The Labour Relations Board
Saskatchewan

BOB CORBEIL, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 and L & L LAWSON ENTERPRISES LTD., WHITESAND ENTERPRISES LTD., P & M HOTELS LTD. and CHAINLINK ENTERPRISES LTD., (operating as Best Western Seven Oaks Inn, Regina, Saskatchewan), Respondents

LRB File No. 133-07; May 13, 2009
Vice-Chairperson, Steven Schiefner; Members: John McCormick and Michael Wainwright

The Applicant:	Mr. Bob Corbeil
For the Respondent::	Mr. Drew Plaxton
For the Interested Party:	Mr. Brian Kenny

Decertification – Employer Interference – Union alleges Employer interference – Support gathered in the workplace but no evidence that management was aware of activities until process almost complete – No direct evidence that management provided advice, encouragement, support or assistance – Board not satisfied that circumstances noted by Union sufficient to compromise ability of employees to decide representative issue - Board orders vote pursuant to s. 6 of *The Trade Union Act*.

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

REASONS FOR DECISION

Background:

[1] **Steven Schiefner, Vice-Chairperson**: Mr. Bob Corbeil (the "Applicant") applied for a rescission of the Order of the Board dated February 21, 2000 designating the United Food and Commercial Workers, Local 1400 (the "Union") as the certified bargaining agent for a unit of employees employed by L & L Lawson Enterprises Ltd., Whitesand Enterprises Ltd., P & M Hotels Ltd. and Chainlink Enterprises, carrying on business as Best Western Seven Oaks Inn in Regina, Saskatchewan (the "Employer").

[2] The Applicant filed his application for rescission (the "application") with the Saskatchewan Labour Relations Board (the "Board") on November 5, 2007. The effective date of the collective bargaining agreement in force between the Union and the Employer was December 10, 2006. The application was filed during the open period mandated by s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), and was filed together with evidence of

majority support from the employees in the bargaining unit. In the application, the Applicant stated numerous reasons why he brought the application for decertification.

[3] On November 22, 2007, the Union filed a reply (the "Reply) alleging that the application was made, in whole or in part, on the advice of, or as a result of influence of or interference or intimidation by, the Employer or agent of the Employer. The specific allegations of the Union were as follows:

> *3(3) With respect to the said application:*
>
> *(a) The union asserts the application within 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 its agents.*
> *(b) The union asserts the support filed was gathered with the encouragement and cooperation of the employer and/or was otherwise improperly obtained and the same should be rejected.*
> *(c) The union asserts the employer has promoted, allowed or acquiesced in the bringing of the within application and gathering support for same and/or related matters on the company premises and on company time and has otherwise interfered with same. Further the support was in part at least gathered by those close to and influenced by management.*
> *(d) The union asserts further the applicant and/or others assisting in gathering support for the application within gave incorrect information to employees, including the amount of union dues to be paid.*
> *(e) The applicant asserts further the employer (or employer's agents) including Mr. Larry Bird, spoke to one or more employees directly in an effort to dissuade them from supporting the union or otherwise interfering with their rights, including Ms. Dana Hryhoriw.*
> *(f) The union asserts further employees signing support cards were not made aware of the nature or effect of the documents they were being asked to sign, nor did they appreciate same.*

[4] The Employer sought further and better particulars from the Union with respect to the allegations set forth in the Union's Reply. Being unsatisfied with the Union's response to its request and unwilling to file its own Reply without further and better particulars, the Employer made application to the Board seeking direction.

[5] The Employer's application was heard on November 7, 2008, with the parties appearing and making representations. By Order dated November 18, 2008, the Union was directed to provide certain further particulars, which they did.

[6] On November 24, 2008, the Employer filed its Reply, ostensibly denying the Union's allegations.

[7] The application was heard on November 26 and 27, 2008 and on March 30, 2009 in Regina.

Evidence of the Applicant:

[8] The Applicant testified concerning his reasons for bringing the application for rescission, as well as the circumstances of his employment. The Applicant was a soft-spoken, modest man of few words, with most of his evidence coming in cross-examination. The Applicant also called Ms. Angela David and Ms. Courtney Ell to testify on his behalf.

[9] The Applicant testified that the main business of the Employer was the operation of the "Best Western Seven Oaks Hotel", located in Regina, Saskatchewan. He testified that this facility was a hotel complex containing approximately one hundred and fifty-seven (157) rooms, a banquet facility, a restaurant (*ie.* "Ricky's"), a bar or corner pub with off-sale, and an indoor swimming pool.

[10] The Applicant testified that he had worked for the Employer for fourteen (14) years and that his primary responsibility was to fix and repair things around the hotel complex. The Applicant also testified that he was a member of the Union and had been a member since the Union was certified (*ie.* "came in") to the workplace but that he held no position therein.

[11] The Applicant further testified that the topic of commencing a rescission application came up while he was having drinks with a former employee of the Employer, Mr. Darren Mayer, who had previous experience in such matters having filed a similar application in the past involving the Employer[1]. The Applicant testified that this conversation with Mr. Mayer was the genesis for the idea that he start a rescission application. The Applicant denied that it was Mr. Mayer's idea that he attempt to decertify the Union; stating that the "*conversation drifted that way and then I asked him questions*." The Applicant stated that his primary motivation for bringing an application to decertify the Union was his desire to no longer pay union dues.

[12] In cross-examination, the Applicant testified that (to the best of his recollection) his conversation with Mr. Mayer had occurred in early October of 2007 (*ie.* approximately a

month before he filed his application with the Board) and that during their conversation, Mr. Mayer had explained his understanding of the process and requirements for bringing a rescission application. Mr. Mayer also indicated to the Applicant that another employee (Ms. Ell) also had prior experience with a rescission application. The Applicant testified that he spoke with Ms. Ell to obtain information regarding her understanding of the process of bringing a rescission application. The Applicant testified that, following his conversation with Mr. Mayer, he phoned the Board's office and was sent a "*kit*" of papers (that he used to prepare and file his application), together with what the Applicant referred to as a "*book*" (*ie.* an office consolidation of the *Act*).

