**The Labour Relations Board**
**Saskatchewan**

**COLIN LESYK, Applicant v. BARRICH FARMS (1994) LTD and TRUE NORTH SEED POTATO CO. LTD. and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondents**

**- and -**

**UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. BARRICH FARMS (1994) LTD. and TRUE NORTH SEED POTATO CO. LTD., Respondent**

LRB File Nos. 094-09 & 111-09, May 17, 2010
Vice-Chairperson, Steven Schiefner; Members: Bruce McDonald and Clare Gitzel

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| For Colin Lesyk: | Appearing in person |
| For Respondent/Applicant Union: | Ms. Heather M. Jensen |
| For Respondent Employer: | Ms. Meghan R. McCreary |

**Practice and Procedure – Board called upon to consider temporal priority of rescission application and first collective agreement application – Union asked Board to delay processing rescission application or delay conduct of representative vote until first collective agreement concluded - Board examines past practices and recent changes to *Trade Union Act* – Board confirms policy that applications ought to be processed in order filed with Board – Board not prepared to delay rescission application.**

***The Trade Union Act, ss. 5(k), 6, 18, and 26.5.***
***The Trade Union Amendment Act, 2008.***

## REASONS FOR DECISION – PROCEDURAL MATTERS

**Background:**

**[1]** **Steven D. Schiefner, Vice-Chairperson**: These Reasons for Decision involve the procedural interrelationship between two (2) separate, yet related, applications before the Saskatchewan Labour Relations Board (the "Board") involving the parties.

**[2]** The first application[1] was filed with the Board on August 26, 2009 by Mr. Colin Lesyk, who applied for a rescission of the Order of the Board dated October 24, 2008 that designated the United Food and Commercial Workers, Local 1400 (the "Union") as the certified bargaining agent for a unit of employees employed by Barrich Farms (1994) Ltd. and True North Seed Potato Co. Ltd. (the "Employer").

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[1] LRB File No. 094-09.

**[3]** The second application[2] was filed with the Board on September 25, 2009 by the Union, who are seeking assistance from the Board toward the conclusion of a first collective agreement pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

**[4]** Because these two (2) applications involved the first time the Board was called upon to consider the temporal priority between a rescission application and an application for first collective agreement assistance filed since s. 6 of the *Act* was amended[3], the Board, through the Registrar, invited submissions from the parties on the processing of these applications. The Board heard submissions from the parties on March 25, 2010 in Saskatoon.

**Background:**

**[5]** The relevant facts with respect to these proceedings are not in dispute. However, it is fair to say that the relevant labour relations history is a little complicated, with both the Employer and the Union having brought various applications and/or having commenced various proceedings over the past number of months.

**[6]** The Union filed an application for certification[4] with the Board on April 23, 2007 and a hearing on that application was conducted on June 18, 2007 and August 8, 2007 by a panel of the Board (the "original panel"). The issues in dispute at the time of hearing related to the Employer's statement of employment and the scope of the bargaining unit. On October 24, 2008, the original panel of the Board rendered a decision on the Union's application; determined the appropriate composition of the Statement of Employment; and concluded that the Union enjoyed the support of the majority of employees in the appropriate bargaining unit[5]. In concluding that the Union enjoyed the majority of support of the employees, the Board relied upon the card evidence of support filed by the Union at the time the certification application was filed with the Board. No representative vote within the meaning of s. 6 of the *Act* was conducted by the Board.

**[7]** At the time the Union filed its application for certification (on April 23, 2007), and at the time of the hearing before the original panel (on June 18, 2007 and August 8, 2007), s. 6 of the *Act* did not mandate that representative votes be conducted and the Board's practice was

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2 LRB File No. 111-09.

3 By *The Trade Union Amendment Act, 2008*, S.S. c.26, assented to May 14, 2008.

4 LRB File No. 043-07

5 See: *United Food and Commercial Workers, Local 1400 v. Barrich Farms (1994) Ltd. et al.*, [2008] Sask. L.R.B.R. 551, 2008 CanLII 57253, LRB File No. 043-07.

to determine whether or not a trade union enjoyed the support of a majority of the employees in a bargaining unit on the basis of card evidence of support (i.e. membership/support cards). At that time, the *Act* only compelled a representative vote in limited circumstances; circumstances not present before the original panel.

**[8]** With the passage of *The Trade Union Amendment Act, 2008*, Saskatchewan adopted a mandatory vote regime, wherein a representative vote is now required to be held (by secret ballot) each time the Board is called upon to determine what trade union, if any, enjoys the support of a majority of employees in a bargaining unit. In so doing, Saskatchewan moved from what had previously (and somewhat inaccurately) been referred to as an "automatic certification" system to a "mandatory vote" system.

