to 194-98.*
>
> *[52] In earlier cases the Board drew a distinction between a wage increase based on a unilateral and discretionary assessment related to each employee, and a wage increase based on a well-established wage grid or published wage increase. In Brandt Industries Ltd. case, supra, the Board stated at 84:*

In support of its argument that implementing the wage increases would constitute a breach of s. 11(1)(m), the Employer referred to Board decision in S.G.E.U. v. Northern Village of Buffalo Narrows SLRB 149-85; and United Steelworkers v. Crestline Coach Ltd. SLRB 132-87.

Since the Board's decision in Buffalo Narrows, the law in this respect has evolved, as witnessed by the Board's subsequent statements in Crestline Coach Ltd. (supra). In Crestline Coach Ltd., the Board dealt with the allegation that Crestline committed an unfair labour practice by failing to give its employees raises as it had done in the past. The Board stated:

> *The evidence indicated that prior to the union's certification, the employer had periodically evaluated the work performance of each employee and had unilaterally decided whether and by how much employee wages would increase. Section 11(1)(m) precludes that very type of unilateral employer action. Once it was certified, the trade union became the exclusive bargaining representative of all employees in the appropriate unit, and it was no longer open to the employer to unilaterally grant discretionary wage increases or to change other terms and conditions of employment by dealing directly with the individual employees… (emphasis added)*

The statement of the Board in Crestline Coach Ltd. is easily distinguished in that the Employer "periodically evaluated the work performance of each employee and … unilaterally decided whether and how much employee wages would increase". In the present case, the terms and conditions of employment that existed at the date of the Board's certification order were those contained in the Employee Information Booklet; these constituted an unequivocal agreement on wage increases and the dates on which they became effective. The Employer proposed the increases set forth in the Employee Information Booklet at the time of hiring and the employees, on an individual basis, accepted those terms and conditions. Therefore, had the Employer complied with its obligations set forth in Ex. 1, it would not have been "unilaterally" changing terms and conditions of employment by dealing directly with the individual employees. On the contrary, the

> *Employer's withholding of these benefits is a clear breach of Section 11(1)(m).*
>
> *It is not relevant, in applications such as the present, for the Board to determine that anti-union animus had a role to play in the Employer's decision to breach the statutory freeze provisions in Section 11(1)(m) of The Trade Union Act. Nevertheless, we have no hesitation in concluding that the purpose of the Employer's refusal to implement the increase in wages to the employees were designed to discredit the Union or to otherwise discourage employees from pursuing their rights under The Trade Union Act. Accordingly, the Board finds the Employer guilty of a breach of Section 11(1)(m) of the Act.*

[53] The decision of the Board in the Crestline Coach Ltd. case focused on the unilateral and discretionary nature of the wage increase, not on the issue of whether there was a regular pattern of wage increases in the pre-certification period. In subsequent cases, as suggested in the quote from Watergroup Canada Ltd., supra, the Board focused on the question of whether or not there was a change in the Employer's practice with respect to the granting of wage increases in the freeze period. This focus and its consequences were discussed in the Conservation Energy Systems Inc. case, supra, at 79 as follows:

> *One test which has been approved by this Board as creating a workable criterion for the assessment of employer conduct during the period before a collective agreement is struck is the "business as before" test. Under this standard, it is acknowledged that an employer must be allowed to carry on its business during this period;* ***what the test requires is that the employer must manage its affairs in accordance with this previous practice, and not make changes which have the effect of undermining the effectiveness of the bargaining agent which is attempting to conclude a first agreement.*** *The implications of the test were described by the Ontario Labour Relations Board in Spar Aerospace Products Limited, [1978] OLRB Rep. Sept. 859, as follows:*
>
> > *The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly*

> *identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.*
>
> ***A harsh consequence of the application of the "business as before" test is that the procedures followed by the employer as the status quo is maintained may be unfair or arbitrary with respect to individual employees. After all, it may be the flaws in such procedures which have made union certification attractive in the first place.*** *It may be ironic that procedures which seem to have an unfavourable impact on individual employees are, under the "business as before" test retained in the same way that more beneficial aspects of the past practice are frozen. Nevertheless, it seems part of the logic of this standard that the employer should not be able to mitigate the undesirable consequences of its past practices in a way which might detract from the achievements the union offers through bargaining.*