[13] In cross-examination, the Applicant had little recollection regarding a number of details on his rescission application. He could not remember where certain information on his application came from; such as the proper corporate name of the Employer; the unit description from the original certification Order; or the effective date of the collective agreement. The Applicant testified that he completed the forms at his lawyer's office but did not think that information came from the lawyer that assisted with his application.

[14] In cross-examination, regarding the collection of support signatures, the Applicant testified that he gathered support for his application during a period of approximately one (1) week; the week immediately prior to when he filed his application. The Applicant testified that he prepared, on his own computer, a form to be used to gather evidence of support from employees (*ie.* support cards) but that he had assistance obtaining signatures on the support cards from Ms. Ell and two (2) other employees; Ms. David and Ms. Nicki Lafontane. At that time, Ms. David worked at the front desk, Ms. Ell worked at the pool and as a porter, and Ms. Lafontane was a server[2]. The Applicant estimated that there were approximately one hundred (100) employees in the workplace and that he, Ms. David, Ms. Ell, and Ms. Lafontaine approached other employees as they saw them at work.

[15] The Applicant testified that, for the most part, he approached other workers as he saw them at work one (1) at a time and when he did he would indicate that he wanted to "vote

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[1] See: *Darren Mayer v. United Food and Commercial Workers, Local 1400 and L.L. Lawson Enterprises Ltd., White Sand Enterprises Ltd., P. & M. Hotels Ltd. and Chain Link Enterprises Ltd*., [2001] Sask. L.R.B.R. 485, LRB File No. 013-01.

[2] The Applicant testified that a couple weeks after the application was filed with the Board, Ms. Lafontaine became the manager of "Ricky's" (*ie.* the restaurant).

out" the Union and, if they interested, he would have them sign one (1) of the support cards he had prepared. The Applicant indicated that he did not talk to other employees about the issue of dues or any other concerns regarding the Union. The Applicant testified that he merely told other employees that he wanted to vote the Union out and, if they agreed with him, they should sign his support cards. The Applicant indicated that he took the completed forms back to his locker in the maintenance office in the basement of the hotel.

[16] In cross-examination, the Applicant testified that he collected over 50% of the support signatures himself and that he did so mostly while he was at work. He indicated that he tried to catch other employees while they were on a break as well; but mostly he just approached other employees whenever he saw them, sometimes he was on break; sometimes he wasn't; sometimes the employees he approached were on breaks; and sometimes they weren't. When asked whether or not signatures were collected in open view, the Applicant answered "yes" but he also indicated that he did not collect support signatures when management was present. When asked why, the Applicant testified that he believed management would tell him to stop.

[17] In cross-examination, the Applicant testified that while he was preparing his rescission application (in October of 2007), someone, whom the Applicant could not remember, recommended that he contact the law firm of MacLean Keith. The Applicant testified that he had called several law firms prior to contacting MacLean Keith. The Applicant testified that, after contacting the law firm of MacLean Keith, he made an appointment to meet with Mr. Kenneth Love. At that time, Mr. Love was a solicitor in private practice.[3] The Applicant testified that he had one (1) initial meeting with Mr. Love but had to attend to the law office twice; as there was something wrong with the application the first time he was there. The Applicant testified that the primary purpose of his attendance at the law office was to make sure that his application was ready for filing and that he spent more time with Mr. Love's secretary than with Mr. Love. Finally, the Applicant testified that he was not charged for the assistance he received from the law firm of MacLean Keith. While the Applicant admitted in cross-examination that this was unusual, the Applicant stated that he offered to pay on more than one (1) occasion and when Mr. Love advised him that there would be no charge, he was "*not going to look a gift horse in the mouth*."

[3] Mr. Love was appointed as Chairperson and Executive Officer of the Board on March 6, 2008. Because of his prior involvement with the parties in these proceedings, Mr. Love recused himself from any participation in the within application.

[18] In cross-examination, regarding his motivation for bring the rescission application, the Applicant testified that his primary concern with the Union was the quantum of dues that he paid, which he testified was approximately $40.00/month. The Applicant testified that, generally speaking, he neither liked nor disliked unions and that he had nothing in particular against the Union. The Applicant testified that he had "glanced" at the collective agreement but that he had never called the Union nor spoke to anyone at the Union regarding the quantum of his dues or his desire to bring an application to decertify the Union. The Applicant also testified that he never compared the quantum of union dues that he paid with anywhere else. In cross-examination, the Applicant also admitted that he did not give much thought to what would happen to things like his rate of pay, his holidays or his seniority if the Union was decertified.

[19] The Applicant denied speaking to management about any of these issues. He also denied speaking to anyone in management regarding the application for rescission or the gather of support in the workplace. He testified that he took the days off work to participate in the hearing and anticipated no compensation for doing so.

[20] Ms. David testified that she had worked for the hotel for approximately seven (7) years working in many areas of the hotel, including banquets, in the restaurant, at the front desk, and as a pool attendant. Ms. David testified that she assisted the Applicant in gathering support for his application to decertify the Union because she wanted the Union out. She testified that her primary concern was the payment of dues but that she also had a general dissatisfaction with the Union's presence in the workplace (or lack thereof). Ms. David testified that, while the Union was often present in the workplace after they were certified, they were not there as much in recent years; that they weren't as much help as she thought they should be; and that they did not appear to be as "professional" as before.