**[9]** The original panel rendered its Reasons for Decision on October 24, 2008, after the changes to s. 6 became effective. The original panel commented only briefly (in a footnote) as to its reason for declining to apply the new provision contained in *The Trade Union Amendment Act, 2008*. Simply, the original panel stated that "*[t]he present application was filed and heard before the recent amendments to The Trade Union Act (S.S. 2008, c.2[6]) requiring a representative vote in every application for certification (s. 6).*"[6]

**[10]** On November 7, 2008, the Employer filed an application for reconsideration with the Board alleging the original panel erred in certifying the Union. On November 13, 2008, the Employer applied under s. 5.3 of the *Act* for an interim Order of the Board staying the effect of the certification Order made by the Board on October 24, 2008. A hearing with respect to the Employer's application for Interim Relief was conduct by a panel of the Board on November 19, 2008. While the Board was satisfied that the Employer had demonstrated an arguable case (in light of the change in legislation), the Board concluded that the balance of labour relations harm, for this particular workplace, at that particular time, did not favour granting the Employer's requested stay (i.e. of the original panel's certification Order). Simply put, the Board concluded that collective bargaining could commence between the parties prior to the substantive decision on whether or not the original panel erred in law in certifying the Union on the basis of card

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[6] Ibid Note 5, page 15.

evidence of support (i.e. in declining to conduct a representative vote).[7] The Employer's application for reconsideration was withdrawn by the Employer on February 6, 2009.

**[11]** By way of additional (but relevant) background, it should be noted that there were a number of certification applications pending before the Board at the time s. 6 of the *Act* was amended (i.e. on May 14, 2008). These certification applications were also granted on the basis of card evidence of support, as was done by the original panel in this case, without the conduct of a representative vote as now required by the *Act*.

**[12]** For example, on December 4, 2008, the Board certified the same trade union (i.e. UFCW, Local 1400) to represent a unit of employees employed by Wal-Mart Canada Corp. ("Wal-Mart") in Weyburn, Saskatchewan and, did so, on the basis of card evidence of support.[8] On December 15, 2008, Wal-Mart applied to this Board for reconsideration of the Board's decision granting the certification Order for that workplace based on a number of grounds, including the allegation that the Board erred in relying on card evidence to determine majority support and in failing to conduct a representative vote. Wal-Mart's application for reconsideration was heard by the Board on February 2, 2009. In Reasons for Decision released on March 26, 2009, the Board concluded that the changes to s. 6 of the *Act* (that became effective on May 14, 2008) did not apply to applications filed with the Board prior to the change in legislation.[9] In coming to this conclusion, the Board agreed with the conclusion of the original panel that the change to the legislation (i.e. which now requires mandatory representative votes) did not apply to applications pending before the Board at the time the legislation changed.

**[13]** On March 27, 2009, following the release of the Board's decision on Wal-Mart's reconsideration application, Wal-Mart applied to the Saskatchewan Court of Queen's Bench seeking judicial review of this Board's decision to designate UFCW, Local 1400 as the certified bargaining agent.[10] One (1) allegation of Wal-Mart in its application for judicial review was that the Board erred in relying on membership cards, rather than conducting a representative vote, for purposes of determining whether or not UFCW, Local 1400 enjoyed the support of the

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7 See: *United Food and Commercial Workers, Local 1400 v. Barrich Farms (1994) Ltd. et. al.*, [2008] Sask. L.R.B.R. 939, 2008 CanLII 64691, LRB File No. 043-07.

8 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, [2008] Sask. L.R.B.R. 951, 2008 CanLII 64399, LRB File Nos. 069-04 & 122-04 to 130-04.

9 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, 2009 CanLII 13640, LRB File No. 069-04.

10 Q.B.G. No. 387 of 2009.

majority of members of the bargaining unit deemed to be appropriate in that workplace. In a decision rendered by the Honourable Mr. Justice Foley on June 23, 2009, the Court concluded that the amendments to s. 6 of the *Act* ought to have been given retroactive application by the Board and, thus, the Board erred in law in not applying the new provisions in the *Act* (i.e. in failing to conduct a representative vote).[11]

**[14]** On July 22, 2009, UFCW, Local 1400 filed an application with the Saskatchewan Court of Appeal seeking judicial review of the decision of Foley J. respecting the temporal application of the amendments to s. 6 of the *Act*.[12] This application was heard by the Court of Appeal on December 2, 2009; however, as of the date of these Reasons for Decision, no decision has been rendered by the Court on the Union's appeal.