[54] In our view, the "business as before" test, with its focus on pre-certification employment conditions and practices, is the appropriate test and it precludes the types of considerations that were relied on by the Board in Crestline Coach Ltd. The Employer is entitled to run its business in the same manner as it did prior to certification even if this involves discretionary wage increases. As the Employer is familiar with its pre-certification practices, it is not overly onerous to expect that such practices will continue in the post-certification period until a collective agreement is concluded. In this regard, ***we might add that the "business as before" rule does not remove the obligation of the Employer to make the Union aware of its practices and to advise the Union of its intention to follow its pre-certification business practice. This kind of communication is required under the general duty to bargain in good faith*** *and will assist the parties in developing a positive labour relations climate in their workplace.*

*[55] In Canadian Union of Public Employees', Local 2152 v. Canadian Deadblind and Rubella Assoc., [1999] Sask L.R.B.R. 138, LRB File No. 095-98, the Board also considered the "**reasonable expectations of employees"** to determine if a unilateral decision on the part of the Employer contravened s. 11(1)(m) of the Act. **This approach is applied to determine if a unilateral employer decision that occurs for the first time in the post-certification period, constitutes a violation of the freeze provisions** contained in s. 11(1)(m). At 159 and 160, the Board set out its reasoning as follows:*

> *The cases demonstrate that, in the past, this Board has given a broad, flexible and purposive interpretation to s. 11(1)(m) of the Act; what in Ontario might be considered to be "privileges" rather than "terms and conditions" of employment, in Saskatchewan appear to have been interpreted to be included with "other conditions of employment." Such items would be within what the Board in the Brekmar decision, supra, described as "a real, well-known and well-defined part of the labour relations fabric before certification." This "labour relations fabric" includes practices and policies that existed prior to certification as well as the terms, conditions and benefits of the relationship of the employees, and of each employee, with the employer. If the employees have come to expect these things it can only be because the employer has made them part of its "business as usual." **It seems to us that the reasonable – and we emphasize the word "reasonable" – expectations of employees arise out of the employer's usual and customary way of conducting its operations and dealing with its employees.** Strictly speaking, many of these items could not be legally enforced as being a terms of an individual employment contract, (for example, the wage increases at issue in the Brekmar decision, supra), but **there is no doubt that they are part of the "labour relations fabric" that existed prior to certification such that the employees have a reasonable expectation that they would continue until a collective agreement is reached.***
>
> *The "reasonable expectations" test does not expand the scope of the result of the application of the "business as before" test. However, it can be a useful tool to better clarify and more accurately identify what is encompassed with the pre-freeze pattern of business, and to assist in making a reasoned determination in instances of first time events. What is the reasonable expectation of employees, or an*

> *employee, is an objective standard, that can help to achieve the most accurate balancing of employers' and employees' rights prior to reaching a collective agreement; employees can place reliance in the fact that the pre-certification pattern of business is preserved, while an employer's ability to respond to changing conditions and new events is not abrogated.*
>
> [***emphasis added***]

[88] With respect to the alleged unilateral changes to the work schedules of Ms. Lovatt and Mr. Haus, in order to apply the business as before test, it is first necessary to determine the nature of the practices and policies in place prior to certification. The only evidence led before the Board is that council made every attempt to accommodate employees working more than one job, as it was common in a small town such as this one for employees to have more than one job. Mr. Keleman, who has been employed with the Town for several years, was also engaged in farming and took time off work, whether by request where the absences could be planned or by informing the Town where the absences were unplanned or more in the nature of an emergency. Mr. Keleman was able to do this and essentially maintain payment for full-time hours through the extra hours he worked and his on-call weekend hours (for which he was paid or he banked).

[89] The assistant administrator position held by Ms. Lovatt is a part-time one. There was no evidence of any pre-certification terms and conditions or practices and policies concerning the hours of work for this position and therefore we are left to assess whether the Employer is abiding by the "business as before" test by reference to the practice the Employer has of generally accommodating employees with more than one job. Ms. Lovatt holds a job with another employer and informed council at the time of her hiring of the need to accommodate her in this regard. Council's resolution at the time Ms. Lovatt was hired stated that her schedule would be agreed upon between her and the administrator. This is precisely what has occurred and it was reasonable for Ms. Lovatt to expect it would occur. Therefore not only is the Employer following its "business as before" during the statutory freeze period but it is also meeting the "reasonable expectations" of the employee.