[21] In cross-examination, Ms. David testified that she was as an assistant to the Food and Beverage Manager, working in banquets, when was gathering signatures from employees. The Food and Beverage Manager at that time was Ms. Karin Ell; Ms. Ell's mother. Ms. David testified that, as an assistant to the Food and Beverage Manager, she was mostly responsible for doing paperwork but that she was also worked as a server from time to time.

[22] Ms. David testified that she approached other employees whenever she saw them at work and asked for signatures on the support cards that the Applicant had prepared. Ms.

David indicated that, when she approached other employees, she indicated that she wanted the Union out of the workplace; that she was trying to get a vote to do so; and that if they agreed with her, she would have them sign a form indicating that they no longer wished to be represented by the Union. Ms. David testified that she gathered approximately 20-30% of the support cards which had been signed by other employees. She also testified that she took the completed support cards to the Applicant or left them on his desk in his office in the maintenance office.

[23] In cross-examination, Ms. David admitted she had gathered support signatures in plain view at the workplace. However, she indicated that she assumed management was not aware of what they were doing because she believed they would have told her to stop. Ms. David denied having any support cards signed in her boss's office and denied speaking to anyone in management about either the Applicant's rescission application or the gathering of support cards. Ms. David further testified that no information had been posted regarding the gathering of support and that, as far as she knew, there had been no general discussions among employees regarding the rescission application until after the rescission application had been filed with the Board.

[24] In cross-examination regarding her dissatisfaction with the Union, Ms. David testified that on one (1) occasion when she had an issue for which the Union could have been of assistance, she had attempted to contact Mr. Darrin Piper at the Union several times but could not reach him. She later contacted Mr. Glen Stewart of the Union and was informed Mr. Piper was on holidays. Ms. David indicated that, by the time she heard back from the Union, she had already talked to management and the issue had been resolved.

[25] Ms. Ell testified that she had worked at the Best Western Seven Oaks Hotel since 1995 and that, at the time of the hearing, she was a pool attendant/porter. Ms. Ell testified that she assisted the Applicant in gathering support for his application to decertify the Union. She also testified that her primary concern was union dues. Specifically, Ms. Ell testified that the quantum she paid in dues had doubled after she received her last raise (*ie.* after the last collective agreement had been signed) and that this increase in dues had substantially eroded the raise she had received as a result of the new contract.

[26] In addition, Ms. Ell also testified regarding an inappropriate comment which she indicated had been made to her; a comment which she attributed to an officer of the Union, whom she believed was a guest at the hotel at the time. Although a not-insignificant volume of evidence was tendered during the hearing regarding this incident, including what was allegedly said to whom, and the Union's policy (*ie.* zero tolerance) with respect to inappropriate conduct by officers of the Union, the Board takes no position with respect to this incident, whether or not it occurred; and/or any significance to be associated therewith; other than the Board is satisfied that it was a motivating factor in Ms. Ell's decision to support the Applicant's application for rescission.

[27] In cross-examination, Ms. Ell testified that she did not pay much attention to Union matters and that she had not attended meetings of the Union. Ms. Ell testified that she had some prior experience in decertification applications having tried previously to obtain sufficient signatures but not being successful in doing so. Ms. Ell testified that she initially learned how to prepare and organize a decertification application by researching the subject on the internet. However, her understanding of the process and requirements (such as the requirement for support signatures and the necessity of filing during the open period) improved when she attempted to bring a similar application some years earlier. Ms. Ell testified that she knew and talked with the Applicant often at the workplace and when she heard that he was working on a decertification application, she offered to assist him.

[28] Ms. Ell testified that she approached every employee she knew both at work and outside of work. Ms. Ell testified that when she approached other employees at work, she assumed it was okay because the Union was permitted to come to the workplace and talk to employees about Union business.

[29] In cross-examination, Ms. Ell testified that her mother, Ms. Karen Ell, worked at the hotel as the Food and Beverage Manager (*ie.* an out-of-scope position) and she was her supervisor. Ms. Ell denied speaking to her mother about either the decertification application or her activities to collecting support cards at the work place. Ms. Ell also indicated that she did not speak to anyone in management, including her mother, about the rescission application or the gathering of support evidence.

Evidence of the Union:

[30] The Union called Ms. Dana Hryhoriw, Ms. Brandi Tracksell-Sampson, and was granted permission to cross-examine Mr. Larry Bird, as a representative of the Employer.

[31] Ms. Hryhoriw testified that she had been an employee of the Employer for approximately four (4) years and that she had worked as both a morning cook and a line cook in the kitchen. Ms. Hryhoriw testified that on September 9, 2007, she was appointed to the position of "Sous Chef" (*ie.* out-of-scope) reporting to the Executive Chef.

[32] Ms. Hryhoriw testified that, prior to her appoint to his position, she had been active in the Union as both a shop steward and on the negotiating team. Ms. Hryhoriw testified that prior to being appointed to his position, she was approached by Mr. Bird and that he asked her to come to his office, stating that he had a "good idea" to discuss. Ms. Hryhoriw indicated that during the ensuing meeting, Mr. Bird asked her about her thoughts about the Union and indicated that they were thinking about offering her a management position (*ie.* the position of "Sous Chef"). At that time, her current position was that of "Line Supervisor", which was within the scope of the bargaining unit. The position of "Sous Chef" was out-of-scope and, thus, if she took the position, she would no longer be a member of the Union.

[33] Ms. Hryhoriw testified that, during her meeting with Mr. Bird, she brought up the issue of union dues because there had been a lot of bad feelings in the work place following a change in the quantum of dues payable to the Union. Ms. Hryhoriw indicated that a lot of rumors were being spread and a lot of bad feelings were being created and that everyone was in a "*tail spin*." Ms. Hryhoriw indicated that Mr. Bird ask her; "*how do we fix it?".* In Ms. Hryhoriw's opinion, it was a few employees that were spreading the rumors but these rumors were affecting the whole workplace. Mr. Bird indicated to Ms. Hryhoriw that if any of the employees spoke to him about the issue of dues, he would send them to her.