**[15]** On July 23, 2009, the Employer applied to the Saskatchewan Court of Queen's Bench seeking judicial review of this Board's decision to designating the Union as the certified bargaining agent.[13] One (1) allegation of the Employer in its application for judicial review was that the Board erred in relying on membership cards, rather than conducting a representative vote, for purposes of determining whether or not the Union enjoyed the support of the majority of members of the bargaining unit deemed to be appropriate in that workplace. This application was adjourned *sine die* by the parties pending the decisions of the Saskatchewan Court of Appeal on the same issue in Wal-Mart's application. It should be noted that, although the Employer applied for judicial review of the original panel's certification Order, no stay of that Order was granted by the Court pending its determination on the Employer's application.

**[16]** On May 26, 2009, the Employer filed an application with the Board alleging that the Union had engaged in an unfair labour practice contrary to s. 11(2)(c) of the *Act* by failing to bargain in good faith.[14] The essence of the Employer's allegation was that the Union frustrated collective bargaining by refusing to produce its wage (monetary) proposals when requested by the Employer, thus preventing the Employer for examining and evaluating all of the Union's collective bargaining proposals in a rational and comprehensive way.

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11 See: Wal-Mart Canada Corp v. *United Food and Commercial Workers, Local 1400, et. al.*, 2009 SKQB 247, (CanLII).

12 C.A. 1811 of 2009 (*United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp, et. al.).*

13 Q.B.G. No. 1123 of 2009.

14 LRB File No. 051-09.

**[17]** On June 25, 2009, the Union filed an application with the Board alleging that the Employer engaged in an unfair labour practice contrary to s. 11(1)(c) of the *Act* by failing to bargain in good faith.[15] The Union identified a number of concerns with the Employer's conduct during collective bargaining, including the failure of the Employer to provide necessary and relevant information required by the Union.

**[18]** It was into this labour relations situation that Mr. Lesyk filed his application for rescission with the Board on August 26, 2009. Mr. Lesyk filed his application during the open period prescribed pursuant to s. 5(k) of the *Act*; in the eleventh (11th) month following this Board's Order certifying the Union as the bargaining agent for the unit of employees of which he is a member.

**[19]** Both the Employer's and the Union's unfair labour practice applications were heard by a panel of the Board on September 23, 2009 in Regina, Saskatchewan, with the panel reserving its decision.

**[20]** On September 29, 2009, Chairperson Love, as Executive Officer, issued a direction for a pre-hearing vote by secret ballot on Mr. Lesyk's rescission application. Prior to the conduct of this vote, the Union brought an application seeking to have a panel of the Board review the Direction for Vote issued by the Board's Executive Officer. The Union's application was heard before a panel of the Board on October 6, 2009 in Saskatoon. Upon hearing from the parties, the Board confirmed the Direction to Vote issued by Chairperson Love. The representative vote of members of the Union's bargaining unit was conducted on October 7, 2009 at the workplace. In accordance with the Direction for Vote, the ballots were not counted following the conduct of the vote. Rather, the ballot box was sealed pending further direction from the Board.

**[21]** On November 19, 2009, a panel of the Board issued Reasons for Decision, dismissing both the Employer's and the Union's unfair labour applications.[16] In these Reasons for Decision, the Board encouraged the Employer and the Union to return to the bargaining table.

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15 LRB. File No. 072-09.

16 See: *Barrich Farms (1994) Ltd. et al.*, v. *United Food and Commercial Workers, Local 1400*, 2009 CanLII 69340, LRB File Nos. 051-09 & 072-09.

**[22]** On December 9, 2009, the Board, through the Registrar, invited submissions on the issue of the temporal priority between Mr. Lesyk's rescission application and the Union's first collective agreement application. As indicated, the Board heard oral submissions from the parties on March 25, 2010 in Saskatoon. As of that date, the parties had not been successful in negotiating their first collective agreement.

**Argument of the Parties**:

**[23]** Mr. Lesyk asked the Board to proceed with his application for rescission as soon as possible. Mr. Lesyk argued that the employees in the workplace had the right to decide whether or not they wished to continue being represented by the Union and expressed his frustration in the delay in processing his application. Mr. Lesyk expressed little interest in the Union's first collective agreement application other than to ask that his rescission application not be delayed any further because of that application. Simply put, with respect to the order in which the two (2) applications should be processed, Mr. Lesyk took the position that his application (i.e. the rescission application) should be first.