[90] Mr. Haus was hired by a resolution of council which stated that he would work six to eight hours per day as may be suitable to both parties. Mr. Haus also advised council at the time of his hiring that he drove a school bus route and wished to continue to do so. There was a significant amount of evidence led at the hearing which described people's expectations concerning how Mr. Haus' work driving the school bus would be integrated with his work for the Town. It is common ground that the initial hours of work agreed to were 9:00 a.m. to 6:00 p.m., hours which would afford Mr. Haus the opportunity to drive his school bus route in the mornings before coming to work for the Town, and that, at least for the remainder of the school year in which he was hired by the Town (i.e. March until June 2004), he would take time off from his work with the Town in the afternoons to perform his bus route. The evidence diverges at this point. It was Mr. Keleman's understanding that, for the school year commencing September 2004, Mr. Haus would either give up his bus route entirely or hire a driver for the afternoon run, thereby being available to work for the Town straight through to 6:00 p.m. It was the evidence of Mr. Haus and council that the arrangement with Mr. Haus was more of a fluid one; that if the required number of hours of work for the Town increased, Mr. Haus would hire a replacement driver for his afternoon run. In our view, the understanding at the time of Mr. Haus' hiring was more aptly described by Mr. Blanc who stated that it was "up in the air" what would occur with Mr. Haus commencing the fall of 2004; he might quit the bus run, hire a replacement driver for either the morning or afternoon run, or modify his hours of work in some way. The evidence indicated that Mr. Haus did in fact hire a replacement driver although the Board was not advised when that first occurred or how often the replacement driver drove for Mr. Haus. Mr. Haus testified that he found that in the later part of 2004 his hours of work with the Town were decreasing and that hiring a replacement driver for the afternoons was not working for him. He then worked under an arrangement where he started work for the Town at approximately 8:30 or 8:45 a.m., left at approximately 3:00 p.m., and when work for the Town was still available, he returned at approximately 4:30 p.m. and continued to work until 6:00 p.m., or later.

[91] There was no evidence led by the Union concerning the hours of work arrangement Mr. Noble had with the Town in the maintenance employee position prior to his departure. As such, we are again left to assess Mr. Haus' situation by reference to the general practices and policies for all employees. We view the hours of work situation

with Mr. Haus as similar to the situations of Mr. Keleman and Ms. Lovatt, in that he worked under an arrangement that accommodated his other job. As such, we find that his hours of work were adjusted to meet his needs and the operational needs of the Town and that these accommodations were part of the labour relations fabric of the workplace. The Town was operating its business as before and in line with the reasonable expectations of the employees.

[92] At the hearing Mr. Keleman complained that since certification he had not been afforded the same latitude as Mr. Haus with respect to working additional hours to bank during the week or making up hours on the weekends to use as he required. While the Union has not asserted an unfair labour practice against the Employer on this point, our review of Mr. Keleman's timesheets does not appear to bear this out such that Mr. Keleman appears to have enjoyed approximately the same number of hours of work pre- and post-certification. The Union did not point us to any examples in the timesheets to support their position and, to the Board, there appears to be no appreciable difference in Mr. Keleman's pattern of work pre-and post-certification. Likewise, a review of Mr. Haus' timesheets, particularly in the period prior to the filing of the applications, does not appear to indicate that Mr. Haus was working many extra hours on the weekends to make up for time lost during the week due to performing his bus route. Mr. Keleman also complained that Mr. Haus was not just taking direction from him but from somewhere else, presumably council members, and that Mr. Keleman was at times kept out of the loop. It appears to us that that is, in part, a natural consequence of the policy of accommodations by the Employer. This is understandably frustrating to Mr. Keleman, and while the workplace communication on tasks required to be performed by Mr. Haus could obviously be improved, the business as before test and the consideration of the reasonable expectations of employees may have the result of appearing arbitrary. Overall, it appears that the operational needs of the Town were being met as were the reasonable expectations of Mr. Haus, who we note was only required to work six to eight hours per day depending on the needs of the Town.