[34] Ms. Hryhoriw testified that she spoke to approximately ten (10) employees about the issue of dues and tried to dispel the rumors that were being circulated in the workplace but doesn't know how many of those employees were sent to her by Mr. Bird. Ms. Hryhoriw testified that she had also been approached by approximately twenty (20) workers before her meeting with Mr. Bird and the concerns were the same; that union dues were too high; that other unions gave calendars to their members but not them; and that other unions held parties for their

members but not their Union. Ms Hryhoriw was not surprised that other employees approached her about their concerns regarding the Union as she was the shop steward at that time. Ms. Hryhoriw denied that Mr. Bird asked her to do or say anything negative regarding the Union. Ms. Hryhoriw testified that she was able to calm down the employees that she spoke to and that she was able to dispel a number of rumors that had been circulating in the workplace.

[35] Ms. Tracksell-Sampson testified that she was a long-term member of the Union and a service representative since 2003, with responsibilities that included the workplaces of the Employer. She testified that she became the service representative for the Employer just before the Applicant's application was filed with the Board. Prior to that, the Union's service representative was Mr. Stewart and before that Mr. Piper.

[36] Ms. Tracksell-Sampson explained the Union's due structure indicating that, for the first two (2) collective agreements, dues were paid by members on a flat rate per week regardless of the member's wage and that this flat rate ranged from $5.00 to $9.00 per week. Specifically for this Employer, the Union had agreed that for the first two (2) collective agreements, members would pay dues at rate of $5.00 per week. Ms. Tracksell-Sampson testified that, after the first two (2) collective agreements, dues were calculated based on a graduated scale representing approximately two percent (2%) of each member's gross wages with a minimum of $6.50 and a maximum of $12.00 per week. Ms. Tracksell-Sampson testified that with the signing of the most recent collective agreement (which became effective December 10, 2006), the method of calculating dues changed from the previous flat rate (*ie.* $5.00 per member per week) to the graduated scale based on a percent of gross wages (*ie.* 2% with a minimum of $6.50 to a maximum of $12.00).

Evidence of the Employer:

[37] Mr. Bird testified that he was the General Manager of the hotel complex and one (1) of multiple owners of the Employer. He testified as to changes in the corporate identity of the Employer. As the details of these changes are not relevant to the Board's Reasons for Decision, they have been omitted.

[38] In cross-examination by the Union, Mr. Bird denied that he had any knowledge of the gathering of support cards in the workplace until, in his words, "*the process was pretty far along*." Mr. Bird indicated that he was informed of a potential decertification application by one of

his managers (*ie.* the head of housekeeping), whom he indicated had heard from one of her employees. Mr. Bird testified that he became aware of the Applicant's rescission application within days of when it was filed with the Board. Mr. Bird testified that, when he found out, he spoke with the Applicant to find out what was happening and, at this point, things were pretty much done.

[39] With respect to the issue of dues, Mr. Bird testified that he became aware that a change in the method of calculating dues had occurred after the last round of collective bargaining was complete. He testified that there had been no information from the Union or discussion of a pending change in the dues structure during collective bargaining. Mr. Bird further testified that management was concerned with the new due structure for two (2) reasons; firstly, because employees were talking in the workplace and complaining to management; and secondly, because the new dues structure was more complicated for management to administer.

[40] Mr. Bird also testified that, on or about April 19, 2007, management called a meeting with the Union's bargaining team and, to do so, rounded up whoever was available at the hotel at that time. The ensuing meeting involved three (3) representatives of management (*ie.* Mr. Larry Bird, Mr. Glenn Weir and Ms. Tammy Wright) and five (5) of the Union's shop stewards (*ie.* Ms. Margaret Dunkeld, Ms. Melinda Piesinger, Mr. Joe Gustavson, Mr. Chad Matwiy and Mr. Craig Kirkby). When asked why the Union's service representatives (Mr. Don Logan and Mr. Paul Meinema), who had also been on the Union's bargaining team, were not invited to the meeting, Mr. Bird indicated that "*they were not immediately available*."

[41] Mr. Bird testified that the result of this meeting was a letter dated April 19, 2007 which was sent to the Union on management stationery signed by all those in attendance at the meeting. The document read as follows:

> *Don Logan/Paul Meinema*
> *UFCW*
>
> *We received your request to increase Union dues collection; an increase in dues is not the decision of either yourself or ourselves. Rather it is an employee decision. The suggested differential of dues based on hours of work would be a nightmare for our accounting and would result in increased administrative costs which we feel would be UFCW responsibility.*
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> *Accordingly we offer the following suggestions:*

1. That UFCW Union dues be increased by the same percentages as are stated in the new contract.
2. That those increases be applied to the current flat rate $5.00 per week per employee during the term of this contract.
3. That this letter be circulated to UFCW employee members of the bargaining committee for their endorsement or not.
4. That this document, if endorsed become Letter of Agreement #6.

	Increase Agreed	*Increase Denied*
Margaret Dunkeld	*"signature"*	
Melinda Piesinger	*"signature"*	
Joe Gustavson		*"signature"*
Chad Matwiy	*"signature"*	
Craig Kirkby		*"signature"*

Larry Bird	*Glenn Weir*	*Tammy Wright*
"signature"	*"signature"*	*"signature"*

[42] In cross-examination, Mr. Bird denied that neither the meeting with shop steward, in the absence of the Union's service representatives, to discuss union dues nor the letter dated April 19, 2007, were intended to "undermine" the Union. Mr. Bird testified that, when the Employer became aware of the change in union dues, management turned to the same representatives they had just been bargaining with at the bargaining table to discuss their concerns. Furthermore, Mr. Bird testified that the memo was not circulated to staff but rather sent only to the Union.

[43] In cross-examination, regarding the Employer's policy with respect to non-work activities at work, Mr. Bird testified that the Employer's only policy related to the use of cell phones at work, which had been a problem in the past. Under the Employer's policy, personal use of cell phones was restricted to times when employees were on their breaks. Other than that, Mr. Bird indicated that the Employer did not have any formal policies respecting non-work related activities at the workplace; stating that it had not been an issue in the past. With respect to Union activities, Mr. Bird testified that employees were permitted to meet with their Union representatives at the workplace and that the Employer did not have any polices in place to restrict their employees' abilities to either encourage or discourage support for the Union. In any event, Mr. Bird denied that management was aware that support for the Applicant's application was being gathered on work time. When asked by counsel for the Union whether any measure had been taken to investigate or take any disciplinary action against the employees involved in gathering support on work time, Mr. Bird indicated "*no*". Mr. Bird testified that management did not have any policy with respect to what people could and could not talk about at work.

[44] With respect to his relationship with the Applicant, Mr. Bird testified that the hotel had, in recent years, undergone a significant amount of renovations and that the Applicant played an important part in that process. Mr. Bird testified that he (Mr. Bird) was been the head of a recent "push to renovate" the hotel complex and that, in doing so, he works closing with the Applicant, often seeing him several times a day. Mr. Bird testified that the Applicant's supervisor was the Maintenance Manager, Mr. Reiner Van Everdink, and that the Applicant was the next most senior employee in that department. Mr. Bird testified that he worked closely with the Applicant and talked to him often in the workplace.

[45] Mr. Bird testified that the position of Maintenance Manager was an out-of-scope position. Mr. Bird also testified that Mr. Van Everdink had been absent from the workplace for health reasons for extended periods, both in 2007 and 2008. When asked by counsel for the Union whether the Applicant was the "acting maintenance manager" during Mr. Van Everdink's absences from the workplace, Mr. Bird answered "*correct*"; when asked whether everyone knew that (*ie.* that the Applicant was the acting maintenance manager in Mr. Van Everdink's absence), Mr. Bird answered "*We never announced it, we never did a memo announcement, the other Managers would have known*"; when asked whether or not Mr. Bird had the same kind of meetings with the Applicant as he would have had with Mr. Van Everdink when Mr. Van Everdink was absent from the workplace, Mr. Bird answered "yeah, yes"; and when asked did the Applicant had the authority to hire and fire during these periods, Mr. Bird answered "*I'm going to say yes*."

Application to Amend Reply:

[46] At this point in the proceedings, the Union sought leave to amend its Reply to add the allegation that the Applicant was not an "employee" at the time he gathered support for and filed the within application. The Board granted leave for the Union to do so and the parties agreed to adjourn the hearing so that payroll records for the Applicant and Mr. Van Everdink could be located and disclosed.

[47] On December 24, 2008, the Union filed an amended Reply with the Board adding the following specific allegation:

> "*(g) The union asserts further that prior to at the time of and/or subsequent, to support being gathered in the within matter and the application within being*

> *filed, the applicant, Bob Corbeil, was an actual defacto or perceived member of management.*
>
> *(h) The union says as a result of the above, the support gathered ought to be disregarded as being tainted. Further, the application within should be dismissed."*

[48] The hearing reconvened on March 30, 2009. With leave from the Board, Mr. Bird was recalled to give further evidence regarding Mr. Van Everdink's absences from the workplace and with respect to the employment status of the Applicant during Mr. Van Everdink's absences.

[49] Mr. Bird testified that Mr. Van Everdink had been absent from the work place for health reasons from February 1, 2007 until June 7, 2007 and then again in March 15, 2008 until August 8, 2008. Mr. Bird testified that during Mr. Van Everdink's absences from the workplace, the Applicant, as the next most senior employee in the maintenance department, took over many of Mr. Van Everdink's responsibilities, including consulting with management on the maintenance requirements of the hotel complex and daily reporting. However, Mr. Bird also testified that the Applicant was not "formally" appointed as the "Acting Maintenance Manager" and that, while the Applicant did have additional responsibilities, he did not have independent authority to hire, fire or discipline, promote or demote other employees, he was not responsible for scheduling, or the completion of performance reviews, and that he did not participate in management's department head meetings. Specifically, Mr. Bird testified that the out-of-scope managers (*ie.* department head) met periodically (*ie.* at least every three (3) months, more often if necessary); that there had been department head meetings during the times in 2007 and 2008 when Mr. Van Everdink had been absent from the workplace; and that the Applicant had not been invited to these meetings.

[50] Mr. Bird also testified that, during the period of Mr. Van Everdink's absences from the workplace, someone had been hired in the maintenance department, but that this person had been hired by himself and not the Applicant. Mr. Bird also indicated that he had conducted the performance reviews of employees in the maintenance department which had come due during Mr. Van Everdink's absences; not the Applicant.

[51] In cross-examination by counsel for the Union, Mr. Bird denied that his later evidence was in conflict with his prior testimony before the Board in these proceedings. Mr. Bird stated that the Applicant was the next most senior employee in the maintenance department;

that the hotel operated on a twenty-four (24) hour basis all year round; and that, in Mr. Van Everdink's absences, the Applicant was responsible for the day-to-day activities of that department. Mr. Bird indicated that everyone would know that, if Mr. Van Everdink was not around, the Applicant was the person to talk to about maintenance issues in the building. Mr. Bird testified that even when Mr. Van Everdink was not on medical leave, the Applicant would act for Mr. Van Everdink. For example, Mr. Van Everdink worked Monday to Friday and the Applicant worked Wednesday to Sunday. Therefore, every Saturday and Sunday, the Applicant was the most senior employee in the maintenance department and, on these days, he was the person management would "*go to .. to get things done."*

[52] The Union called Mr. Glen Stewart, who had been a service representative with the Union since 1993, with responsibilities for this particular workplace since January of 2008. Mr. Stewart testified that in his observation, the Employer did not normally hire new employees from the outside to replace workers who are on leaves of absences.

[53] The balance of Mr. Stewart's testimony related to the incident described by Ms. Ell and the Union's policy with respect to harassment. For the reasons stated previously, we have elected to omit this testimony.

Argument of the Parties:

[54] As indicated, the Applicant was a man of few words as evidenced by the fact that he did not argue on behalf of his application. This is not to say that the Applicant was abandoning his application but rather, as he put it, he wasn't "*not much of a talker*."

[55] Mr. Plaxton, counsel for the Union, argued that the application for rescission should be dismissed pursuant to s. 9 of the *Act* because, in the Union's opinion, the application was made in whole or in part on the advice of, or with the involvement of, or as a result of the influence or interference of the Employer. Counsel filed a book of authorities which we have read and for which we are thankful.

[56] The Union took the position that the Board ought to dismiss the application if it believes that the Employer provide advice or encouragement to the Applicant in preparing his application or if management assisted or influenced the obtaining of support in any way. In this regard, the Union asked the Board to consider the whole of the circumstances of the application,

including circumstances that (the Union argued) were either insufficiently explained or questionable.

[57] Firstly, the Union took the position that the Applicant was either a *de facto* manager at the time he gather support for, and filed, his application or he would have at least been perceived by other employees in the workplace as a representative of management. In this regard, the Union argued that the testimony of Mr. Bird, on behalf of the Employer, was inconsistent and self-serving and called his credibility into question. The Union argued that Mr. Bird's original testimony was simple and clear; when originally asked whether or not the Applicant was the "acting maintenance manager", Mr. Bird answer "correct"; but in his later testimony Mr. Bird recanted this statement. In the alternative, the Union argued that, because of the Applicant's close relationship with Mr. Bird and because of the general knowledge that the Applicant was responsible for day-to-day activities in the maintenance department in Mr. Van Everdink's absence, the employees would have perceived the Applicant as a representative of management.

[58] In addition, the Union argued that the other employees assisting in the application also had a close relationship with management, including Ms. Ell, whose mother was a member of management and her supervisor, and Ms. David, who was the "assistant" to Ms. Ell's mother. The Union argued that, under these circumstances, it would be unreasonable to assume that management did not know what was happening at the workplace and, if they knew, and did nothing to stop it, the other employees in the workplace would have reasonably assumed that the gathering of support to decertify the Union had, at least, the tacit approval of management. In such circumstances, the Union argued the Board ought not to permit a representative vote. In taking this position, the Union relied on the cases of *Martyn Arnold v. United Steel Workers of America, Local 5917 and Westeel Ltd.*, [2005] Sask. L.R.B.R. 5, LRB File No. 275-04.

[59] Secondly, the Union took the position that the Applicant's reasons for bringing his application were questionable noting that, it wasn't until after his meeting with Mr. Mayer that he had the idea to start an application to decertify the Union. The Union argued that it was Mr. Mayer that planted the idea for the application and reminded the Board that Mr. Mayer was the Applicant in a prior failed attempt to decertify the Union. The Union also observed that the Applicant had no recollection of how he knew to file his application during the open period, who

recommended the lawyer that assisted him in his application, and did not know where the description of the bargaining unit came from that he used on his application.

[60] The Union also argued that the Employer had an anti-union animus and attempted to undermine the Union's reputation in the workplace when it communicated directly with members of the Union (*ie.* the shop stewards) regarding the issue of dues. The Union's theory of the facts was that management was happy to hear that someone had commenced a decertification application and therefore turned a blind eye to the gathering of support in the workplace.

[61] The Union took the position that the only reasonable interpretation of the whole of the circumstances was that the application was made in whole or in part on the advice of, or with the involvement of, or as a result of, the influence of the Employer. While the evidence of employer influence may have been subtle, the Union took the position that it was sufficient. In taking this position, the Union relied on the decisions of this Board in *Susie Madziak v. Remai Investment Co. Ltd.*, [1987] Sask. Labour Report (December 1987) 35, LRB File No. 162-87; *Kim Leavitt v Confederation Flag Inn (1989) Limited and United Food and Commercial Workers, Local 1400*, [1990] Sask. Labour Report (Summer 1990) 61, LRB File No. 225-89; *Ben Schaeffer and Larry Lang v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Loraas Disposal Services Ltd.,* [1998] Sask. L.R.B.R. 573, LRB File No. 019-98; *Patrick Quigley v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Custom Built Ag Industries Ltd, operating a Trail Teck*, [2000] Sask. L.R.B.R. 128, LRB File No. 220-99; *Tyler Nadon v. United Steelworkers of America and X-Potential Products Inc.*, [2003] Sask. L.R.B.R. 383, LRB File No. 076-03; and *Kim Paproski v. International Union of Painters and Allied Trades, Local 739 and Jordan Asbestos Removal Ltd.*, [2008] Sask. L.R.B.R. 1, LRB File No. 173-06.

[62] The Union asked that the application for rescission be dismissed pursuant to s. 9 of the *Act*, arguing that the employees would have an opportunity in the future, if they wished to do so, to attempt a new rescission application but that the current application was tainted by Employer influence.

[63] Mr. Kenny, counsel for the Employer, argued that the Union's allegations of interference were based on mere conjecture and that there was no evidence supporting these

allegations. The Employer argued that there was no direct evidence before the Board that the Employer provide advice or encouragement to the Applicant or that management assisted or influenced in any way the gathering of support. The Employer argued that there was no evidence that the Employer even knew that the Applicant was organizing or preparing a rescission application or that management knew support was being gathered in the workplace until very late in the process. Counsel noted that the employees involved in gather support had routine access to all areas of the hotel complex and that nothing in their conduct would have alerted management to their activities.

[64] With respect to the issue of dues, Counsel for the Employer argued that management only became aware of the change in method of calculating dues after the last round of collective bargaining had concluded and that the Union's bargaining team had made no mention of the upcoming change during bargaining. Counsel argued that, when the issue arose, the Employer merely went back to the shop stewards with whom management had been bargaining. The Employer took the position that the concern that management had with the new dues structure was reasonable, as was the method of communicating that concern with the Union. Furthermore, the Employer argued that there was no evidence that the Applicant ever saw this document or was aware the management and the shop stewards had discussed the issue.

[65] With respect to the Applicant's employment status, the Employer reminded the Board that, during the period of time when the Applicant was preparing for and gathering support for his application and, at the time he filed his Application with the Board, Mr. Van Everdink was not on medical leave and, therefore, the Applicant was not "acting" for him during the period of time relevant to the within applicant. However, even if such was not the case, the Employer argued that the temporary performance of higher duties did not remove the Applicant from the bargaining unit and it did not disqualify him from commencing his application.

[66] With respect to the issue of Mr. Bird's evidence, Counsel for the Employer took the position that Mr. Bird's testimony was not "inconsistent" but rather his earlier testimony was "imprecise" and that he merely clarified his answer in his later testimony.

[67] Finally, counsel for the Employer also observed that this is the second rescission application to come before the Board. In the first application, the same allegations were made

by the Union in similar circumstances.[4] The Employer observed that the Union was unsuccessful in having that application dismissed pursuant to s. 9 of the *Act* in that case. The Employer further observed that a vote was conducted and was unsuccessful.

Relevant Statutory Provisions:

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

> 3 *Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> . . .
>
> *5 The board may make orders:*
>
> . . .
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> *(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
>
> *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> . . .
>
> *9 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.*

[4] See: *Darren Mayer v. United Food and Commercial Workers, Local 1400, supra.*

Analysis and Decision:

[69] On careful consideration of the whole of the evidence, we are not satisfied that this is an appropriate application for the Board to exercise its discretion pursuant to s. 9 of the *Act*.

[70] In coming to this conclusion, we are mindful of the caution expressed by this Board in *Wells v. Remai Investment Corporation and United Food and Commercial Workers, Local 1400*, [1996] Sask. L.R.B.R. 194, LRB File No. 305-95, at 197, that the Board must be alert to any sign that an application for decertification has been initiated, encouraged, assisted or influenced by the actions of the Employer and confirmed that "***the Employer has no legitimate role to play in determining the outcome of the representation question***." Similarly, in *Matychuk v. Hotel Employees and Restaurant Employees Union, Local 206 and El-Rancho Food & Hospitality Partnership o/a KFC/Taco Bell*, [2004] Sask. L.R.B.R. 5, LRB File No. 242-03, 2004 CanLII 65622 (SK L.R.B.), the Board endorsed the observation that it must be "*vigilant*" in guarding against applications to decertify a Union that in reality reflect the will of the Employer instead of the wishes of employees of the workplace.

[71] On the other hand, the Board has also noted in the past that not every suspicious or questionable act or circumstance will necessarily lead to the conclusion that an application has been made as a result of influence, interference, assistance or intimidation by the Employer. Furthermore, the Board in *Leavitt, supra,* has stated that the impugned conduct of the Employer must be of a nature and significance that it compromises the ability of the employees to freely make the choice protected by s. 3 of the *Act*:

> *Generally, where the Employer's conduct leads to a decertification application being made or, although not responsible for the filing of the application, compromises the ability of the employees to decide whether or not the 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.*

[72] In *Shuba v. Gunnar Industries Ltd. and International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870*, [1997] Sask. L.R.B.R. 829, LRB File

No. 127-97, that Board concluded that, in considering the exercise of the discretion granted pursuant to s. 9 of the *Act*¸ the Board must carefully balance the democratic right of employees to choose to be represented by a trade union (pursuant to s. 3 of the *Act*), against the need to ensure that the Employer has not used coercive power to improperly influence the outcome of that choice (pursuant to s. 9 of the *Act*).

[73] The Board has reviewed each of the case filed by the Union in support of its allegation of Employer interference. However, in the Board's opinion, each of these cases are distinguishable on their respective facts from the present circumstances.

[74] In the Board's opinion, the Applicant was neither a *de facto* manager nor would he have been perceived by employees in the workplace as a representative of management. Firstly, the Board is satisfied that Mr. Van Everdink (the Applicant's supervisor) was not on medical leave during the period of time relevant to these proceedings (*ie.* October and November of 2007). However, even if it were otherwise, while the Applicant may have been "acting" for his supervisor during the periods of his absences from the workplace, the scope of the Applicant's duties and responsibilities in doing so was not sufficient to exclude him from the bargaining unit or, in the Board's opinion, cloak the Applicant in the perceived authority of management. In this respect, the Board is satisfied that Mr. Bird's evidence was credible and his testimony on March 30, 2009 merely clarified his prior testimony as to the Applicant's status during Mr. Van Everdink's absences from the workplace. The Board is satisfied that, on November 27, 2008, Mr. Bird provided overly-simplistic answers to questions that he clearly had not previously put his mind to and that, in doing so, his answers were equivocal and imprecise. We are satisfied that, in testifying on March 30, 2009, Mr. Bird was merely clarifying his prior evidence.

[75] The Board accepts that the Applicant was the second most senior employee in the maintenance department and in charge of the day-to-day maintenance of the hotel complex in his supervisor's absence. While the Applicant may have been "acting" for his supervisor from time to time (and for extended periods of time during his medical leaves), the Board saw no evidence that the Applicant had the authority or capacity to affect the economic lives of his coworkers during these periods nor any other evidence upon which other employees would have reasonably perceived the Applicant as a representative of management. Simply put, while Mr.

Bird clearly had a great deal of respect for the Applicant, we are not satisfied that anyone in the workplace would have perceived the Applicant as a person in authority.

[76] In the Board's opinion, there was no direct evidence that the Employer provided advice or encouragement to the Applicant or that management assisted or influenced in any way the gathering of support for his application. Furthermore, there was no evidence that the Employer even knew that the Applicant was organizing or preparing a rescission application or that management knew support was being gathered in the workplace until very late in the process. The evidence of the Applicant, Ms. Ell and Ms. David in this respect was delivered forthrightly and with conviction. While the Applicant's memory was poor, his testimony under cross-examination was sincere, reasonable and consistent. While the Applicant was unable to recall where he obtained certain information he required in bringing his application, such as the effective date of the collective agreement and the description of the bargaining unit, it is not an obvious conclusion that he must have obtained this information from management. In the course of preparing his application, the Applicant spoke with Mr. Mayer, someone experienced in such matters; he consulted and obtained information from the Board's office; the Applicant conducted his own research on the internet; and finally, he received assistance from at least one (1) other employee in the workplace (Ms. Ell) who had prior experience in such matters. While the Board has indicated that it must be alert and vigilant, not every unanswered question will necessarily lead to the conclusion of management interference. In this respect, we rely on the decision of the Board in *Matychuk, supra.*

[77] With respect to the motives of the Applicant (and those persons assisting him in gathering support), the Board is mindful that it is not to judge whether or not the stated "reasons" are "good" reasons; only whether or not they are plausible, credible and represent the person's true motivation. In the Board's opinion, the motivations expressed by the Applicant for commencing and filing his application for rescission and by Ms. Ell and Ms. David in assisting in gathering support were plausible and credible. It matters not to the Board if they were mistaken or even ill-informed in their opinions. The issue for the Board is whether these opinions were their own or whether they were merely a facade for some hidden motivating factor and, if so, if that other motivating factor found its origin in the influences of management. In this respect, we rely on the decision of the Board in *Stephen Makelki v. International Union of Painters and Allied Trades, Local 739 and Western Painting & Decorating Inc.*, 2008 CanLII 47034 (SK L.R.B.), LRB File No. 152-08.

[78] With respect to the issue of dues, the Board has reviewed the letter dated April 19, 2007 from the Employer to the Union, together with the circumstances of the meeting that occurred on or about that date between representatives of the Employer and the Union's shop stewards. In the Board's opinion, the decision to convene a meeting of shop stewards without the presence of the Union's service representatives to discuss the issue of dues was probably poorly conceived and the resultant letter was both poorly worded and unnecessarily inflammatory. On the other hand, the Board accepts the Employer's evidence that it was caught off guard by the change in the Union's dues structure and that convening a meeting of members of the Union's bargaining team was a reasonable forum to discuss its concerns. While the significance of these events may have been different under other circumstances, in the Board's opinion there was no evidence that these events were known to the Applicant or in any way were a turning point in his decision to commence his application.

[79] The evidence before the Board was that the Applicant's conversation with Mr. Mayer in October of 2007 was the origin for his effort to decertify the Union. There was no evidence that Mr. Mayer had any knowledge of management's meeting with the shop stewards or the subsequent letter that was transmitted to the Union in April of 2007.

[80] The Union argued that concerns about union dues was a consistent theme in the within application and that this issue can be traced back to management. While the issue of the dues was a consistent motivating factor for the Applicant, for Ms. Ell, and for Ms. David, the Board notes that dues are often a stated motivating factor for applicants in rescission applications. Similarly, in the Board's opinion, the fact that both the employees in the workplace and the Employer were simultaneously complaining about the change in union dues was more reasonably the result of the mere fact that they had changed and not from anything done by management.

[81] The evidence of Ms. Hryhoriw was that she, as a shop steward and an active member of the Union, raised the issue of dues with Mr. Bird and that management appropriately agreed to direct employees back to the Union to address the issue. In the Board's opinion, the facts tend to indicate that the change in the dues structure came as a surprise to both employees and management. Simply put, we are not satisfied that the commonality of this one (1) issue in the present application is indicative of Employer influence as suggested by the Union.

[82] In the present case, having reviewed the whole of the circumstances, we have determined that there is insufficient basis for the Board to exercise its discretion to withhold the democratic right of employees to determine the representative question. In coming to this conclusion, we noted that the collective bargaining relationship of the parties is not in its infancy and that the parties are into their third (3rd) collective agreement. Furthermore, there was no direct evidence that management provided advice, encouragement, support or assistance to the Applicant. Finally, we are not satisfied that the unexplained or questionable circumstances noted by the Union are indicative of interference by the Employer. Simply put, we are not satisfied that the circumstances of the within application are sufficient to compromise the ability of the employees in the workplace to decide whether or not they wish to continue to be represented by the Union.

[83] Having been satisfied that the Applicant has met the statutory requirements, an Order will issue that a vote on the application, be conducted in the usual manner.

DATED at Regina, Saskatchewan, this **13th** day of **May, 2009.**

LABOUR RELATIONS BOARD

Steven Schiefner,
Vice-Chairperson