**[24]** Counsel for the Union reminded the Board that, notwithstanding the various applications to both this Board and the Courts, the Union's certification Order for the Employer's workplace was still in force and effect. As a consequence, the Union argued that both parties (i.e. the Union and the Employer) continued to be under a statutory duty to bargain in good faith towards the conclusion of a first collective agreement.

**[25]** Counsel argued that the long standing practice of this Board has been to delay (suspend) any final determination on rescission applications until a first collective agreement had been concluded by the parties and the employees within that bargaining unit had a reasonable opportunity to experience working life with union representation under a collective agreement. The Union relied on various decisions of the Board in support of this proposition, including *Walter Choponis v. Madison Development Group Inc. and United Food and Commercial Workers, Local 1400*, [1996] Sask. L.R.B.R. 511, LRB File No. 226-95; *Charmaine Evans v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada) and Saskatchewan Indian Gaming Authority*, [2002] Sask. L.R.B.R. 313, LRB File No. 258-00; and *Heidi Anne Karlonas v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Starbucks Coffee Canada*, [2008] Sask. L.R.B.R. 645, 2008 CanLII 58435, LRB File No. 169-06.

**[26]** The Union argued that any hearing on Mr. Lesyk's rescission application should be delayed until after its application for first collective agreement assistance had been determined by the Board or, in the alternative, that the final determination on Mr. Lesyk's rescission application should be delayed. Specifically, the Union argued that the representative vote conducted on October 7, 2009 should not be counted. Rather, the Union argued that (assuming Mr. Lesyk's rescission application was not dismissed by the Board as desired by the Union) another representative vote should take place but not until a reasonable period after a first collective agreement has been concluded by the parties.

**[27]** In this regard, counsel for the Union argued that it is not the order of when the two (2) applications were filed with the Board that should determine when the applications be heard (or the proper timing of the conduct of a representative vote); but rather, whether or not the members of the bargaining unit have sufficient information upon which to make an informed decision with respect to the representative question. To which end, counsel argued that, until the employees have had a reasonable opportunity to experience working life with union representation under a collective agreement, they do not have the necessary information to make an informed decision on the representative question. The Union took the position that, because there was no collective agreement in place at this workplace, the employees did not have sufficient information on October 7, 2009 (when the vote was conducted) upon which to make an informed decision on the representative question because they have not had the benefit of knowing what the Union might be able to achieve for them through collective bargaining.

**[28]** The Union argued that the change to the *Act* that implemented mandatory votes should not modify the Board's past practice with respect to delaying rescission applications because, if anything, the change to the legislation can be seen as signaling a legislative intent to strengthen the information available to employees when deciding the representative question. The Union argued that the change to the legislation (permitting greater communication by employers) underscored the importance of ensuring that employees have the information they need to decide the representative question. To which end, the Union argued that the change to the legislation continued to support the Board's past practice of ensuring that employees had an opportunity to experience the benefits of collective bargaining before being called upon to decide the representative question in a recission application.

**[29]** Finally, the Union argued that its application for first collective agreement assistance satisfied that preconditions enumerated in s. 26.5(1.1) of the *Act* and, thus, asked the Board to appoint a Board Agent in accordance with this Board's usual practice. The Union argued that doing so would not prejudice Mr. Lesyk's application; albeit that application would need to be delayed. On the other hand, the Union argued that delaying its application (delaying the appointment of a Board Agent) would have a number of undesirable consequences. For example, the Union argued that if the Board adopted a new practice of delaying first collective agreement applications until the conclusion of pending rescission applications, this new procedure would have the undesirable consequence of forcing trade unions to prematurely seek intervention by way of a s. 26.5 application to prevent a foot race between a rescission applicant and the trade union during the open period until a first collective agreement is obtained.

**[30]** In support of its position, the Union filed a detailed Brief of Law, together with a Book of Authorities, which the Board has reviewed and for which we are thankful.

**[31]** The Employer took the position that the Board should process the applications in the order in which they were filed with the Board. The Employer relied upon this Board's decision in *R. Sidney Glas, et al. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Loraas Disposal Services Ltd.*, [1999] Sask. L.R.B.R. 123, LRB File Nos. 031-99 to 034-99 for the proposition that the "normal" practice of the Board is to hear applications involving the same, or some of the same parties, in the order in which they were filed.

**[32]** Counsel for the Employer noted that the Union filed its application seeking first collective agreement assistance within days of receiving a copy of Mr. Lesyk's rescission application and cautioned the Board that the Union's application should properly be seen as a defense to the rescission application. The Employer argued that, as in *Glas, supra*, the Union would have been aware of the upcoming open period and that, if the Union believed the Employer was delaying or frustrating collective bargaining, the Union could have (and arguably should have) acted sooner (i.e. before the open period) to ensure that its application was received first.

**[33]** Counsel for the Employer argued that, to the extent the Board had a practice of delaying the conduct of a representative vote on a rescission application until after a first

collective agreement had been obtained, the change in the legislation in 2008 implementing mandatory votes signaled that this process in no longer valid. The Employer argued that the change in the legislation took away the capacity of this Board to delay the conduct of a representative vote by replacing the words "*the board may, in its discretion … direct a vote be taken*" with "*the board must direct a vote be taken*." The Employer argued that the new legislation now directs the Board to order a vote on the representative question and that this change to the wording of s. 6 signals a legislative intent that the Board's past practice of delaying representative votes was wrong; represented an unnecessary intervention by the Board into the wishes of the employees; and, simply put, was paternalistic.

**[34]** Finally, the Employer argued that it made more sense to process the rescission application first, as this application has the potential of rendering the Union's application unnecessary. To which, counsel for the Employer argued that it would be inefficient and potentially a waste of resources for the Board to appoint an Agent if Mr. Lesyk's application has the potential of ending the collective bargaining relationship between the parties.

**Relevant Statutory Provisions:**

**[35]** The relevant provisions of *The Trade Union Act* are as follows:

> ***5*** *The board may make orders:*
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> *(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
>
> *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> . . .
>
> ***18*** *The board has, for any matter before it, the power:*
>
> *(a) to require any party to provide particulars before or during a hearing;*
>
> *(b) to require any party to produce documents or things that may be*

*relevant to a matter before it and to do so before or during a hearing;*

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

*(i) summon and enforce the attendance of witnesses;*

*(ii) compel witnesses to give evidence on oath or otherwise; and*

*(iii) compel witnesses to produce documents or things;*

*(d) to administer oaths and solemn affirmations;*

*(e) to receive and accept any evidence and information on oath, affidavit or otherwise that the board in its decision sees fit, whether admissible in a court of law or not;*

*(f) subject to the regulations made by the Lieutenant Governor in Council, to determine the form in which evidence of membership in a trade union or communication from employees that they no longer wish to be represented by a trade union is to be filed with the board on an application for certification or for rescission, and to refuse to accept any evidence that is not filed in that form;*

*(g) subject to the regulations made by the Lieutenant Governor in Council, to determine the form in which and the time within which any party to a proceeding before the board must file or present any thing, document or information and to refuse to accept any thing, document or information that is not filed or presented in that form or by that time;*

*(h) to order preliminary procedures, including pre-hearing settlement conferences;*

*(i) to determine who may attend and the time, date and place of any preliminary procedure or conference mentioned in clause (h);*

*(j) to conduct any hearing using a means of telecommunications that permits the parties and the board to communicate with each other simultaneously;*

*(k) to adjourn or postpone the proceeding;*

*(l) to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative method of resolution;*

*(m) to bar from making a similar application for any period not exceeding one year from the date an unsuccessful application is dismissed:*

*(i) an unsuccessful applicant;*

*(ii) any of the employees affected by an unsuccessful application;*

*(iii) any person or trade union representing the employees affected by an unsuccessful application; or*

*(iv) any person or organization representing the employer affected by an unsuccessful application;*

*(n) to refuse to entertain a similar application for any period not exceeding one year from the date an unsuccessful application is dismissed from anyone mentioned in subclauses (m)(i) to (iv);*

*(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;*

*(p) to summarily dismiss a matter if there is a lack of evidence or no arguable case;*

*(q) to decide any matter before it without holding an oral hearing;*

*(r) to decide any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether:*

*(i) a person is a member of a trade union;*

*(ii) a collective agreement has been entered into or is in operation; or*

*(iii) any person or organization is a party to or bound by a collective agreement;*

*(s) to require any person, trade union or employer to post and keep posted in a place determined by the board, or to send by any means that the board determines, any notice that the board considers necessary to bring to the attention of any employees;*

*(t) to enter any premises of an employer where work is being or has been done by employees, or in which the employer carries on business, whether or not the premises are those of the employer, and to inspect and view any work, material, machinery, appliances, articles, records or documents and question any person;*

*(u) to enter any premises of a trade union and to inspect and view any work, materials, articles, records or documents and question any person;*

*(v) to order, at any time before the proceedings has been finally disposed of by the board, that:*

*(i) a vote or an additional vote be taken among employees affected by the proceeding if the board considers that the taking of such a vote would assist the board to decide any question that has arisen or is likely to arise in the proceeding, whether or not such a vote is provided for elsewhere; and*

*(ii) the ballots cast in any vote ordered by the board pursuant to subclause (i) be sealed in ballot boxes and not counted except as directed by the board;*

*(w) to enter on the premises of an employer for the purpose of conducting a vote during working hours, and to give any directions in connection with the vote that it considers necessary;*

*(x) to authorize any person to do anything that the board may do pursuant*

*to clauses (a), (b), (d), (e), (i), (j), (s), (t), (u) and (w), on any terms and conditions the board considers appropriate, and to require that person to report to the board on anything done.*

*. . .*

***26.5****(1) If the board has made an order pursuant to clause 5(b), the trade union and the employer, or their authorized representatives, must meet and commence bargaining collectively within 20 days after the order is made, unless the parties agree otherwise.*

*(1.1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:*

*(a) the board has made an order pursuant to clause 5(a), (b) or (c);*

*(b) the trade union and the employer have bargained collectively and have failed to conclude a first collective bargaining agreement; and*

*(c) one or more of the following circumstances exists:*

*(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;*

*(ii) the employer has commenced a lock-out;*

*(iii) the board has made a determination pursuant to clause 11(1)(c) or (2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6);*

*(iv) 90 days or more have passed since the board made an order pursuant to clause 5(b).*

*(2) If an application is made pursuant to subsection (1.1), an employee shall not strike or continue to strike, and the employer shall not lock out or continue to lock out the employees.*

*(3) An application pursuant to subsection (1.1) must include a list of the disputed issues and a statement of the position of the applicant on those issues, including the applicant's last offer on those issues.*

*(4) All materials filed with the board in support of an application pursuant to subsection (1.1) must be served on the other party within 24 hours after filing the application with the board.*

*(5) Within 14 days after receiving the information mentioned in subsection (4), the other party must:*

*(a) file with the board a list of the issues in dispute and a statement of the position of that party on those issues, including that party's last offer on those issues; and*

*(b) serve on the applicant a copy of the list and statement.*

*(6) On receipt of an application pursuant to subsection (1.1):*

*(a) the board may require the parties to submit the matter to conciliation if they have not already done so; and*

*(b) if the parties have submitted the matter to conciliation or 120 days have elapsed since the appointment of a conciliator, the board may do any of the following:*

*(i) conclude, within 45 days after undertaking to do so, any term or terms of a first collective bargaining agreement between the parties;*

*(ii) order arbitration by a single arbitrator to conclude, within 45 days after the date of the order, any term or terms of the first collective bargaining agreement.*

*(7) Before concluding any term or terms of a first collective bargaining agreement, the board or a single arbitrator may hear:*

*(a) evidence adduced relating to the parties' positions on disputed issues; and*

*(b) argument by the parties or their counsel.*

*(8) Notwithstanding section 33 but subject to subsections (9) and (10), the expiry date of a collective bargaining agreement concluded pursuant to this section is deemed to be two years from its effective date or any other date that the parties agree on.*

*(9) Notwithstanding section 33 not less than 30 days or more than 60 days before the expiry date of a collective bargaining agreement concluded pursuant to this section, either party may give notice in writing to terminate the agreement or to negotiate a revision of the agreement.*

*(10) Where a notice is given pursuant to subsection (9), the parties shall immediately bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.*

**Analysis and Conclusion:**

**[36]** As indicated, this is the first opportunity for the Board to consider the temporal priority between a rescission application and a first collective agreement application filed since s. 6 of the *Act* was amended in 2008. There have been a number of cases, including those cited by the Union, wherein this Board has, in the past, exercised discretion to delay the final determination on a rescission application in circumstances were no collective agreement was in place. In some case, such as in *Choponis, supra*, and *Evans, supra*, the Board exercised its discretion in the face of inappropriate conduct on the part of a resistant employer; conduct not sufficient to trigger the application of s. 9 of the *Act*; but conduct sufficient to cause the Board to be concerned that an atmosphere or environment may exist such that the employees could not

make a reasoned or informed decision with respect to the representative question at that time. In some cases, for example in *Karlonas*, *supra*, the Board has exercised its discretion to delay a representative vote merely because a first collective agreement was not in place. The Board's rationale for doing so was canvassed in each case. In some cases, the Board's discretion was seen as remedial (specifically intended to redress inappropriate conduct on the part of an employer); and in some cases, the Board's discretion may be seen in furtherance of general policy (to ensure employees have a fulsome opportunity to experience the benefits of collective bargaining before being called upon to decide the representative question). Whether the Board's past exercise of discretion is seen as necessary and appropriate, or unnecessary and paternalistic, is probably a matter of perspective.