[93] With respect to the wage rate of Ms. Lovatt at the time she was hired, there was no evidence concerning the wage rate given to her predecessor which would allow us to assess whether the Employer was operating its business as before. Also, since Ms. Lovatt commenced employment, there has been no change to her wage rate

and therefore no unfair labour practice. There was no allegation before us that Ms. Lovatt should have received a wage increase after three months as occurred for Mr. Haus.

[94] The issue of Mr. Haus' wage increase is on a somewhat different footing. The first determination to make is whether there was in fact a change made to his wage without negotiating the same with the Union. Mr. Haus testified that he believed he had the knowledge and permission of Mr. Blanc to request a wage increase and on this basis he made such a request through his shop steward, Mr. Keleman, and to Ms. Braman. Mr. Blanc did not specifically deny having such a conversation with Mr. Haus but stated that he told Ms. Braman that he was willing to look at any offer the Town had, which suggests that he expected that the matter would be negotiated with the Union. Ms. Braman denied having such a conversation. Ms. Braman stated that she asked Mr. Keleman and Mr. Haus whether the Union had given permission for the consideration of a wage increase. When the wage increase request went before council, they knew that they had to maintain the status quo during collective bargaining and inquired whether Mr. Haus had the permission of the Union to make the request for the increase. It was on the understanding that the Union had given its permission, as well as the fact that the Town wanted to retain Mr. Haus, that council agreed to an increase in the amount requested by Mr. Haus.

[95] Even if we were to accept the testimony of the Employer's witnesses and Mr. Haus in its entirety, the fact remains that the wage rate of Mr. Haus was increased without the direct involvement of the Union. There was nothing in the evidence led by the Employer that suggested it thought that Mr. Keleman, as shop steward, had the authority to negotiate on behalf of the Union. Therefore, the person who should have been involved was Mr. Blanc. This is the case whether Mr. Haus believed he had the permission of Mr. Blanc, whether we accept Ms. Braman's evidence that there was no conversation with Mr. Blanc that he wished to be involved in the negotiations, whether Mr. Haus misunderstood that his raise was to still be cleared with or accepted by the Union, or whether council misunderstood the law relating to the unilateral change to employees' terms and conditions of work. It was incumbent on council to negotiate Mr. Haus' wage rate directly with the Union, it being the exclusive bargaining agent for the employees, including Mr. Haus.

[96] Having found that the Employer failed to negotiate with the Union with respect to Mr. Haus's wage rate, such a change could still be justified by the Employer under the "business as before" test. In our view, the Employer is in violation of s. 11(1)(m), having failed to establish that it was conducting its "business as before." The evidence of some of the Employer's witnesses that the Employer always gave an increase after a probationary period is not credible. No examples were provided except for Mr. Braman's reference to a student employed in the summer of 2004 who received a $.75 increase. This example does not support the Employer's position because there is no evidence the summer student was serving a probationary period and there was no reference to other summer students receiving such a wage increase. It appeared to have been given to the summer student solely on the basis that the Town felt her work performance was very good. Mr. Keleman testified that he does not recall receiving a wage increase following his probationary period and Ms. Lovatt did not even have a stated probationary period, let alone receive an increase to her wage rate. There was also no evidence that any wage rate increases given after probationary periods were as significant as that given to Mr. Haus. While there may have been a reasonable expectation on the part of Mr. Haus that he would receive a pay increase upon successful completion of his probationary period, an increase of approximately 30 per cent or $2.75 per hour was not a reasonable expectation and there was simply no evidence that such a significant increase was ever awarded to an employee pre-certification. In any event, if such wage increases were part of the Employer's "business as before" it was incumbent upon the Employer to advise the Union of changes it made and this it did not do.

[97] While there are some indications that the Employer may be anti-union, its actions appear to result more from being new to the bargaining process and the rules it must follow. It is not necessary, however, that we make a finding that the Employer was motivated by anti-union animus in order to find the Employer guilty of an unfair labour practice under s. 11(1)(m).

[98] At the hearing, the Union did not pursue the allegations that the Employer violated ss. 11(1)(a), (b) and (g) except to assert that they arise upon a finding that the Employer violated s. 11(1)(m), allowing the Board to conclude that the Employer coerced

the employees into making the rescission application. As those allegations really amount to reliance on s. 9 of the *Act* as a basis to dismiss the rescission application, we will proceed to address the issue of employer coercion, influence or interference below.

Employer Involvement

[99] The final issue to be determined is whether the rescission application was made in whole or in part on the advice of, or as a result of the influence of or interference or intimidation by the Employer, and, in particular, whether the finding of the Board that the Employer committed an unfair labour practice amounts to coercion in the circumstances of this case.

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

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

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

> *In determining whether to grant a rescission vote, the Board must balance the democratic rights of employees to select a trade union of their own choosing, which is enshrined in s. 3 of the Act, against the need to ensure that the employer has not used coercive power to improperly influence the outcome of the democratic choice. In*

Wells v. United Food and Commercial Workers, Local 1400 and Remai Investment Corp., [1996] Sask. L.R.B.R. 194, the Board described its approach to the balancing task as follows, at 197-198:

> *Section 3 of The Trade Union Act reads as follows:*
>
> > *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> *The Board has often commented on the significance of the power which is accorded to employees under this provision to make their own choices concerning representation by a trade union. We have also stated that the rights granted under Section 3 include the right to decide against trade union representation as well as the right to undertake activities in support of a trade union. In the decision in United Food and Commercial Workers v. Remai Investment Corporation and Laura Olson, LRB Files No. 171-94 and 177-94, the Board made the following observation:*
>
> > *Counsel for the Employer urged the Board to take the same view of Ms. Olson's conduct as we took in Brandt Industries Ltd., LRB File No. 095-91. In Brandt Industries Ltd. the Board recognized the right of employees to debate the representation question vigorously and to campaign against the Union. We still regard this as an important right. In F. W. Woolworth Co. Limited, LRB File No. 158-92, the Board returned to this theme and stated that charges against individual employees of interfering in an organizing drive are particularly serious because of the chilling effect that they can have upon the democratic process which is at the heart of The Trade Union Act.*
>
> *Earlier decisions have made it clear, however, that the Board is alert to any sign that an application for certification has been initiated, encouraged, assisted or influenced by the actions of the employer, as the employer has no legitimate role to play in determining the outcome of the representation question. In the*

Remai Investment Corporation decision from which the above quotation was taken, the Board went on to say:

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

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

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

The Board proceeded to make the following statement:

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

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

> *While the Board generally assumes that all employees are of sufficient intelligence and fortitude to know what is best for them and*

> *is reluctant to deprive them of an opportunity to express their views by way of a secret ballot vote, it will not ignore the legislative purpose and intent of Section 9 of The Trade Union Act. Section 9 is clearly meant to be applied when an employer's departure from reasonable neutrality in the representation question leads to or results in an application for decertification being made to the Board. In the Board's view, this application resulted directly from the employer's influence and indirect participation in the gathering of necessary evidence of employee support.*
>
> *This statement makes clear that Section 9 is directed at a circumstance in which an employer departs from a posture of detachment and neutrality in connection with the issue of trade union representation. There have been cases where an employer has taken a direct role in initiating or assisting an application for rescission of a certification order, and in these cases, it is fairly easy for the Board to identify the conduct on the part of the employer which constitutes improper interference. On the other hand, as the Board pointed out in Rick Poberznek v. United Masonry Construction Ltd. and International Union of Bricklayers and Allied Craftsmen, LRB File No. 245-84, employer interference is rarely of an overt nature, and the Board must be prepared to consider the possibility that subtle or indirect forms of influence may improperly inject the interests or views of the employer into the decision concerning trade union representation.*

[102] The Board has determined that there was no direct evidence of employer involvement, influence or intimidation with the rescission application. The Board must determine, however, whether there was evidence from which it can draw an inference that the Employer was involved with the application or interfered with or intimidated or influenced the application being made to an extent that the true wishes of the employees cannot be determined by a vote. In order to make such a determination, the Board may examine a number of circumstances: the relevant ones in this application include Ms. Lovatt's reasons for bringing the application, the unfair labour practice committed by the Employer, aspects of the employees' relationships with the Employer, and the Employer's collective bargaining agreement negotiations with the Union. Any unusual or suspicious circumstances warrant a close examination by the Board to

determine whether it should draw an inference that the Employer intimidated, interfered with or influenced the bringing of the application.