**[37]** However, in considering this Board's past decisions, it is important to distinguish cases wherein the Board exercised its discretion to delay a vote on the representative question from cases were the Board exercised its discretion, pursuant to s. 9 of the *Act*, to reject or dismiss a rescission application on the basis of employer interference. Examples of the later, may be seen in *Lang and Schaeffer v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1998] Sask. L.R.B.R. 573, LRB File No. 019-98 or in *Gary Bresch v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [2002] Sask. L.R.B.R. 4, 162-01. The importance of the distinction is that the exercise of the Board's discretion to dismiss an application on the basis of employer interference is predicated on express statutory authority; that being, s. 9 of the *Act*. The discretion exercised by this Board to delay a representative vote was not based on express statutory authority as there is no express authority in the *Act* to delay the conduct of a representative vote either on a remedial basis or based upon general policy of the Board. Rather, the Board found its authority to delay a vote indirectly from the Board's general discretion regarding the conduct of a representative vote.

**[38]** The Employer took the position that the change in the legislation has taken away the capacity of this Board to delay the conduct of a representative vote. To consider counsel's argument, it is helpful to ruminate on the language of s. 6, as well as the changes which have occurred to this section over the years.

**[39]** The current form of *The Trade Union Act* came into existence in 1972[17]. The *Act* was consolidated (but unchanged) as part of the Revised Statutes of Saskatchewan, effective February 26, 1979. Section 6 of the *Act* remained unchanged until June 17, 1983, when it was amended by *The Trade Union Amendment Act, 1983*[18]. Prior to this amendment (from 1972 until June of 1983), s. 6 of the *Act* read as follows:

> ***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) and (3), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
>
> *(2) Where a trade union:*
>
> *(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and*
>
> *(b) shows that 25% or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining*
>
> *the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:*
>
> *(c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit; or*
>
> *(d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.*
>
> *(3) Where a trade union:*
>
> *(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is no existing order of the board; and*
>
> *(b) shows that twenty-five percent or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining;*
>
> *the board, upon receipt from the trade union of a request that the board direct a vote to determine the question, shall direct a vote to be taken by secret ballot of all employees eligible to vote.*

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17 S.S. 1972, ch. 137.

18 S.S. 1983, ch. 81.

**[40]** As indicated, s. 6 of the *Act* was amended in 1983 but remained unchanged until 2008, when it was amended again. From June 17, 1983 until May 14, 2008, s. 6 of the *Act* read as follows:

> ***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.*
>
> *(2) Where a trade union:*
>
> *(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and*
>
> *(b) shows that 25% or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining*
>
> *the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:*
>
> *(c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit; or*
>
> *(d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.*
>
> *(3)* ***Repealed.***

**[41]** On May 14, 2008, *The Trade Union Amendment Act, 2008* was given Royal Assent and, in so doing, s. 6 of the *Act* was amended to read as follows:

> ***6****(1) Subject to subsections (1.1) and (2), 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 must direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
>
> *(1.1) No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application.*

> *(1.2) The board must require as evidence of each employee's support mentioned in subsection (1.1) written support of the application, as prescribed in the regulations made by the Lieutenant Governor in Council, made within 90 days of the filing of the application.*
>
> *(2) Where a trade union:*
>
> *(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and*
>
> *(b) shows that 45% or more of the employees in the appropriate unit have within 90 days preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining*
>
> *the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:*
>
> *(c)* ***Repealed.***
>
> *(d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.*
>
> *(3)* ***Repealed.***

**[42]** Save for one (1) decision, *Karlonas, supra*, the whole of this Board's jurisprudence regarding the discretion to delay the conduct of a representative vote (until after the first collective agreement) appears to have arisen during a period when the legislation granted discretion to this Board regarding the conduct of representative votes. To which end, the Board's discretion regarding the timing of a representative vote can be seen as a component of the Board's broader discretion regarding the occurrence of a vote. However, the current wording of s. 6 of the *Act* may be seen in contrast (arguably stark contrast) to the langue of s. 6 when the Board decided *Choponis, supra,* [1996] and *Evans, supra*, [2002] and, as such, the Employer's argument is persuasive.

**[43]** After reviewing the current wording of s. 6, we are inescapably drawn to the conclusion that, if the change to the legislation has not wholly removed our discretion to delay the conduct of representative votes, it would certainly be indicative of a legislative intent signaling the primacy of the right of employees to determine the representative question for themselves without intervention by the Board as to when that vote should take place. The language of s. 6 is now mandatory, with the Board directed to conduct a vote on the

representative question when the conditions precedent prescribed therein are satisfied. The exercise of discretion on the part of the Board to delay the conduct of a representative vote appears inconsistent with the prescriptive nature of the current version of s. 6 of the *Act*. As a consequence, the past jurisprudence of this Board must give way to the new legislation.

**[44]** In coming to this conclusion, we acknowledge that s. 6 permits the Board to exercise the authority granted pursuant to s. 18 of the *Act* in addition to directing the conduct of a representative vote. However, in examining s. 18, we are not satisfied that this section provides the requisite authority for the exercise of the kind of discretion previously exercised by the Board (i.e. to delay the conduct of a representative vote) irrespective of the Board's motivation in doing so (i.e. be that motivation remedial or based on general policy). While s. 18(v) authorizes the Board to conduct a representative vote earlier in the proceedings (i.e. pre or mid-hearing), s. 18 does not contain authority to postpone the conduct of a representative vote. In this regard, the Board is not satisfied that s. 18(k) was intended to provide the requisite authority to delay the conduct of a representative vote once the Board is satisfied that a representative vote is required pursuant to s. 6. In our opinion, s. 18(k) authorizes the adjournment or postponement of the proceedings (i.e. the hearing) and is language common to many statutes. If the legislature intended to grant authority to the Board to postpone the conduct of a representative vote to provide remedial relief or for the purpose of implementing general policy, the legislature would have provided express authority to do so, as was done in the case of s. 9 or s.18(v) of the *Act*.

**[45]** When the Board is required to make a determination as to whether or not a group of employees wish to be represented (or continue to be represented) by a trade union, s. 6 now mandates that a representative vote be conducted by secret ballot. In our opinion, such votes ought to be conducted in the ordinary course (i.e. without delay and, if possible, prior to the hearing and within days of receipt of the application). Simply put, following the change to s. 6 that occurred in 2008, the exercise of this Board's discretion to withhold the representative question from affected employees must now find its genesis in s. 9 of the *Act*; in which case, the remedial question for the Board is not when the vote should be conducted but whether or not the ballots should be counted at all.

**[46]** The initial ten (10) month statutory bar to an application for rescission allows a newly certified union to consolidate its support among the employees of the bargaining unit. However, after the expiration of this period (and as periodically permitted by the *Act*), members

of the bargaining unit have the right to revisit the representative questions. This is not an unlimited right but it is a fundamental right, the exercise of which has been clearly defined by statute.

**[47]** Turning to the two (2) applications pending before this Board, we conclude that the applications should be processed in the order they were filed with the Board. We can not accept the proposition of the Union that Mr. Lesyk's application ought to be delayed pending the outcome of the Union's first collective agreement application. Rather, we confirm the Board's "normal" practice, as described in *Glas, supra*, of hearing applications involving the same (or some of the same) parties in the order that they were filed. To which end, the Board Registrar will be instructed to arrange suitable dates for hearing Mr. Lesyk's application and to do so as expeditiously as possible. There has already been delay in processing Mr. Lesyk's application. On the other hand, the complexities of circumstances into which Mr. Lesyk filed his application warranted a cautious approach by both the Board and the parties.

**[48]** With respect to the Union's application, the Board can see no reasons in law or policy to delay the appointment of a Board Agent as the first stage in the Union's application. While the decision of Foley J. in *Wal-Mart Canada Corp, supra,* casts doubt on the appropriateness of this Board's Order certifying the Union to this workplace, at the present time that certification Order continues to exist and thus does the onus on the parties to bargain collectively.

**[49]** The Board concurs with the Union that appointing a Board Agent does not undermine or frustrate Mr. Lesyk's application, as appointing an Agent does not presume that the Board will agree that it ought to intervene. On the other hand, delaying the appointment of a Board agent may result in undesirable consequences. While the Board recognizes that collective bargaining involves the allocation of time and resources by the parties, the Board is not satisfied that the potential that the energies expended in collective bargaining may ultimately prove to be unnecessary is sufficient on its own to warrant delaying the appointment of a Board Agent.

**[50]** Having reviewed the Union's application for first collective agreement assistance, we are satisfied that the preconditions set forth in s. 26.5(1.1) of the *Act* for the appointment of a Board Agent have been satisfied. As a consequence, a Board Agent shall be appointed to meet

with the parties, to examine the matters in dispute, and to report back to the Board within ninety (90) days. However, as to order of processing the applications, it is anticipated that Mr. Lesyk's application will be set down for hearing before a hearing is conducted (if a hearing is required) in response to the report of the Board's Agent.

**DATED** at Regina, Saskatchewan, this **17** day of **May, 2010.**

**LABOUR RELATIONS BOARD**

Steven D. Schiefner,
Vice-Chairperson