[103] In *Swan v. Canadian Union of Public Employees, Local 1975 and Treats at the University of Saskatchewan*, [2000] Sask. L.R.B.R. 448, LRB File No. 258-99, the Board examined the reasons offered by the applicant for bringing the application and stated at 458 and 459:

> *[31] The plausibility of an applicant's reasons for applying for rescission of a certification order – that is, the credibility of the rationale – and the bona fides of the applicant's motivation for so doing, are matters for us to consider on an application for rescission. In Pfefferle v. Ace Masonry Contractors Ltd. and Bricklayers and Masons International Union of America, [1984] Aug. Sask. Labour Rep. 45, LRB File No. 225-84, in dismissing an application for rescission, former Chairperson Ball stated, at 46:*
>
> > *Although the applicant denies having discussed this application with the co-owners and the members of their family, the Board finds it difficult to accept that denial at face value since all of the employees work fairly closely with one another. Furthermore, the Board is not satisfied that the applicant has an honest belief, well founded or otherwise, that the union has failed to adequately carry out its responsibilities as his bargaining agent.* ***He attempted but failed to advance any credible rationale for applying for rescission, and that, coupled with all of the other circumstances, leads the majority of the Board to conclude that the application has been made in whole or in part as a result of the influence of the employer.*** [emphasis added]
>
> *[32] Similarly, in Poberznek v. United Masonry Construction Ltd. and International Union of Bricklayers and Allied Craftsmen, [1984] Oct. Sask. Labour Rep. 35, LRB File No. 245-84, the Board commented that the absence of plausible reasons for supporting an application for rescission may be a sign that the application was initiated by the Employer. At 36, the Board observed:*
>
> > ***…[The Board] cannot accept the proposition that the Applicant acting spontaneously, and alone, and at his own expense, with no knowledge of industrial relations between the employer and the union, and no idea of how the application might affect him personally, took it upon himself to retain a lawyer to apply for rescission at a time that happened to***

> ***coincide with the available open period.*** [emphasis added]
>
> *Employer influence is rarely overt. Under the circumstances, the only inference the Board can draw is that this application was made in whole or in part on the advice or as a result of influence by the employer*

[104] In the present case the Board finds that the Applicant had credible reasons for bringing the rescission application. The Applicant was not pleased to find out, when she was hired, that she was required to sign a union membership card as a condition of employment, although she did so without complaint as the job was important to her. Her reason for bringing the application is simple; after her hiring she noticed that there was only one employee in the bargaining unit who had been present at the time of the certification and she wanted the opportunity to vote to determine her own fate with respect to whether a union represented her in the workplace. There is no evidence from which the Board may draw an inference that it was any action of the Employer that prompted Ms. Lovatt to bring the application. At the time of the application, very little progress had been made toward the negotiation of a first collective agreement. At the hearing, Ms. Lovatt struck us as a forthright witness; an individual with strong opinions and one not easily influenced by others. Perhaps Ms. Lovatt has not given the Union a sufficient opportunity to prove itself of benefit to her, but her stated reasons for bringing the application appear credible to the Board.

[105] The Union alleged that the unilateral change to the terms and conditions of work of Ms. Lovatt and Mr. Haus constituted an unfair labour practice and had the effect of coercing employees into bringing the application for rescission. While the Board has found the Employer in violation of s. 11(1)(m) of the *Act* in relation to the wage increase given to Mr. Haus following his probationary period, in our view, the actions of the Employer in that regard did not have the effect of encouraging, influencing or coercing the employees into bringing the rescission application or initiating or assisting with the application. In the circumstances of this case, it is our opinion that the actions of the Employer did not have the effect of undermining the Union in the eyes of the employees. It is our view that the Employer's conduct, although in violation of s. 11(1)(m), did not lead to the rescission application being made, nor has it compromised

the ability of the employees to express their true wishes in a vote and, as such, the argument in favour of the application of s. 9 of the *Act* must fail. Our reasons for this conclusion are several fold:

(i) The Board views the violation of s. 11(1)(m) of the *Act* as more in the nature of a reckless transgression rather than an expression of anti-union animus or a calculated effort on the part of the Employer to undermine the Union or influence the employees to bring a rescission application -- the Employer is unsophisticated in labour relations matters and the *Act* and acted without the advice of a third party experienced in labour relations;

(ii) It was Mr. Haus and the shop steward, Mr. Keleman, not the Employer, who instigated the wage increase;

(iii) Mr. Haus asked for and was given a wage increase less than the Union's wage proposal to the Employer, suggesting that employees would not be led to believe that they could do better without the Union than with the Union;

(iv) While there may not have been a past practice of providing wage increases upon completion of probation (a factor necessary to the determination of the unfair labour practice application) the Employer's decision to give Mr. Haus the wage increase he requested, because Mr. Haus had successfully completed his probationary period and the Town wished to retain him, appears to be a credible one and not one designed to induce the employees to bring the application for rescission;

(v) Ms. Lovatt was hired at the same council meeting as Mr. Haus was given his wage increase and therefore the Employer's actions do not appear to have been intended to prompt Ms. Lovatt to bring the rescission application (and even though the wage increase would have likely come to Ms. Lovatt's

attention after her employment commenced, she appeared to have wanted a “re-vote” since the start of her employment with the Employer);

(vi) It is not likely that it later occurred to Ms. Lovatt that Mr. Haus was able to negotiate a wage increase without the Union’s assistance (thereby prompting her to bring the rescission application and other employees to support it so all employees could negotiate independent of the Union), as it was common knowledge, or at least a common assumption by all involved, that Mr. Haus had the Union’s permission to request the increase he received; and

(vii) According to the testimony of Mr. Haus, evidence which was uncontradicted by the Union, Mr. Haus advised the Union of the amount of his wage increase at a meeting in August 2004 and there was no evidence the Union took any action with respect to the Employer’s unilateral action or even raised the issue during the course of negotiations, thereby suggesting the Union was not displeased with the matter and did not feel that its authority had been undermined.

[106] Having found the Employer guilty of an unfair labour practice in relation to Mr. Haus’ wage increase, it is apparent that there has been an inequality of treatment between Mr. Haus and Ms. Lovatt who did not receive a similar wage increase. The Employer’s explanations for this are that Ms. Lovatt was not subject to a probationary period like Mr. Haus was (although it was not explained why she was not) and that she did not ask the Employer for a wage increase, while Mr. Haus did. While these reasons appear to make little sense, such arbitrary and unfair treatment might provide a good example of the reasons Mr. Keleman gave for the employees wanting to be represented by a union in the first place. Even so, it cannot be concluded that the wage increase was given to Mr. Haus for the purpose of attempting to show the employees they could do as well negotiating directly with the Employer than could the Union negotiating on their behalf. Ms. Lovatt, who brought the rescission application,

was not given a wage increase, even though it would have been easy for the Employer to justify giving her one on the basis that, if Mr. Haus received a wage increase, so must she. After all, they were hired at approximately the same starting rate with hiring dates only three months apart, in circumstances where the Union's wage proposals contained a proposal for the same hourly rates of the individuals in the positions of both Mr. Haus and Ms. Lovatt.

[107] While those who have some experience with labour relations might ask how the Employer could not know that it should have been dealing directly with the Union with respect to Mr. Haus' wage increase, regardless of whether Mr. Haus said he had the permission of the Union, what is somewhat more troubling to the Board is that, at the hearing, the Employer's representatives took the position that what they had done was proper, without admitting that they could have been mistaken with respect to their duties and obligations toward the Union and the bargaining unit employees. It is our hope that in the future the Employer will seek out the assistance of able counsel such as counsel representing the Employer at the hearing, or another labour relations specialist, to advise it of the law that is to govern its conduct with the Union and its employees.

[108] Although Ms. Lovatt appears to have had plausible reasons for bringing the rescission application and we have found that the circumstances giving rise to the unfair labour practice committed by the Employer do not amount to undue influence or coercion within the meaning of s. 9 of the *Act*, it is still necessary for us to determine whether there are any unusual circumstances that would lead us to conclude that the Employer influenced the bringing of this application.

[109] There was nothing suspicious about the departure of the bargaining unit employees who were employed at the time of certification, nor concerning the hiring of the new employees. It is quite plausible that the new employees have not yet experienced the problems that Mr. Keleman said led to certification. Therefore the formality of collective bargaining may not have appealed to them in their rather small working environment.

[110] One other unusual situation that should be addressed concerns Ms. Lovatt's photocopying of the Town's union file and her statement that it contained an excerpt of the *Act* referencing s. 5(k). Ms. Braman stated, and we accept her evidence, the Union having called her as its witness and there being no evidence presented to the contrary, that she did not give permission to Ms. Lovatt to photocopy the Union file. Ms. Braman recalled that Ms. Lovatt asked to take the file home, that Ms. Braman refused to grant that request and that Ms. Braman advised Ms. Lovatt she could have a copy of a draft contract that initially came from the Union. In our view, there was nothing improper in Ms. Braman's actions. With respect to the statement by Ms. Lovatt that there was a copy of s. 5(k) of the *Act* in the file, Ms. Braman stated that she did not know why that document would be in the file. There was simply no evidence from which we could draw the conclusion that the Employer had "planted" the document there for Ms. Lovatt to find, thereby prompting her to bring the rescission application. In fact the whole of the evidence suggests that the Employer had so little working knowledge of the *Act* that it would be impossible to conclude that it was aware that rescission could be applied for by an employee or that s. 5(k) was directly applicable to such an application. In our view, after observing the presentation of Ms. Lovatt's testimony and evaluating the evidence she gave, it is quite possible that Ms. Lovatt was mistaken concerning where she obtained the excerpt from the *Act.* She did not appear at all certain concerning her recollection of exactly which documents were from the file and she sifted through many papers in her possession in her attempt to identify what documents were in the file. We find that the presence of such a document in the file is not indicative of employer influence or interference.

[111] Some of the questions the Employer raised at the bargaining table in the presence of bargaining unit employees are troubling. A representative of the Employer asked who had to pay for the administrative costs associated with unionization and why employees had to join the Union if they did not wish to. Employees could view these comments as being indicative of the Employer not wanting the workplace to be unionized. On balance, however, it appears that the Employer's representative's comments were more the result of a lack of labour relations knowledge and the exercise of poor judgment than any subtle encouragement for the bringing of a rescission application. At the meeting the Union's representative adequately responded to these questions. Also, it appears that Ms. Lovatt made her decision to bring the application for

rescission early in her employment relationship as she had already made preparations to ask the Union's representative at the time of this very meeting how to go about making an application for rescission. Despite its anti-union comments, the Employer did respond to the Union's requests for information and bargaining dates in a timely fashion. There was no evidence that, aside from the increase to Mr. Haus' hourly rate, the Employer failed in its duty to bargain collectively toward a first collective agreement. We find that, in the circumstances of this case, the questions and comments by the Employer at the bargaining table did not encourage the application to the extent that a vote will not reflect the true wishes of the employees.

Summary

[112] The Board finds that the Employer committed an unfair labour practice by granting a wage increase to Mr. Haus without first negotiating the same with the Union, in violation of s. 11(1)(m) of the *Act*. We therefore direct the Employer, within seven days of the date of these Reasons for Decision, to post these Reasons for Decision and the Order that will issue herein, for a period of fourteen (14) days in a place in the workplace where the Employer normally posts notices to employees. The remainder of the allegations made by the Union in its unfair labour practice application are dismissed.

[113] The Board has determined that, in the circumstances of this case, an inference cannot be drawn that the Employer influenced the bringing of the rescission application or interfered with the application in a manner and to the extent that the true wishes of the employees cannot be determined with a secret ballot vote. We therefore find, on a balance of probabilities, that the application was not made in part or in whole on the advice of or as a result of influence by the Employer within the meaning of s. 9 of the *Act*. As such, the Board will issue an order directing a vote in the usual manner.

[114] With respect to the vote ordered on the application for rescission, the Board has determined that the names on the statement of employment of those who are eligible to vote, provided they are employed on the date of the vote, are: Lora Lovatt, Mervyn Keleman and Keith Haus.

DATED at Regina, Saskatchewan, this **2nd** day of **February, 2006**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson