The Labour Relations Board
Saskatchewan

GORDON BUTTON, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 and WAL-MART CANADA CORP., Respondents

- and -

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. WAL-MART CANADA CORP., Respondent

LRB File Nos. 096-04, 038-05, 001-09, 177-10, 184-10 & 224-10, June 23, 2011
Vice-Chairperson, Steven Schiefner; Members: Hugh Wagner and Mick Grainger

Mr. Gordon Button:	Appearing in person.
For Respondent/Applicant Union:	Mr. Drew Plaxton.
For Respondent Employer:	Mr. John R. Beckman, Q.C. and Ms. Catherine A. Sloan.

Unfair Labour Practice - Communication - Union alleges communications posted by Employer in the workplace in 2004 represented violation of *Trade Union Act* – Board concludes that communications that occurred 7 years ago too old to form basis of violation – Board also not satisfied that communications contained misleading information, suggested employees undertake anti-union activities or otherwise interfered with employees in the exercise of rights under *Trade Union Act*.

Unfair Labour Practice – Jurisdiction – Union alleges that Employer closed store in Quebec to intimidate employees in Saskatchewan from supporting the Union – Board concludes that it has authority to examine events occurring in another province to determine their significance, if any, in Saskatchewan pursuant to *Trade Union Act* – Board concludes that it should not exercise jurisdiction under *Trade Union Act* based on events occurring in another province unless real and substantial connection is established between extra-jurisdictional events and events occurring in Saskatchewan.

Unfair Labour Practice – Intimidation - Union alleges that Employer closed store in Quebec to intimidate employees in Saskatchewan from supporting the Union – Board concludes that store closure in 2005 too old to form basis of violation under *Trade Union Act* – While speculation continued to exist in workplace 6 years later that Employer might close store if Union remained, Board not prepared to find Employer in violation of *Trade Union Act* based on speculation – Board not satisfied that evidence demonstrated real and substantial connection between closure of store in Quebec and events occurring in Saskatchewan.

Unfair Labour Practice – Communication – Union alleges that communication posted by the Employer in the workplace were

intended to intimidate employees and interfere with proper administration of Union – Board concludes communications were responsive to changes affecting employees and that they were factual – Board not satisfied that communications were likely to infer with or intimidate employees in the exercise of rights under *Trade Union Act*.

Union Security – Union alleges that Employer failed to comply with union security obligations imposed by *Trade Union Act* – Employer not providing union membership application forms to new Employees nor advising new employees of obligation to join the Union as a condition of employment – Board reviews obligations on employers hiring new employees in a certified workplace – Board concludes that, while employers need not provide new employees with trade union's membership application forms, employers are obligated to advise new employees that obtaining and maintaining membership in trade union is statutory condition of employment in certified workplace – Board finds that no new employees hired by employer in any period relevant to Union's application.

Decertification - Communication – Union alleges rescission application was encouraged and assisted by employer communication – Board discusses changes in employers' right to communicate with employees following 2008 amendment to *Trade Union Act* and the exercise of the Board's discretion pursuant to s. 9 in light of changes to legislation – Board not satisfied that information provided by Employer could reasonably have impaired capacity of employees to decide the representative question.

Decertification – Interference – Union alleges rescission application was result of employer interference – Board not satisfied that Employer's conduct of kind or degree sufficient for Board to exercise discretion pursuant to s. 9 of *Trade Union Act*.

The Trade Union Act, ss. 5(k), 9, 11(1) & 36

REASONS FOR DECISION

[1] **Steven D. Schiefner, Vice-Chairperson**: These Reasons for Decision involve five (5) separate, yet related, applications before the Saskatchewan Labour Relations Board (the "Board") involving the United Food and Commercial Workers, Local 1400 (the "Union"); Wal-Mart Canada Corp., (the "Employer"); and Mr. Gordon Button, the Applicant in LRB File No. 177-10.

[2] The involved applications include a rescission application[1] filed by Mr. Button and four (4) applications[2] filed by the Union alleging the commission of various unfair labour practices by the Employer over the past seven (7) years all related to, or concomitant with, the Union's organizing efforts at the Employer's store in Weyburn, Saskatchewan; an organizing effort that began in 2004 and culminated in a certification Order being granted by this Board on December 4, 2008[3]; an Order that was vacated by the Saskatchewan Court of Queens Bench on June 23, 2009[4] but restored by the Saskatchewan Court of Appeal on October 14, 2010[5].

[3] By Order of the Board dated December 9, 2010, these five (5) applications were consolidated for hearing. The Board heard evidence on the applications in Regina, Saskatchewan on March 23, 24 & 25, 2011. Mr. Button testified in support of his rescission application and elected to call no further evidence. The Union called Mr. Darren Piper, a long-time member and organizer with the Union, and Mr. Norm Neault, the President of the Union. Both Mr. Piper and Mr. Neault were involved, to varying degrees, in the Union's organizing efforts at the Employer's store in Weyburn, Saskatchewan (the "Weyburn store"). The Union also called Mr. Hermann Dallaire, a former National Representative with the United Food and Commercial Workers, now retired. Mr. Dallaire was involved with the United Food and Commercial Workers organizing efforts with the Employer's stores in Quebec. The Employer called Mr. Troy Langford, the manager of the Employer's store in Weyburn, Saskatchewan.

[4] On April 25, 2011, the Board heard argument from the parties on all five (5) of the applications. Both the Employer and the Union filed written briefs of law and arguments, which we have read and for which we are thankful.

Facts:

[5] In 2004, the Union began an organizing drive of the employees of the Employer at three (3) of its stores in Saskatchewan, located at North Battleford, Weyburn and Moose Jaw. Mr. Neault testified that the Union's organizing efforts in Saskatchewan were part of a national

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1 LRB File No. 177-10.

2 LRB File Nos. 096-04, 038-05, 001-09 & 184-10.

3 See: *United Food and Commercial Workers v. Wal-Mart Canada Corp. at Weyburn, Saskatchewan*, *et. al.,* [2008] Sask. L.R.B.R. 951, 2008 CanLII 64399, LRB File Nos. 069-04 & 122-04 to 130-04 (inclusive) (Chairperson Seibel, Reasons for Decision dated December 4, 2008).

4 See: Wal-Mart Canada Corp v. *United Food and Commercial Workers, Local 1400, et. al.*, 2009 SKQB 247, (CanLII), Q.B.G. No. 387 of 2009 (Foley J. Fiat dated June 23, 2009).

5 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, 2010 SKCA 123 (CanLII).

initiative across Canada undertaken by various locals and National Representatives of the United Food and Commercial Workers. Various locals across Canada began coordinated campaigns to organize employees of the Employer at its various stores, including stores in British Columbia, Saskatchewan, Manitoba, Ontario and Quebec. For example, Mr. Dallaire confirmed that in 2002, Local 503 of the United Food and Commercial Workers ("Local 503") began attempting to organize the employees at a number of the Employer's stores in Quebec. This organizing drive culminated in at least two (2) stores in Quebec being certified; namely, stores in or near the cities of Jonquiere and Saint-Hyacinthe.

[6] Mr. Neault, who was the Union's Secretary/Treasurer at the time, described the Union's organizing efforts in Saskatchewan as a "*look and see*" campaign (i.e.: an unsolicited approach by the Union intended to gauge potential support among the employees). The Union's campaign in Saskatchewan was similar to the organizing efforts of other locals in other provinces. Mr. Piper, who was part of the organizing team in Saskatchewan, testified that, in early 2004, the Union began doing reconnaissance on the Employer's stores, with the first steps being to determine the approximate number, and gathering the names, of employees at each of the Employer's stores and to attempt to identify key organizing people (i.e.: employees in the workplace supportive of unionization and willing to assist the Union in identifying and approaching other employees).

[7] Mr. Piper testified that the Union focused its organizing drive first on the Employer's store in North Battleford and then on the Weyburn store. Presumably the Employer became aware of the Union's organizing drive in early April, 2004, as the following communication was posted by the Employer on or about April 7, 2004 on a notice board for employees in the Weyburn store[6]:

> ***To All Associates***
> ***April 7, 2004***
>
> ***Saskatchewan***
> ***Associate Communication***

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[6] The evidence indicated that, in the case of the Weyburn store, the Employer had a notice board hanging on a wall near the punch-in clock in plain view of all employees upon which information and notices were posted by the Employer for employees. Mr. Langford testified that a variety of notices were posted on this notice board, including both communications from the Employer to all employees and information about upcoming events, such as charitable, celebratory and morale-building events. These notices were intended to be viewed by employees, with older notices remaining on the notice board but being covered up by newer notices. Employees were permitted to view and copy communications and notices from the notice board.

Know Your Rights

The purpose of this communication is to answer some basic questions on unions. The choice of whether you wish to belong or not belong to a union is yours. This message is designed to give you some basic information before you sign any commitment or your rights if you have signed something and changed your mind.

It is important to remember that signing is a major commitment and you should get all the pertinent facts BEFORE you sign.

How does a union come into a workforce?
This usually occurs by employees signing membership cards in the union. Some people who sign these cards sign think[ing] there will be a secret ballot vote. This is not the case. In practice, the union card is usually your only chance to express your opinion.

What is the effect of signing a union card when asked to do so?
It is probably the most important decision of your working life because you commit yourself to the union. By signing a card, you give the union exclusive rights to represent you and agree to be bound by the union's rules. You should therefore always get a copy of the union's Constitution and Bylaws and understand what you are committing to before you sign the card.

In addition, if a majority of people sign a card, you are committed to a union for at least a year. You then need to file a formal application to the Labour Relations Board if you change your mind and no longer want a union.

How do I deal with union promises when they ask me to sign the card?
Because it is not unusual to have promises made to convince you to sign a card, you should ask questions and be satisfied with the answers before you sign the card.

How do union representatives get paid?
Union Representatives are paid from union dues paid by their members. Dues are paid from your wages if you are unionized regardless of whether you agree with what the union is doing or not. Before you join the union, you may want to determine how they spend union dues, how much you pay in union dues, what union representatives get paid and if they get paid if you go on strike.

Will I lose my job if I join or don't join the union?
It is your decision to make. You cannot lose your job if you do not support or support the union. However, if the union comes in, you must pay union dues whether you support it or not.

What if I signed something for a union but changed my mind or feel misled, or now want more information?
You must write to the union telling them to give you back what you have signed. It is best to send a copy of your letter to the Saskatchewan Labour Relations Board, 1600 – 1920 Broad Street, Regina, Saskatchewan S4P 3V7.

These are a few common questions and answers to those questions. If you are approached and want to know your rights and obligations, make sure you find them out before you sign anything. Further questions could be asked by calling the Labour Relations Board in Regina at 787-2406. In addition, you may want to check out the LabourWatch website for additional information: www.labourwatch.com.

> *I trust this gives you the factual information that can assist you in making decisions. Remember, any such decision is your decision to make and you should not be rushed or feel forced into that decision.*
>
> ***Because this is such an important decision, take as much time as you feel you need and ask for any information you feel will assist you BEFORE you sign anything.***
>
> *(Emphasis in original document)*

[8] For the Weyburn store, the Union concluded that there were approximately eighty-five (85) employees at the store and, in April of 2004, the Union assembled five (5) or six (6) teams to approach the employees of that workplace and, if they were willing to do so, to obtain their signatures on membership/support cards. Mr. Piper testified that the Union's teams began approaching employees at their respective homes on a Thursday and by Saturday at noon the teams had contacted as many of the employees as they could. The next week, on April 19, 2004, the Union filed an application[7] for certification with the Board seeking to represent the employees of the Employer at the Weyburn store. The Union's certification application was filed with evidence of majority support in the form of membership/support cards for the unit of employees determined to be appropriate by the Board[8].

[9] On or about the same day as the Union filed its application for certification involving the Weyburn store, the Employer posted the following communication on the notice board:

> ***Weyburn, Saskatchewan***
>
> *April 19, 2004*
> *To All Associates:*
>
> *Concerned Associates have approached Management to complain that in recent days they have received visits at their homes from one or more than one UFCW union representative seeking their interest to join a union.*
>
> *The Associates said that no prior approval was given for this organization or person to have or use their private home telephone number for the purpose of soliciting.*
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> *Rest assured that Wal-Mart did not provide any person or organization any private information concerning any of our Associates. This would include*

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7 LRB File No. 069-04.

8 See: *United Food and Commercial Workers v. Wal-Mart Canada Corp. at Weyburn, Saskatchewan*, *et. al.,* [2008] Sask. L.R.B.R. 951, 2008 CanLII 64399, LRB File Nos. 069-04 & 122-04 to 130-04 (inclusive) at para. 227 (Chairperson Seibel, Reasons for Decision dated December 4, 2008).

Associates home telephone numbers, addresses or any other private and confidential information.

It is important for all Associates to know and understand that Wal-Mart will always respect the confidentiality of its Associates' private information such as names, telephone numbers, and addresses. We will continue to provide a safe workplace, free from harassment. We will never disclose your personal and confidential information to anyone at any time unless required to do so by law, for instance to the Government for the purposes of tax reporting.

Our Solicitation and Distribution of Literature Policy, CPD-38, is intended to prohibit any unauthorized solicitation or distribution of literature on Company property. As with any other organization, a union and its representatives have no legal right to attempt, at the store, during working hours, to persuade any Associate to support the organization or participate in any of its activities or functions. If you encounter any such activity either in the form of direct solicitation or copies of literature left in the store please immediately bring this matter to the attention of store management. Wal-Mart will take all necessary steps to ensure that the normal work activities of all Associates are in no way disrupted by solicitation and distribution by any organization.

The union would like to convince you that there is, or ought to be, a wedge between you and your management team. That's just not so! The relationship we enjoy is based on mutual trust and respect. We respect all our Associates individual rights and are committed to maintaining a working environment that is open and cooperative.

The decision to join or not to join a union is a very important one. Union organizers may make certain promises but it is important for you to remember that they can only deliver what the Company agrees to in collective bargaining, and neither the union nor the company is required to agree to anything requested by the other. Wal-Mart strongly supports and respects our Associates rights to exercise freedom of association, including the decision to join or not to join a union. Associates have the legal right to make such choices free from intimidation, coercion or undue influence from ANYONE. Wal-Mart also expects the union to treat your rights and Wal-Mart policies with the same respect.

As always, if you have any question concerning any of these matters, or any other issue of interest, your Management team remains available to speak to you and answer any questions or address any concerns you might have.

Sincerely,
Store Manager

[10] On May 3, 2004, the Union filed an application[9] with the Board alleging that the two (2) communications posted by the Employer at the Weyburn store violated *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") on the basis that they interfered with the Union's organizing efforts and/or were posted for the purpose of intimidating employees from supporting the Union and/or to motivate the employees to complain to the Board.

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[9] LRB File No. 096-04.

[11] The hearing on the Union's certification application, together with a number of other applications related to the Union's organizing efforts at the Weyburn store, began in May of 2004 and continued over an extended period of time. A number of delays were occasioned by various judicial review applications. As noted by the Board, although the Union's certification application was, in itself, not inordinately complicated, "*the parties certainly tried their best to make them so*", including judicial review applications of interim proceedings of the Board, *Charter* challenges to provisions of the *Act*, allegations of company domination of the Union, and allegations of bribery by Union representatives[10].

[12] In addition to these not-insignificant complications, factors outside of the Province of Saskatchewan arose and cast a shadow over proceedings here in Saskatchewan. Mr. Dallaire testified that UFCW, Local 503 was successful on its second attempt to organize the employees of the Employer's store in Jonquiere, Quebec. On August 2, 2004, Local 503 was certified to represent the employee of the Jonquiere store. Following certification, the Employer and Local 503 began bargaining toward a first collective agreement. In October, 2004, a company spokesperson for the Employer, Mr. Andrew Pelletier, was quoted in the media as saying that "*the Jonquiere store [was] not meeting its business plan and the company [was] concerned about the economic viability of the store.*" In December, 2004 and January, 2005, the parties utilized the services of a conciliator to assist in collective bargaining, but were unsuccessful. On or about February 9, 2005, the Quebec Minister of Labour appointed an arbitrator to help the parties achieve their first collective agreement. That same day, the Employer announced the closure of the Jonquiere store.

[13] Mr. Dallaire testified that, following the Employer's decision to close the Jonquiere store, various legal proceedings were commenced against the Employer in Quebec by individual employees and by Local 503. In addition, there was extensive coverage of the labour dispute by the media, with the reporters seeking out and obtaining comments from the Employer, from employees and from representatives of the United Food and Commercial Workers. In addition, the United Food and Commercial Workers staged a large protest in Quebec and encouraged similar protests across Canada by other locals to generate public awareness as to the closure of

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[10] See: *United Food and Commercial Workers v. Wal-Mart Canada Corp. at Weyburn, Saskatchewan*, *et. al.,* [2008] Sask. L.R.B.R. 951, 2008 CanLII 64399, LRB File Nos. 069-04 & 122-04 to 130-04 (inclusive) at para. 156 (Chairperson Seibel, Reasons for Decision dated December 4, 2008).

the Jonquiere store. The parties filed an extensive exhibit of newspaper clippings related to this topic, with over 100 direct quotes from union representatives and a similar number of quotes from the Employer. Although much of this material contains personal opinions and conclusions, the consistent theme from union officials was that the Employer had closed the Jonquiere store because of an anti-union animus. On the other hand, the consistent message of the Employer was that the Jonquiere store was closed for economic reasons.

[14] At the time of the Jonquiere store closure, the Union had various applications pending before this Board including an application[11] for certification involving the Employer's store in North Battleford (filed with the Board on March 22, 2004), the Union's application[12] for certification involving the Employer's store in Weyburn (filed with the Board on April 19, 2004) and a successorship application[13] involving the Employer's store in Moose Jaw (filed July 20, 2004).

[15] On February 28, 2005, the Union filed an application[14] with the Board (amended June 9, 2005) alleging that the Employer committed an unfair labour practice in Saskatchewan arising out of the closure of the Jonquiere store. In its application, the Union alleged that the Employer's action in threatening to close, and then closing, its store in Jonquiere was intended, *inter alia*, to intimidate its employees in Saskatchewan from attempting to organize and/or to discourage these employees from supporting the Union.

[16] The hearing into the Union's certification and concomitant applications with respect to the Employer's store in Weyburn, Saskatchewan concluded on December 13, 2005, with the Board issuing its decision on December 4, 2008. In rendering its decision, the Board determined the appropriate unit for the workplace and concluded that the Union enjoyed the support of the majority of employees in that unit. The Board also disposed of various other issues and the related applications (but not LRB File Nos. 096-04 & 038-05). In concluding that the Union enjoyed the majority support of affected employees, the Board relied upon the card evidence of support filed by the Union with its certification application. No representative vote within the meaning of s. 6 of the *Act* was conducted by the Board.

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11 LRB File No. 055-04.
12 LRB File No. 069-04.
13 LRB File No. 194-04.
14 LRB File No. 038-05.

[17] At the time the Union filed its application for certification (on April 19, 2004), and at the time argument on the Union's certification application before the Board concluded (on December 13, 2005), s. 6 of the *Act* did not mandate that a representative vote be conducted and the Board's practice at the time was 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 Board at that time.

[18] With the passage of *The Trade Union Amendment Act, 2008*[15], 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. This change to Saskatchewan's *Trade Union Act* came into force on May 14, 2008, approximately seven (7) months prior to the Board rendering its decision on the Weyburn certification application.

[19] On December 15, 2008, the Employer filed an application for reconsideration with the Board alleging the Board erred in certifying the Union for a number of reasons, including the failure of the Board to conduct a representative vote of the employees in the proposed bargaining unit. Prior to a hearing on its application for reconsideration, the Employer sought and obtained, by Order of the Board dated December 24, 2008, a partial stay of the statutory obligations on an employer following certification, including for example, the obligation on the Employer respecting disclosure of employee information to the Union.

[20] On January 12, 2009, the Union filed an application[16] with the Board alleging that the Employer had committed an unfair labour practice by failing to meet and bargain collectively with the Union following the Board's certification Order. The remedies requested by the Union included an Order directing the Employer to identify members of its bargaining team and for the Employer to meet and commence collective bargaining with the Union. Pursuant to this application, the Union sought and obtained an interim Order of the Board dated January 16, 2009 compelling the parties to meet and bargain collectively.

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15 S.S. 2008, ch. 26 of 2008 (Assented to May 14, 2008).

16 LRB File No. 001-09.

[21] The Employer and the Union met for purpose of collective bargaining on February 4, 2009 and March 4, 2009.

[22] On March 26, 2009, the Board rejected the Employer's application for reconsideration, concluding 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.[17]

[23] On March 27, 2009, the Employer applied to the Saskatchewan Court of Queen's Bench seeking judicial review of the Board's decision to designate the Union as the certified bargaining agent in this workplace.[18] On April 6, 2009, the Saskatchewan Court of Queen's Bench, being satisfied that there was a serious issue to be tried, issued an interim stay of the Board's certification Order[19]. On June 23, 2009, the Saskatchewan Court of Queen's Bench concluded that the Board erred in relying on membership/support cards for purposes of determining whether or not the Union enjoyed majority support in certifying the Employer's store in Weyburn. Simply put, 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 failing to conduct a representative vote. The Board's certification Order dated December 4, 2008 was quashed and the matter was remitted back to the Board.[20]

[24] On July 22, 2009, the Union filed an application with the Saskatchewan Court of Appeal seeking to overturn the decision of the Court of Queen's Bench.[21] On October 14, 2010, the Court of Appeal granted the Union's application, concluding that the changes to s. 6 of the *Act* did not apply to applications filed and argued before the Board prior to the change in legislation.[22] In so doing, the Court of Appeal overturned the decision of the lower court and re-instated the Board's certification Order.

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17 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, 2009 CanLII 13640, LRB File No. 069-04 (Vice-Chairperson Schiefner, Reasons for Decision dated March 26, 2009).

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

19 See: Wal-Mart Canada Corp v. *United Food and Commercial Workers, Local 1400, et. al.*, 2009 SKQB 127, (CanLII), Q.B.G. No. 387 of 2009. (Goldenberg J. Fiat dated April 6, 2009).

20 See: Wal-Mart Canada Corp v. *United Food and Commercial Workers, Local 1400, et. al.*, 2009 SKQB 247, (CanLII), Q.B.G. No. 387 of 2009 (Foley J. Fiat dated June 23, 2009).

21 C.A. 1811 of 2009.

22 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, 2010 SKCA 123 (CanLII), C.A. 1811 of 2009.

[25] Following the decision of the Court of Appeal, a number of things happened. For example, the Union renewed its demands that the Employer comply with the union security provisions of the *Act* by letter dated October 15, 2010. The Union also sought the employee information that the Board had directed the Employer to collect but that the Union had been enjoined from receiving pursuant to the Order of this Board dated December 24, 2008. The Union also demanded that the Employer return to collective bargaining with the Union and sought dates when members of the Employer's bargaining team were available for negotiations.

[26] In addition, on October 15, 2010, the Union filed an application[23] seeking assistance from the Board toward the conclusion of a first collective agreement pursuant to s. 26.5 of the *Act*. By Order of the Board dated February 8, 2011, an agent of the Board was appointed to meet with the parties and to report to the Board on, *inter alia*, the status of collective bargaining.

[27] On October 29, 2010, Mr. Gordon Button filed an application[24] with the Board seeking a rescission of the certification Order of the Board (dated December 4, 2008). In its Reply to Mr. Button's rescission application, the Union alleged that Mr. Button's application was filed out of time; that it was the result of management interference and thus should be dismissed pursuant to s.9 of the *Act*; and that the Board should exercise its discretion and dismiss Mr. Button's rescission application for other reasons, including the fact that the Union did not have an opportunity to properly represent its members in collective bargaining or otherwise. The allegations of fact in support of the Union's position on Mr. Button's rescission application were essentially the same as the allegations of fact in support of the four (4) unfair labour practice applications it filed with the Board.

[28] Following the decision of the Board certifying the Weyburn store in December of 2008, the Employer began placing communications on the employee notice board providing certain information related to proceedings involving the employees. In total, between December, 2008 and November, 2010, the Employer posted approximately twenty-eight (28) communications at the workplace on the notice board. For example, on December 9 and 23, 2008, the Employer posted the following information:

December 9, 2008

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[23] LRB File No. 166-10.
[24] LRB File No. 177-10.

To All Weyburn Wal-Mart Associates

In April of 2004, before many of you were employed in this store, local 1400 of the UFCW union filed an application to unionize a group of Associates in this store. After numerous hearings there remained a number of unresolved issues surrounding the application and the last hearing we attended was in December 2005.

We have just received the decision from the Saskatchewan Labour Board and they have ruled in favour of the union's card based application for certification.

We're disappointed our Associates in Weyburn were not given the chance to vote on whether or not their store would become unionized.

The Weyburn decision excludes 17 hourly Associates from the bargaining unit. These Associates have been included in previous bargaining units determined by Canadian labour boards, calling into question this exclusion. We believe a bargaining unit should include all hourly Associates.

Of the 104 Associates currently employed in the Weyburn store, only 29 were there at the time of the union's application to unionize the store four years ago.

Automatic Certification was abolished this year by the Saskatchewan government, which calls into question the decision to certify the Weyburn store without a vote. Under the new legislation a democratic, secret-ballot vote is required to unionize any workplace in Saskatchewan.

It is business as usual at the Weyburn store. Our focus is on serving our customers during the holiday season.

We expect to seek reconsideration of the decision to certify the store without a vote. If there are any new developments we will continue to keep you updated.

In the meantime, if you have any questions, please feel free to speak to me or any member of management.

David Halstead
Store Manager

December 23, 2008

To All Weyburn Associates

As we advised before, the Labour Board made a ruling on December 4, 2008, certifying the UFCW Local 1400 as the bargaining agent for a group of associates in our store. Wal-Mart is appealing that decision as it does not give our current associates the right to vote as to whether or not you want a union to represent you.

Part of that decision requires Wal-Mart to give associate records and store policies to the union on or before December 24, 2008 as a start to the collective bargaining process.

> *On December 22, 2008, we asked the Labour Board to excuse us from providing that information until we know whether or not a vote will be held. The union fought our request and asked for the associate records and store policies now. Wal-Mart values and respects our associates' right to privacy, but we are required by law to comply if the Labour Board rules in favour of the union. We hope that the board will make their decision on this matter within the next couple of days.*
>
> *Our appeal of the certification decision is still outstanding, and we will provide more information to you as it becomes available.*
>
> *In the meantime, you are still not required to sign union membership cards and we will update you if this changes.*
>
> *As always, if you have any questions, please do not hesitate to see, me or any member or management after the meeting.*
>
> *David Halstead*
> *Store Manager*

[29] By way of further example, following the decision of the Saskatchewan Court of Appeal to reinstate the Board's certification Order, the Employer posted the following information:

> *October 15, 2010*
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> *To All Weyburn Wal-Mart Associates*
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> *Yesterday, the Saskatchewan Court of Appeal released a decision that certified the UFCW Local 1400 union as the bargaining agent for a group of Associates in our store. We anticipate that the union will be requesting associate records and store policies as a start for the collective bargaining process.*
>
> *This matter has been going since April of 2004, when the union filed an application to unionize a group of Associates in the Weyburn store. The last day of hearing in this matter was in December 2005. Since that time Walmart has been fighting to get the associates in this store a vote because so many of you were upset that you had no say on this important workplace issue.*
>
> *On December 4, 2008, the Labour Board made a ruling that certified the UFCW Local 1400 as the bargaining agent for a group of Associates in our store. Wal-Mart appealed that decision since it does not give our current associates the right to vote as to whether or not they want a union to represent them.*
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> *On April 14, 2009 the court heard arguments from the lawyers from Wal-Mart and the union as to whether or not the Associate's in Weyburn should be granted a vote.*
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> *On June 23, 2009 the court ruled that the Weyburn Wal-mart Associates are entitled to a secret ballot vote.*
>
> *On July 14, 2009 the UFCW appealed the court's decision to grant a secret ballot vote for the Weyburn Wal-mart Associates.*

On Dec. 2, 2009 the Court of Appeal heard arguments again as to whether or not the Associate's should be granted a vote, and it issued its decision yesterday.

Walmart is reviewing our opinions regarding this most recent decision. In the meantime, it is business as usual at the Weyburn store and our focus will continue to be on serving our customers.

If you have any questions, please feel free to speak to me or any member of management.

Troy Langford
Store Manager

Oct. 20, 2010

To All Weyburn Wal-mart Associates

On Friday October 15, 2010 we advised you that the Saskatchewan Court of Appeal had certified the UFCW Local 1400 as the bargaining unit for a group of Associates in the store without a vote ever being held.

Since that time the company has had a request from the union to release the personal and confidential information of our Associates and they have also requested that the company enter into collective bargaining.

In addition we have had questions from our Associates about what the next steps or options are for the company and/or Associates and about decertifying the union.

- *Walmart will do everything to protect our Associates right to privacy and we would not release your private and confidential information unless required by law.*
- *Walmart continues to explore if there are any options to appeal this latest ruling through the legal process.*
- *Associates have the right to decertify the UFCW Local 1400 as their bargaining agent. The company cannot give advice on this process or be involved in any way. If you have questions on decertification you can contact Fred Bayer who is the Board Registrar of the Saskatchewan Labour Relations Board at (306) 787-2406. The deadline for an application to decertify is November 2, 2010.*

I have attached a copy of the Saskatchewan Court of Appeal decision which may answer any other questions you may have. In addition, your management team continues to be available to discuss this or any other topic.

Troy Langford
Store Manager

[30] As with most employers in the retail sector, there is an ongoing (and not-insignificant) turn-over of employees at the Employer's stores. Evidence before the Board

indicates that a large majority of the employees who were employed at the Weyburn store at the time of the Union's certification drive (April, 2004) were no longer working there by the time the Board rendered its decision on the Union's certification application (December 4, 2008). Furthermore, evidence also indicates that, following the Board's certification Order (and as of the date of hearing), approximately forty-two (42) new employees falling within the scope of the Union's bargaining unit had been hired by the Employer to work at the Weyburn store. Mr. Langford testified that none of the employees hired by the Employer following the Board's certification Order (either before or after the decision of the Saskatchewan Court of Appeal) were either asked to join the Union or advised that joining the Union was a condition of employment for new employees. In this regard, two (2) factors are relevant; first, the vast majority of employees hired to work at the Weyburn store were hired during the period when the Union's certification Order was either stayed or quashed by the Saskatchewan Court of Queen's Bench (April 6, 2009 until October 14, 2010); and second, Mr. Langford testified that it was not his intention to notify new employees of the obligation to join the Union unless directed to do so by this Board.

[31] On November 8, 2010, the Union filed another unfair labour practice application[25] with the Board alleging that, following the decision of the Saskatchewan Court of Appeal (reinstating the Union's certification Order), the Employer had failed to comply with the Union's demand for information related to the employees in the workplace; that the Employer had failed to bargain collectively with the Union; that the communications that the Employer had posted in the workplace (including, and in particular, the communications posted by the Employer on October 15 and 20, 2010) were intimidating employees and interfering with the proper function of the Union; and that the Employer had failed to comply with its obligations pursuant to s. 36 of the *Act* by failing to have new employees hired after December 4, 2008 complete Union membership application forms and/or to advise new employees of their obligation to join the Union as a condition of employment to work at the Weyburn store.

[32] On November 9, 2010, the Union filed an application seeking interim relief from the Board with respect to the unfair labour practice application it filed on November 8, 2010. On December 10, 2010, the Board directed that Employer to provide the Union with contact information for employees within the scope of the Union's bargaining unit, together with the respective date of hire for employees.

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[25] LRB File No. 184-10.

[33] Finally, the Board heard evidence as to the existence and application of the Employer's non-solicitation policy and the impact of this policy on the Union's efforts to communicate with employees in the workplace. Mr. Langford testified that the Employer had a policy prohibiting solicitation of either customers or employees and that, as Store Manager, it was his responsibility to enforce this policy. The Employer's non-solicitation policy was well known in the store and staff would contact the management if anyone was soliciting in the store. Mr. Langford testified that the Employer's policy was strictly enforced and that he had personally removed a woman attempting to sell cosmetics in the store. Mr. Langford testified that, pursuant to this policy, he had also removed representatives of the Union from the Weyburn store. Both Mr. Piper and Mr. Neault confirmed that they had attended to the Weyburn store on several occasions purporting to be shopping but desiring to communicate with employees and that, on each occasion, they were asked to leave the store pursuant to the Employer's non-solicitation policy. The evidence indicated that the most recent example of representatives of the Union being asked to leave the Weyburn store occurred after the decision of the Saskatchewan Court of Appeal to reinstate the Board's certification Order (i.e.: after October 14, 2010).

Relevant Statutory Provisions:

[34] 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;*
>
> . . .

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

. . .

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

> *(a) to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinions to its employees;*
>
> *(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purpose of such trade union;*
>
> *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*
>
> *. . .*
>
> *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reasons shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*

. . .

***36**(1) Upon the request of a trade union representing a majority of employees in any appropriate unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the*

employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:

> *Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within 30 days after the commencement in his employment, apply for and maintain membership in the union, and maintain membership in the union as a condition of his employment, provided that any employee in the appropriate bargaining unit who is not required to maintain his membership or apply for and maintain his membership in the union shall, as a condition of his employment, tender to the union the periodic dues uniformly required to be paid by the members of the union;*

*and the expression "**the union**" in the clause shall mean the trade union making such request.*

(2) Failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice.

Analysis and Conclusion:

[35] While the Union argued that the Employer's actions constituted a continuing course of interrelated actions and conduct intended to undermine the Union and to interfere with the rights of employees to organize in and join a trade union, in the Board's opinion, each alleged violation of the *Act* ought to be considered (at least, in the first instance) separately to determine if a violation has occurred and, if so, what remedy is appropriate in the circumstances. Thereafter, the Board will consider the impugned conduct of the Employer (both individually and collectively) pursuant to s. 9 of the *Act* to determine if the impugned conduct of the Employer is either relevant or sufficient for the Board to exercise its discretion to reject Mr. Button's rescission application on the basis of employer influence, interference or intimidation, or to take any other action.

LRB File No. 096-04 – Communications to Employees in 2004

[36] In this application, the Union alleged that the communications posted by the Employer on April 7 and April 14, 2004 (i.e.: the "2004 communications") were posted for the purpose of interfering with the Union's organizing efforts and/or were posted for the purpose of intimidating employees from supporting the Union and/or were intended to motivate the employees to complain to the Board in opposition to the Union's original certification application in April, 2004. The Union argued that, while the original intent of the 2004 communications was to interfere with and undermine support for the Union's certification application, the Employer's

communications should also be seen by the Board as part of a long-term strategy by the Employer to cultivate an anti-union attitude in the workplace. The Union took the position that, notwithstanding the fact that it was successful in obtaining a certification Order for the workplace, the 2004 communications were part of the Employer's strategy to cultivate dissent among employees; an action that the Union alleged later supported, if not gave rise to, Mr. Button's rescission application.

[37] The Employer argued that Union's complaints with respect to the communications it posted in 2004 are moot as the Union was successful in obtaining a certification Order from the Board for the unit of employees it sought to represent. Furthermore, the Employer argued that its 2004 communications merely provided information to employees; that the information in these documents did not display an anti-union tone nor suggest the employees undertake any anti-union activities; and that these documents contained no misleading information. Finally, the Employer argued that the communications ought to be irrelevant for purposes of Mr. Button's rescission application, as only nine (9) current employees (eligible to participate in the vote on the rescission application) were present in 2004, who might have seen or read the document, let alone remembering the content of these communications some seven (7) years later.

[38] In our opinion, LRB File No. 096-04 ought to be dismissed. Firstly, these allegations are now too old to form the basis of a violation under the Act. In *Garnet Dishaw v. Canadian Office and Professional Employees Union, Local 397*, (2009) CanLII 507, LRB File No. 164-08, the Board noted that the authors of *The Trade Union Act* signaled an intention that time is of the essence in dealing with disputes in a labour relations context and that the timely commencement and resolution of outstanding grievances is an important component in maintaining amicable labour relations in the Province. In that case, the Board concluded that parties have the right to expect that claims, which were not asserted within a reasonable period of time, or which involve matters that appeared to have been satisfactorily settled (because of the effluxion of time), would not later re-emerge. These same considerations are true for both grievance proceedings, as was the case in *Dishaw, supra*, and other alleged violations of the *Act,* as was the case in *Saskatchewan Joint Board Retail, Wholesale and Department Store Union, et. al. v. Off the Wall Productions Ltd.* 2009 CanLII 2603, LRB File No. 146-04. While both the events that underlie this application (the 2004 communications) and the filling of LRB

File No. 096-04 occurred prior to the introduction of s. 12.1[26], in our opinion, the introduction of this provision, together with the introduction of s. 21.1 (which was added to the *Act* at the same time), are clear signals from the legislature that time is of the essence in labour relations proceedings.

[39] In this application, the Union asked this Board to find that a violation of the *Act* had occurred for communications posted by the Employer at the workplace some seven (7) years ago. Even if the claims of the Union with respect to the Employer's 2004 communications were not satisfactorily settled through the Board's certification Order (an argument that has considerable merit), the Board is inescapably drawn to the conclusion that seven (7) years is too much delay for this Board to subject the Employer's actions in 2004 to the scrutiny of the *Act*.

[40] Secondly, even if these communications were not too old to form the basis of a violation of the Act, in our opinion, the 2004 communications did not constitute a violation of s.11(1) of the *Act*. In coming to this conclusion, we note that the impugned conduct occurred prior to the amendment to s.11(1)(a) of the *Act* (May 14, 2008), which expanded the authority of employers to communicate fact and opinions to employees. For purposes of the 2004 communications, we have relied upon the language of s.11(1)(a) as it was prior to the 2008 amendment.

[41] The most recent review of the interpretation that the Board has placed on s.11(1)(a), as it was prior to the 2008 amendment, can be found in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc. and Deb Thorn*, [2007] Sask. L.R.B.R. 87, LRB File No. 162-05. In that case, at 101 through 105, the Board said:

> *[31] The first decision of the Board which analyzed the test to be applied under s. 11 (1) (a) was the Saskatoon Co-operative Association case [Saskatchewan United Food and Commercial Workers, Local 1400 v. Saskatoon Co-operative Association Limited, [1983] Sask. Labour Rep. 29, LRB File Nos. 255-83 and 256-83]. In that case, the Board examined the lawfulness of several employer communications during the course of the parties' negotiations for the renewal of a collective agreement. The Board determined that the examination of the communication is not limited to determining whether the subject matter is prohibited or permitted under the Act, and stated at 37:*

[26] Section 12.1 was added to *The Trade Union Act* by *The Trade Union Amendment Act, 2008* and became effective on May 14, 2008.

> *…but that is not to say that any particular subject is invariably prohibited (or permitted) under The Act. The result is that the Board's inquiry does not end once the subject being discussed is identified and categorized as permitted or prohibited. Instead, it concentrates on whether in the particular circumstances a communication has likely interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of any right conferred by The Act.*

[32] The Board described a two-part test in the following terms at 37:

> *The Board's approach is designed to ascertain the likely effect on an employee of average intelligence and fortitude. That kind of objective approach by its very nature eliminates insignificant conduct, since trivialities will not likely influence an average employee's ability to freely express his wishes. It also necessitates an inquiry into the particular circumstances of each case, because it recognizes that the effect of an employer's words and conduct may vary depending upon the situation.*

. . .

> *The employers' communications were directed to the employees as a group and made no effort to isolate them from each other or from their union representatives who had ready access to the picket lines.*
>
> *The Board heard a great deal of evidence regarding alleged inaccuracies in the written communications. It finds that the first and second communications were substantially accurate, and that in the circumstances they did not likely interfere with the average employee's ability to form his own opinion or to reach his own conclusions. Nor were they of the kind that could reasonably support an inference of improper employer motive.*

[33] In Canadian Linen, the employer held two meetings with employees to discuss its final offer before the union's meeting to vote on the employer's final offer. With regard to the propriety of employer communications general, the Board stated at 67 and 68:

It is settled law in this Province that an employer is entitled to communicate with its employees, even with respect to matters that are the subject of collective bargaining negotiations, so long as the communication:

a. does not amount to an attempt to bargain directly with the employees and circumvent the union as the exclusive bargaining agent;

b. *does not amount to an attempt to undermine the union's ability to properly represent the employees; and*

c. does not interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any rights conferred by the Act.

[42] Having reviewed the 2004 communications, other than one (1) potentially inappropriate reference in the April 19, 2004 document (i.e.: wherein the Employer described the Union as a "wedge" between management and its employees), we were not satisfied that these communications, when viewed objectively, would have interfered with an employee (of average intelligence and fortitude) in the exercise of his or her rights under the *Act*. The communications were directed to all of the employees as a group and were responsive to new events occurring in the workplaces involving the employees; namely the solicitation of support by the Union for a certification application. We are satisfied that the communications did not suggest that employees undertake any anti-union activities and, more importantly, we were not satisfied that these documents amounted to a campaign by the Employer against the Union as was the case in *Canadian Union of Public Employees v. Prairie Bus Services (1983) Ltd.*, [1999] Sask. L.R.B.R. 413, LRB File No. 083-98.

[43] Simply put, in our opinion, the 2004 communications posted by the Employer in the workplace do not give rise to a violation of the *Act*. These communications are too old for the Board to reasonably conclude that they could have any significant residual impact in terms of influencing the current employees in the workplace.

LRB File No. 038-05 – the Closure of the Jonquiere Store:

[44] In this application, the Union argued that the Employer's closure of its store in Jonquiere, Quebec was intended to not only punish workers in Quebec for supporting a trade union but also to intimidate workers in the rest of Canada, including workers in Saskatchewan, from exercising their rights under the *Act*. The Union relied upon the evidence of Mr. Dallaire and the numerous newspaper clippings to demonstrate that the organizing drive in Quebec was controversial and highly publicized; sufficiently so that Local 503's efforts to organize the Jonquiere store were widely publicized in Saskatchewan. The Union argued that the Employer was well aware that the United Food and Commercial Workers' efforts to organize its stores were being publicized across Canada and that the Employer knew, when it closed the Jonquiere store after being certified, that the media would communicate that story to the rest of Canada. The Union argued that one (1) of the intended consequences of the Employer's action in closing the Jonquiere store was the communication of a clearly anti-union message; that if a store unionizes, it will be closed. Simply put, the Union took the position that the Employer did not close its Jonquiere store for economic reasons; it closed the store to deter its other employees across Canada from supporting a trade union.

[45] In support of its allegations, the Union relied on the evidence of Mr. Dellaire, who testified that, just prior to UFCW Local 503's organizing drive, the employees at the Jonquiere store were told by the Employer that they were meeting their targets. Mr. Dellaire took these statements, coupled with the fact that a number of new employees had been hired at the Jonquiere store just prior to the Union's organizing drive, as an indication that the Jonquiere store was financially viable. Mr. Dellaire testified that it was only after the store became certified that representatives of the Employer began expressing concern with respect to the store's economic viability. Mr. Dellaire also testified that the timing of the Employer's decision to close the store was suspicious being that it occurred just hours after being advised by the Quebec Labour Relations Board that it had arranged for first contract arbitration.

[46] The Union argued that the suspicious timing and circumstances of the Employer's decision to close the Jonquiere store cried out for the Employer to produce some evidence to justify closure of the Jonquiere store and that, in the absence of such evidence, this Board should draw an adverse inference (i.e.: that the purpose of the store closure was to intimidate employees) because the Employer's failure to lead any evidence justifying its decision. Also, the Union relied upon the reverse onus in s. 11(1)(e) of the *Act* as imposing an obligation on the Employer to establish that the Jonquiere store was closed for good and sufficient reason.

[47] The Union argued that the Employer's message of intimidation and anti-union animus had reached Saskatchewan and, in particular, the employees of the Weyburn store. The Union pointed to the evidence of Mr. Piper, who testified that he noticed from speaking with employees in 2010 that many were concerned about losing their jobs because the Weyburn store might close if the Union remained in the workplace. Mr. Piper testified that he had not heard these concerns from employees prior to the Jonquiere store closure but that by 2010 these concerns were common place. In fact, as Mr. Piper put it "*the whole community was afraid they were going to lose their store".*

[48] The Union argued that the impact of the Employer's decision to close its store in Jonquiere, Quebec, following a trade union's successful efforts to organize that store, was to send a clear message to all of its employees in the rest of Canada, including members of the bargaining unit at the Weyburn store, that employees had to choose between supporting a trade union and losing their jobs.

[49] In response, the Employer argued that the Union's allegations with respect to the closure of the Jonquiere store were unfounded; that the Union's allegations are based upon statements and conclusions of the Union and the media but not on any statements made by the Employer; and, in any event, the Board should decline jurisdiction with respect to the lawfulness of the closure of the Jonquiere store as these events occurred outside of this Board's territorial limits.

[50] The Employer argued that the evidence clearly established that, contrary to the Union's assertion, the Employer did justify its decision to close the Jonquiere store. The Employer argued that the evidence before this Board was clear that the Employer's consistent explanation for its decision to close the Jonquiere store was for "*economic reasons*" and that the Employer repeatedly denied the rumours that it closed the Jonquiere store because of unionization. The Employer pointed to the statements made by Mr. Andrew Pelletier, as spokesperson for the Employer, and reported in the August 3, 2004 edition of the LeaderPost that "*[t]he only reason we would close a store would be due to economic reasons*." The Employer also pointed to evidence that in 2004 the Employer had advised the Union that the Jonquiere store "*was not that valuable*" and was "*not meeting targets*". The Employer argued that it had been consistent and clear in all its statements regarding the Jonquiere store closure that the store had been closed for "*economic reasons*" and had repeatedly confirmed that information with and through the media.

[51] The Employer argued that it was the United Food and Commercial Workers, and not the Employer, who had propagated the rumours that the Employer had closed the Jonquiere store because of the certification of a trade union. The Employer argued that the Union is now attempting to hold the Employer responsible for its own opinions and erroneous conclusions and not the actual statements or communications made by the Employer. The Employer argued that there was no evidence that the Employer said anything intimidating or made any statements that could give rise to the finding of an unfair labour practice in Saskatchewan.

[52] The Employer pointed to the evidence that of Mr. Langford, who testified that, when he was offered the position of Store Manager for the Weyburn store, he too had heard the rumours of potential store closure and he asked whether or not the Weyburn store could potentially close. Mr. Langford testified that he was informed by this Regional Manager that the

Weyburn store would not close because of the presence of a trade union and that Mr. Langford passed this message along to anyone who asked him.

[53] In addition, the Employer argued that the closure of its Jonquiere store was a lawful act in Quebec and, as such, cannot now form the basis of an unfair labour practice in Saskatchewan. In this regard, the Employer relied upon the decision of the Supreme Court of Canada in *International Alliance of Theatrical Stage Employees Moving Picture Technicians, Artists and Allied Crafts of the United States, Local 56 v. Societe de la Place de Arts de Montreal*, [2004] 1 S.C.R. 43, for the proposition that employers have the unilateral right to cease operations and close-up shop, whether unionized or non-unionized, and have the right to do so based on considerations that might be deemed by some to be "*socially reprehensible*". The Employer denied that it closed the Jonquiere store for a "*socially reprehensible*" reason. Rather, the Employer propounded this decision to demonstrate the breadth of the discretion available to employers should they choose to close-up shop and cease operations, irrespective of whether or not they are unionized.

[54] The Employer also relied upon the decision of the Supreme Court of Canada in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63 for the principle that, for acts occurring outside of one province to have legal effect in that province, a "real and substantial connection" must exist between those acts and the province in question. The Employer argued that this principle was applied by the Alberta Labour Relations Board in the case of *Otis Canada (Re)*, [1997] Alta L.R.B.R. 486 for determining whether or not that Board had jurisdiction over a dispute with a connection to two (2) provinces. The Employer argued that there was no evidence that the Employer took any action in Saskatchewan and cautioned the Board to not assume jurisdiction over actions that took place in other province merely on the basis that the media in Saskatchewan reported on those events. The Employer took the position that speculation and erroneous conclusions of and in the media are an insufficient nexus for this Board to assume jurisdiction over events that occurred outside of this province.

[55] Finally, the Employer argued that the events that occurred in Quebec occurred over five (5) years ago and that these events are now too old to form the basis of a violation of the *Act* in Saskatchewan.

[56] In reply to the Employer's jurisdictional arguments, the Union argued it was not asking this Board to determine whether or not the Employer breached the *Quebec Labour Code*; rather, the Union argued that it was merely asking this Board to determine whether or not the Employer's actions in closing its Jonquiere store sent a message to employees in Saskatchewan and whether or not that message was contrary to the *Act*. The Union argued that not only is this Board the appropriate forum to make that determination but it is the only forum that can make such a determination.

[57] For the reasons stated by this Board in its preliminary determination as to jurisdiction[27] and in its reconsideration[28] of that determination, we are satisfied that this Board can examine events transpiring in another province to determine the significance of those events, if any, in the application of the *Act* in Saskatchewan. We do, however, accept that, before this Board should assume and exercise jurisdiction on the basis of events occurring outside of this province, we must be satisfied that the subject events have a real and substantial connection to this province and that we are the appropriate forum to determine the matters in dispute between the parties. In this regard, we adopt the reasoning of the Alberta Labour Relations Board in *Otis Canada Inc., supra*, as to jurisdiction in labour relations cases involving interprovincial elements.

[58] In our opinion, there are a number of factors that support this Board accepting jurisdiction to determine whether or not the Employer's actions in closing its store in Jonquiere Quebec was intended or had the effect of intimidating employees at the Weyburn store contrary to the provisions of the *Saskatchewan Trade Union Act*. These factors include the fact that the Employer is an interprovincial company, having simultaneous presence in multiple provinces, including both Quebec and Saskatchewan at the time of the Jonquiere store closure; the fact that the Union is not asking this Board to determine whether or not the Employer's actions violated the *Quebec Labour Code*; rather, the Union is asking this Board to determine whether or not the Employer's actions in closing its Jonquiere store sent a message to employees in Saskatchewan and whether or not that message was contrary to the *Act*; and finally, the fact that this Board is the only forum where such a determination could take place.

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[27] See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.,* [2008] Sask. L.R.B.R. 575, 2008 CanLII 57252, LRB File No. 038-05 (Chairperson Seibel, Reasons for Decision dated October 24, 2008).

[28] See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.,* 2008 CanLII 11242, LRB File No. 038-05 (Vice-Chairperson Schiefner, Reasons for Decision dated March 17, 2009).

[59] On the other hand, there are a number of factors that caution this Board against accepting jurisdiction. Firstly, the impugned conduct of the Employer (i.e.: the closure of its store in Jonquiere, Quebec) was inherently a lawful act, as employers have right to close-up shop and cease operations. Although the Union alleged that the Employer closed the Jonquiere store for an ulterior motive (i.e.: to intimidate employees in Saskatchewan), the Board must be mindful that the impugned conduct of the Employer, simpliciter, was lawful. Secondly, the impugned conduct of the Employer occurred approximately six (6) years ago, thereby eroding the clarity of the necessary nexus between those events and the allegation of a violation occurring in this province. Finally, the vector by which the Employer's conduct in Quebec is alleged to be connected with this province is the media and the comments, conclusions and opinions reported in the media by persons other than the Employer.

[60] After careful consideration, we were not persuaded that the evidence presented in these proceedings was sufficient to sustain the alleged violation of the *Act*. Furthermore, we were not satisfied that there was a real and substantial connection between the events occurring in Quebec (i.e.: the Employer's actions in closings its Jonquiere store) and the alleged violation of the *Act* in this province (i.e.: the intimidation of employees in the workplace) sufficient for this Board to exercise its jurisdiction under the *Act*.

[61] Firstly, the events that underlie the Union's allegation occurred approximately six (6) years ago and, for the reasons already stated, are now too old to form the basis of a violation under the *Act*, whether they occurred within or outside of this province. Secondly, the fact that the impugned conduct of the Employer occurred outside of Saskatchewan also erodes their persuasive value in terms of any alleged violation in Saskatchewan. To sustain a violation of the Act, the evidence must demonstrate a real and substantial connection between the impugned conduct of the Employer (i.e.: in Quebec) and events occurring in this province.

[62] In this regard it should be noted that there was no evidence before this Board that the Employer said anything intimidating or made any statements or undertook any action in Saskatchewan arising out of, or related to, the closure of the Jonquiere store that could give rise to the finding of an unfair labour practice pursuant to the *Act*. For example, we note that the Employer did not close any stores in Saskatchewan. Rather, the Union asks this Board to infer an anti-union motive on the part of the Employer (associated with its decision to close its Jonquiere store) because of the timing of that decision, which the Union alleged was suspicious

(i.e.: following the certification of that workplace and the day an arbitrator is appointed to assist in a first collective agreement). The Union also points to the evidence that prior to Local 503's organizing drive, the employees were advised that they were meeting their targets and that new employees had been hired. With all due respect, this evidence is highly circumstantial and not particularly probabitive as to the economic viability of a retail store in Quebec. There are many factors that could have affected the economics of the Jonquiere store, including its proximity to a number of the Employer's other stores in the area (information about which was also reported in the media). The Union may well believe that the Employer's motive in closing the Jonquiere store was to avoid unionization. However, believing a thing to be true is not evidence of that truth and the burden of proof rests upon the Union.

[63] The Union argued that the Employer anticipated the wide-spread media coverage of the Jonquiere store closure and pointed to the speculation in the workplace as evidence of the spread into Saskatchewan of the Employer's anti-union animus. While there clearly was speculation in both the workplace (and in the community generally) that the Employer might close the Weyburn store because of the presence of the Union, it is a not-insignificant evidentiary leap to infer from this speculation that the Employer closed the Jonquiere store for the purpose of cultivating that speculation. Particularly so when the speculation persisted notwithstanding the Employer's statements that the Jonquiere store was closed for economic reasons and the Employer's denials that the Weyburn store would close because of the presence of the Union in the workplace.

[64] This Board is not prepared to sustain a violation of the *Act* based on speculation in the workplace; speculation that the Employer publicly denied. In the words of Shana Alexander[29]; "*Trying to squash a rumor is like trying to unring a bell*". In this regard, we note that the speculation that the Employer would close the Weyburn store persisted in the face of evidence to the contrary in the continued operation of the Employer's unionized store in Saint-Hyacinthe, Quebec. In our opinion, the speculation in the workplace provided a poor evidentiary base for finding the Employer in violation of the *Act*. Arguably, the speculation could have found its genesis, not in the actions of the Employer, but in the comments, statements, conclusions and opinions of others, including the Union. Absent the Union's own statements and conclusions, as well as the opinions and commentary of the media, there was no evidence that the Employer closed the Jonquiere store for anything other than economic reasons.

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[29] 1925-2005

[65] The Union also took the position that s. 11(1)(e) of the *Act* was applicable and argued that the Employer had failed to tender sufficient evidence to demonstrate that the Jonquiere store was closed for a good and sufficient reason. In our opinion, s. 11(1)(e) is not applicable to the Employer's decision to close its store in Jonquiere, Quebec.

[66] The Union asks this Board to draw an adverse inference because the Employer tendered no evidence as to the economic viability (or lack thereof) of the Jonquiere store. The Board is not prepared to make the inferences suggested by the Union. To do so would require this Board to discount direct evidence presented during the hearing as to the Employer's justification for closing the Jonquiere store and to infer a motive wholly inconsistent with that evidence. Furthermore, intervening events, including the certification of other stores in Canada which have remained open following certification, including the Employer's store in Saint-Hyacinthe, Quebec, mitigate against the Union's allegations.

[67] In coming to this conclusion, the Board is mindful that the closure of the Jonquiere store involves events that occurred in another province. In our opinion, it would be inappropriate for this Board to rely upon the reverse onus set forth in s. 11(1)(e) and/or the kind of inferential reasoning suggested by the Union to establish the necessary nexus to this province. To exercise jurisdiction with respect to events that find their genesis in another province, this Board must be satisfied that a real and substantial connection between those events and this province exists. In our opinion, absent nothing more than inferential reasoning and/or the application of a reverse onus provision, there is an insufficient evidentiary basis for this Board to exercise its jurisdiction pursuant to the *Act* with respect to events that occurred in another province.

[68] Thirdly, even if the Board was to accept, deduce or infer that the Employer's motivation in closing the Jonquiere store was an anti-union animus, the vector by which the Employer is alleged to have "spread its message" and thus committed a violation in Saskatchewan, is the media. In *United Food and Commercial Workers, Local 1400 and Madison Development Group Inc.* [1997] Sask. L.R.B.R. 198, LRB File Nos. 329-96 & 226-95, the Board expressed the following cautions regarding the Board's use of media reports as evidence in proceedings before the Board:

> *We therefore do not share the view attributed to Mr. Humeny in the newspaper story of October 29, 1996, that an employer has some inherent right to free*

> *expression in the press. Such expression is amenable to scrutiny in the same terms as other forms of employer communication. If it could be established that an employer was cynically or willfully manipulating media coverage as part of a strategy of communication with employees, it would be a matter of considerable concern to this Board. Though the negotiations in this case have been subjected to an unusual degree of discussion and scrutiny in public, owing to the application for first contract arbitration, we do not accept that this has the effect of liberating the representatives of the Employer entirely from the limits placed on communication by the Act.*
>
> *On the other hand, we think considerable caution is justified in assessing communications which are published by this means. For one thing, the statements which are reported may be altered or given an editorial gloss in their reporting. It would be a matter of extreme difficulty for the Board to devise a standard for assessing the extent to which statements have undergone change or have been inaccurately or misleadingly reported, and to thus arrive at a reasonable assessment of the extent to which an employer should be held responsible for the statements as reported.*

[69] An examination of the evidence reveals that many individuals, particularly those in the labour movement, vociferously speculated that the Employer's motives in closing the Jonquiere store were to punish and intimidate employees. However, a review of this evidence also establishes that the Employer consistently stated to the media that the Jonquiere store was closed for economic reasons and denied the rumours that the Weyburn store would close because of the certification of a trade union. In *Madison Development Group, supra*, this Board was cautious in the use of media reports of statements by the employer's representative. In this case, the only evidence that the Employer cynically or willfully manipulated media coverage as part of a national communication strategy affecting employees here in Saskatchewan was the media coverage of the statements, conclusions and opinions of the Union and others in the labour movements; not the statements or comments of the Employer. As a consequence, we are even more cautious in providing any evidentiary weight to any of the media statements.

[70] Simply put, the media is a poor vector by which to establish a real and substantial connection between the events that occurred in Quebec (i.e.: the closure of the Jonquiere store) and an alleged violation of the *Act* in Saskatchewan and we are not satisfied that the statements in the media established a sufficient or reliable nexus upon which this Board could exercise its jurisdiction under the *Act*.

[71] Having carefully considered the evidence in these proceedings, we find that the events related to the closure of the Jonquiere store are now too old to provide a basis for an alleged violation of the *Act*. Even if these events were not too old, there was insufficient

evidence to sustain the allegation that the Employer's decision to close the Jonquiere store was motivated by an anti-union animus or that the Employer otherwise did so for reasons in violation of the *Act*. In the Board's opinion, the events that form the basis of the Employer's alleged violation are too temporally and geographically distant and that there was an insufficient nexus between the Employer's actions in Quebec and this province for the Board to exercise its jurisdiction under the *Act*. For the foregoing reasons, LRB File No. 038-05 must be dismissed.

LRB File No. 001-09 – Refusal to Meet and Bargain Collectively:

[72] In this application, the Union alleged that the Employer failed to meet and bargain collectively with the Union in the period following the certification Order being issued by this Board (December 4, 2008) and until that Order was stayed by the Saskatchewan Court of Queen's Bench (April 6, 2009).

[73] The facts relevant to this application are relatively straightforward. The Union was first certified by the Board on December 4, 2008. On December 9, 2008, the Union wrote to the Employer and demanded the names of the Employer's bargaining team and sought available dates for the parties to commence collective bargaining. On December 11, 2008, the Employer applied to the Board for reconsideration of the Board's certification Order. On December 16, 2008, the Employer sought an interim stay of the Board's Order pending reconsideration. The Employer's interim application (for a stay) was heard on December 24, 2008 and partial relief was granted by the Board at that time with reasons to follow. The interim relief granted by the Board was as follows:

> ***THE LABOUR RELATIONS BOARD**, pursuant to Section 5.3 of The Trade Union Act, **HEREBY ORDERS** that the application for interim relief be granted, in part, as follows:*
>
> 1. *THAT except to the extent set out in this Order, the certification Order of the Board dated December 4, 2008 shall remain in effect and be binding on the parties hereto;*
> 2. *THAT any employees who may be required to join the Respondent Union pursuant to Section 36 of The Trade Union Act shall have their applications for membership forwarded to counsel for the Applicant who shall hold such applications until further order of this Board;*
> 3. *THAT any dues which may be required to be remitted to the Respondent Union pursuant to ss. 32 or 36 of the Act shall be remitted by the Applicant to counsel for the Respondent, who shall hold such monies in his trust account until further order of this Board;*

> 4. *THAT the information requested by the Respondent Union by its letter of December 9, 2008 (or any similar request by the Union), shall be collected by the Applicant, but need not be provided to the Respondent Union until further order of this Board;*
> 5. *THAT the application for Reconsideration be heard on an expedited basis;*
> 6. *THAT a copy of this Order and the Reasons for Decision be posted in a conspicuous place on the Applicant's premises within two (2) business days of its receipt by the Applicant; and*
> 7. *THAT this panel of the Board shall be seized with any matters which may arise with respect to this interim application or this Order until the hearing by the Board of the application for Reconsideration of the Order of the Board dated December 4, 2008.*
>
> ***LABOUR RELATIONS BOARD***

[74] By correspondence dated December 29, 2008, the Union again demanded that the Employer identify the names of its bargaining team and the dates the Employer's bargaining team would be available for collective bargaining. By correspondence dated December 31, 2008, the Union again demanded that the Employer identify the names of its bargaining team and the dates its bargaining team would be ready for collective bargaining. The Union offered the date of January 7, 2009 and their offices in Saskatoon as the time and place for collective bargaining to commence. The Employer did not identify either the names of its bargaining team or dates that it would be available for collective bargaining. Rather, the Employer indicated in correspondence dated January 7, 2009 that it was the Employer's understanding that collective bargaining was not required following the interim relief granted by the Board on December 24, 2008. At that point in time, the Board's Reasons for Decision on the interim application had not yet been issued.

[75] On January 12, 2009, the Union filed its unfair labour practice applications with the Board. On that same date, the Union also filed an interim application seeking an Order of the Board, *inter alia*, directing the Employer to name its bargaining team and to provide available dates for the commencement of collective bargaining.

[76] On January 13, 2009, the Board issued its Reasons for Decision with respect to the interim relief granted pursuant to the Employer's application for a stay of the Board's certification Order[30].

[77] The Union's application for interim relief was heard by the Board on January 16, 2009, at which time the following interim relief was granted by the Board:

> ***INTERIM ORDER***
>
> ***THE LABOUR RELATIONS BOARD****, pursuant to Sections 5(d), 5.3 and 11(1)(c) of The Trade Union Act,* ***HEREBY:***
>
> ***1. ORDERS*** *that, on or before February 6, 2009, the Respondent, its agents or such persons acting on its behalf, shall provide the Applicant with the identity of the members of its collective bargaining team and when such persons are available for collective bargaining;*
>
> ***2. ORDERS*** *that, on or before February 6, 2009, the Respondent, its agents or such persons acting on its behalf, shall meet with representatives of the Applicant; and*
>
> ***3. REMAINS*** *seized to deal with any issues arising out of implementation of this Order.*
>
> ***LABOUR RELATIONS BOARD***

[78] The Employer and the Union met for the purpose of collective bargaining on February 4, 2009 and March 4, 2009. Although additional dates for collective bargaining were agreed to by the parties, the Saskatchewan Court of Queen's Bench issued a stay of the Board's certification Order on April 6, 2009 and no further collective bargaining occurred that is relevant to this application.

[79] The Union asserted that the breach of the *Act* was obvious on the basis that the Employer consistently failed to bargain collectively with the Union until ordered to do so by the Board. The Union argued that the granting of interim relief by the Board did not undo the underlying breach which led to the interim application; namely, the Employer's refusal to bargain collectively. Furthermore, the Union observed that the Employer lead no evidence that it was confused by or misunderstood the Board's December 24, 2008 Order and argued that the Board should not assume that it was confused or misunderstood the Board's Order absent direct

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[30] See: *United Food and Commercial Workers, Local No. 1400 v. Wal-Mart Canada Corp.*, 2009 CanLII 2047, LRB File No. 069-04 (Chairperson Love, Reasons for Decision dated January 13, 2009).

evidence to that effect. The Union took the position that the Board's interim Order was straightforward and did not relieve the Employer of its obligation to bargain collectively.

[80] Having considered the evidence with respect to this application, we have concluded that it ought to be dismissed. Firstly, we were not satisfied that the Employer violated the *Act*. In the brief oral reasons provided by the Board on January 16, 2009 (in granting interim relief and directing the parties to commence collective bargaining), the Board acknowledged that the Employer may well have had an adequate explanation for previously declining to name its bargaining team and for not agreeing to bargaining dates with the Union. The Employer had only just received the Reasons for Decision from the Board at the time of the hearing on the Union's interim application and clearly would not have had an opportunity to digest the contents thereof nor to modify its position. On January 16, 2009, this Board clarified that, notwithstanding the Employer's application for reconsideration and notwithstanding the partial stay imposed on the certification Order by the Board, the parties continued to be under an obligation to bargain collectively. In doing so, the Board acknowledged that meaningful collective bargaining could be problematic until the status of the Board's certification Order was resolved.

[81] We agree with the position advanced by the Employer that the status of the obligations on the parties to bargain collectively pursuant to the Board's certification Order could have reasonably been misinterpreted following the Board's interim Order of December 24, 2008 until such time as the Board's Reasons for Decision were issued on January 13, 2009 and thus there can be no violation of the *Act* for failing to bargain collectively during this period. Following the Board's interim Order on January 16, 2009, the Employer did bargain collectively with the Union until the Board's certification Order was quashed by the Saskatchewan Court of Queen's Bench and thus there can be no violation for this period. Simply put, the allegations that the Employer failed to bargain collectively with the Union are unsubstantiated.

[82] Secondly, even if we had been satisfied that there was no confusion with respect to the obligations on the parties to bargain collectively and the Employer erred in failing to commence bargaining with the Union prior to the Board's interim Order of January 16, 2009, we would not have been persuaded that any further relief from the Board would be appropriate. All appropriate remedial relief arising out of the Union's application was granted by the Board on January 16, 2009 and no further relief would be appropriate or reasonable under the

circumstances. In this regard, we agree with the position advanced by the Employer that the passage of time has rendered this application moot.

LRB File No. 184-10 – Alleged Violations following the Reinstatement of Certification Order:

[83] In this Application, the Union alleged that, following the decision of the Saskatchewan Court of Appeal (to reinstate the Union's certification Order) the Employer failed to comply with the Union's demand for information related to the employees in the workplace; that the Employer again failed to bargain collectively with the Union; that the Employer had posted communications in the workplace (including, and in particular, communications posted by the Employer on October 15 and 20, 2010) intended to intimidate employees and interfere with the proper functioning of the Union; and that the Employer had violated its obligations pursuant to s.36 of the *Act* by failing to have new employees hired after December 4, 2008 complete the Union's membership application forms and/or by failing to advise new employees of their obligation to join the Union as a condition of employment to work at the Weyburn store.

[84] On November 9, 2010, the Union filed an application for interim relief pursuant to this application. The Union's application for interim relief was heard by the Board on November 18, 2010. On December 10, 2010, the Board granted the following interim relief:

> ***INTERIM ORDER***
>
> ***THE LABOUR RELATIONS BOARD****, pursuant to Section 5.3 of The Trade Union Act,* ***HEREBY ORDERS*** *that the Employer provides the Union with the following information****;***
>
> ***1.*** *Contact information for all employees falling within the scope of the bargaining unit, including up-to-date civic addresses, home telephone numbers and e-mail addresses; and*
>
> ***2.*** *The date of hire for all employees falling within the scope of the bargaining unit.*
>
> ***LABOUR RELATIONS BOARD***

[85] As noted, the Union's allegations in this application were multi-pronged. In our opinion, each allegation must be examined individually.

*Allegation that the Employer refused to provide adequate information respecting employees***:**

[86] In the first component of the Union's allegations in this application, the Union alleged that the Employer refused to properly comply with the Union's demand for employee information and that the Union only received partial information, including inadequate contact information. In our opinion, the interim relief granted by the Board on December 10, 2010 fully addressed the defect in information required to be provided by the Employer. The evidence indicates that the Employer complied with the Board's interim Order. As such, in our opinion, this aspect of the Union's application is now moot as no additional remedial relief is required or appropriate at this time.

Allegation that the Employer failed to bargain collectively:

[87] The second component of the Union's allegation in this application alleged that the Employer failed to bargain collectively with the Union. In this application, the Union's allegations related to the period of time after the Saskatchewan Court of Appeal reinstated the Board's certification Order (i.e.: on October 14, 2010). The facts with respect to this allegation are straightforward. The Court of Appeal reinstated the Board's certification Order on October 14, 2010. On October 15, 2010, the Union wrote to the Employer and asked the Employer to return to the bargaining table. On that same date, the Union also applied to the Board seeking assistance in achieving a first collective agreement. On November 8, 2010, the Union filed the within application. In response to the Unions' first collective agreement application, on February 8, 2011, the Board appointed an agent to meet with the parties and report to the Board on, *inter alia*, the status of collective bargaining.

[88] In our opinion, this aspect of the Union's application ought to be dismissed. Firstly, as the Board noted in our Reasons for Decision dated December 10, 2010 in response to the Union's application for interim relief[31], it is impracticable for the Employer to have violated the *Act* in the **few days**[32] between receiving the Union's demand to return to the bargaining table and the time the Union's application was filed with the Board. At this point in time, both parties were digesting the decision of the Court of Appeal. In addition, the Union had also just filed a

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[31] *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.*, 2010 CanLII 90103, LRB File No. 184-10 (Vice-Chairperson Schiefner, Reasons for Decision dated December 10, 2010). Corrigendum released March 31, 2011.

[32] In the Board's Reasons for Decision, the words a "few hours" were erroneously used in paragraph 37. The reference should have been to a "few days".

first collective agreement application with the Board. In light of these not-insignificant events, the Employer's failure to return to the bargaining table by November 8, 2010 (23 days later) is not indicative of a violation of the *Act*. The parties to collective bargaining have the right to a reasonable period of time to ruminate on the implications of major, new developments affecting their relationship (particularly so to developments of the magnitude that occurred during the period relevant to this application) before being answerable for failing to comply with their statutory obligations under the *Act*.

[89] Secondly, in light of the fact that a Board Agent has been appointed, in our opinion, all matters related to the status of collective bargaining between parties are better and more appropriately resolved pursuant to the Union's first collective agreement application.

*Allegation that the Employer's communications were in violation of the Act***:**

[90] The third component of the Union's application alleged that the Employer's communications to employees in the workplace were in violation of the *Act* on the basis that these communications interfered with and intimidated employees in the exercise of their rights under the *Act* in violation of s. 11(1)(a); and/or that these communications discriminated and interfered with the administration of the Union in violation of s. 11(1)(b). While the Union argued the most egregious communications were those dated October 15, 2010 and October 20, 2010, the Union urged the Board to consider these communications in light of all twenty-eight (28) communications posted by the Employer at the workplace during the period December, 2008 until November, 2010. The Union argued that these communications contained a number of inappropriate themes, including the suggestion that the Union was an outsider to the workplace without employee support; that the Employer was merely trying to protect the privacy of employees and the Union was trying to invade that privacy; that the Employer wanted employees to have a vote on the representative question; and that employees should talk to management if they had any concerns about these issues. The Union submitted that either of these two (2) communications could constitute a violation of the *Act*. However, the Union also argued that the frequency and repetition of all the communications posted by the Employer during this period amounted to a barrage of propaganda and constituted corporate bullyism of its employees.

[91] The Union relied on this Board's decision in *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. The United Group – Taxi Division*, [2009] 167 C.L.R.B.R. (2nd) 1, 2009 CanLII 20026, LRB File Nos. 052-07, 053-07

and 117-07, for the proposition that the amendment to s. 11(1)(a) that occurred in 2008[33] resulted in little or no change to the restriction imposed on employers in communicating with their employees. The Union pointed to the fact that s. 11(1)(a) has been modified a number of times over the history of *The Trade Union Act*, in some cases expanding, and in some cases restricting, an employer's right to communicate with its employees. The Union argued that the Board's interpretation of the restrictions on employer communications remained essentially unchanged over this period, notwithstanding the changes to s. 11(1)(a).

[92] The Employer argued that all of the communications that it posted in the workplace were factual and balanced and did not contain any of the themes suggested by the Union nor could they reasonably be interpreted by the employees of the workplace as intimidating or intended to interfere in the administration of the Union. In addition (and potentially in the alternative), the Employer argued that, in 2008, employers gained the right to communicate facts and opinions to employees with the enactment of *The Trade Union Amendment Act, 2008*. To which end, the Employer argued that its communications clearly fell within the scope of the new right of communication provided to employers under the *Act*.

[93] Having considered the argument of the parties, we disagree with the position advanced by the Union that the 2008 amendment to s. 11(1)(a) did not alter the restrictions on employers in communicating with their employees. A plain reading of the 2008 amendment to s. 11(1)(a) leads to the inescapable conclusion that the previous restrictions on employer communications have been modified and that employers are now permitted to communicate facts and opinions to their employees. This Board has yet to make a substantive determination on the interpretation of this new provision but it is sufficient to say that the state of the law on employer communications changed in 2008.

[94] However, having considered the impugned communications of the Employer, and in particular the communications that were posted by the Employer on October 15, 2010 and October 20, 2010, we were not satisfied that either of these communications were in violation of the *Act* before or after the amendment to s.11(1)(a). These communications were responsive to significant developments affecting employees in the workplace and were factual. In our opinion, when objectively viewed, the documents posted by the Employer on October 15th and 20th did not amount to an attempt to bargain directly with the employees or to circumvent the Union as

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[33] *The Trade Union Amendment Act, 2008*, S.S. c.26 of 2008 (assented to May 14, 2008).

the exclusive bargaining agent of the employees. These documents did not amount to an attempt to undermine the Union's ability to properly represent the employees in the bargaining unit. Finally, neither the October 15, 2010 nor October 20, 2010 documents, when viewed individually or collectively with the Employer's previous communications, could reasonably be seen as likely to interfere with, restrain, intimidate, threaten or coerce the employees in the exercise of their rights under the *Act*.

Allegation that the Employer failed to comply with the Union's security demand:

[95] The fourth component of the Union's application alleged that the Employer had violated its obligations pursuant to s. 36 of the *Act*. The Union noted that it had served its union security demand on the Employer pursuant to the *Act* and, thus, the Employer was bound by s. 36. The Union pointed to the evidence of Mr. Langford that the Employer had not asked new employees hired after December 4, 2008 to complete the Union's membership application forms nor had the Employer advised these employees of their obligation to join the Union as a condition of employment to work at the Weyburn store. The Union also pointed to the evidence of Mr. Langford that he did not intend to advise new employees of their obligation to join the Union unless ordered to do so by this Board.

[96] The Union relied on this Board's decisions in *Canadian Union of Public Employees, Local 4195 v. Board of Education for the Saskatchewan Rivers School Division, No. 19*, [2000] Sask. L.R.B.R. 104, LRB File No. 202-98, and *United Food and Commercial Workers, Local 1400 v. Impact Security Group Inc. and Invicta Group Inc.* [2006] Sask. L.R.B.R. 517, 2006 CanLII 62946, LRB File No. 081-06, as standing for the proposition that, while employers may not be obligated to obtain union cards from new hires, employers are clearly under an obligation to advise new employees of the obligation to join the representative trade union in an organized workplace.

[97] The Employer, on the other hand, argued that it had not failed to comply with its obligations under the *Act*. Firstly, the Employer took the position that it was not its job to arrange for the execution of membership cards for the Union. While many employers may agree to have new employees sign membership cards, the Employer argued that its obligation under the *Act* was only to provide the Union with the names and contact information for new employees so that the Union could ask those employees to join. The Employer argued that it complied with its obligations under the *Act* and provided the Union with the names and basic contact information

(i.e.: name and home mailing address) for all employees in the bargaining unit. In response to this Board's Order of December 10, 2010, the Employer provided the Union with all information the Employer had regarding the employees in the bargaining unit, including their date of hire, their home addresses, their home phone numbers and their email addresses; information which the Employer had previously deemed to be private information. Furthermore, the Employer advised the Union that it would terminate any employee that refused to join the Union pursuant to s. 36 upon the request of the Union. In doing so, the Employer argued that it fully satisfied the obligations on it pursuant to s. 36 of the *Act*.

[98] Secondly, the Employer argued that no new employees were hired by the Employer during any period of time relevant to the Union's application. In this regard, the Employer noted that the Board's certification Order had been either partially stayed by the Board or stayed or quashed by the Court of Queen's Bench for most of the time prior to the Union filing its application and that no new employees were hired during any period of time that the Board's certification Order was extant. For example, the Employer observed that there had been no new hires between December 4, 2008 (i.e.: the date of certification) and April 6, 2009 (i.e.: the date the Board's certification Order was stayed by the Saskatchewan Court of Queen's Bench). As a consequence, the Employer argued that it could not have been in violation of its s. 36 obligations during or with respect to that period.

[99] Furthermore, the Employer relied on this Board's decision in *United Food and Commercial Workers, local 1400 v. The North West Company and Tora Regina (Tower) Limited (o/a Giant Tiger)*, 2009 CanLII 26936, LRB File No. 026-04, as standing for the proposition that the Employer was under no obligation to comply with s.36 of the *Act* during the period of time when the Board's certification Order was suspended (i.e.: stayed or quashed) by the Court of Queen's Bench. The Employer argued that, during this period and until the Board's certification Order was reinstated by the Saskatchewan Court of Appeal on October 10, 2010, the s. 36 obligations on the Employer were suspended. As such, the Employer argued that it could not be in violation of the *Act* with respect to any new employees hired during this period.

[100] In addition, the Employer observed that there were no employees hired by the Employer following the decision of the Saskatchewan Court of Appeal to the point in time that the Union filed its application alleging that the Employer had violated s. 36 of the *Act (i.e.: November*

8, 2010). As such, the Employer argued that it could not be in violation of the *Act* during or with respect to this period.

[101] The Employer acknowledged that new employees were hired after the Union filed its application (i.e.: after November 8, 2010. However, the Employer argued that it satisfied its s. 36 obligations by advising the Union of the names and contact information for each new employee, as they were hired. In doing so, the Employer argued that it fully satisfied its s. 36 obligations under the *Act*.

[102] Having considered the argument of the parties, we are satisfied that, if an employer in a certified workplace opts not to provide union membership application forms directly to new hires (which is an employer's right), that employer is under an obligation to do more than just advise the representative trade union of the name and contact information for new employees. We agree with the position advanced by the Union that employers are also under an obligation to advise new employees of their obligation to obtain and maintain membership in the Union as a condition of employment to work in a certified workplace pursuant to the *Act*. For the reasons stated by this Board in *Saskatchewan Rivers School Division, supra*, the failure of an employer to advise a new hire in a certified workplace that he/she will be under a statutory obligation to join the representative trade union interferes with both an employee's rights under the *Act* and the proper administration of that trade union. Failing to give this crucial information to new hires is disingenuous; it confuses new employees, and inappropriately places the representative trade union in the position of having to advise a recently hired employee that he/she could loose his/her job for failing to join the union, something that could easily be incorrectly perceived by a new employee as intimidation rather than merely an explanation of a statutory obligation. See also: *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. Limited, et. al.*, [1994] 1st Quarter Sask. Labour Rep. 169, LRB File Nos. 148-93, 192-93, 193-93, & 194-93.

[103] While the evidence of Mr. Langford established that the Employer had not advised new employees at the Weyburn store of their obligation to obtain and maintain membership in the Union as a condition of employment at that workplace following certification of the Union, no employees were hired by the Employer during any period of time that could give rise to a violation of the nature alleged by the Union in the present application.

[104] We agree with the position advanced by the Employer and for the reasons stated by this Board in *Giant Tiger, supra*, the Employer was under no obligation to anticipate the fact that the Saskatchewan Court of Appeal would overturn the decision of the Saskatchewan Court of Queen's Bench and reinstate the Union's certification Order. As a consequence, during the period of time that the certification Order was suspended, the Employer was under no obligation to advise new employees of their statutory obligation to join the Union as a condition of employment for working at the Weyburn store.

[105] In our opinion, the partial stay imposed by the Board on December 24, 2008 would not have affected the Employer's obligations with respect to new employees. On the other hand, we are satisfied that the interim stay imposed by the Court on April 6, 2009 did effectively suspend the Board' certification Order and thus the s. 36 obligations on the Employer. The certification Order was quashed on June 23, 2009 and not reinstated until October 14, 2010.

[106] A review of the evidence indicates that no employees were hired between December 4, 2008 (the issuance of the certification Order) and April 6, 2009 (the date of the interim stay), which includes the period of time that the certification Order was only partially stayed by Order of this Board. As no employees were hired during this period, no violation of s. 36 could have occurred. The Employer was under no obligation to advise employees hired of the obligation to join the Union after April 6, 2009 until the Board's certification Order was reinstated by the Court of Appeal on October 14, 2010. As a consequence, there can also be no violation of the *Act* for this period of time. Finally, the evidence indicates that no employees were hired by the Employer during the period following the reinstatement of the Board's Order (i.e.: starting October 15, 2010) and prior to the filing of the Union's application (i.e.: on November 8, 2010). While new employees were hired by the Employer to work at the Weyburn store after the Union filed its application, these subsequent events, in our opinion, are not properly before the Board. As a consequence and after carefully considering the evidence in these proceedings, we were not satisfied that a violation of the *Act* occurred on the basis that no employees were hired by the Employer during any period of time relevant to the Union's application and when the s. 36 obligations on the Employer were not suspended.

[107] However, for the purposes of clarity, in our opinion, the Employer is under an obligation to advise new employees that they are under a statutory obligation to join the Union as a condition of employment unless and until this Board rescinds the Union's certification Order. A

failure on the part of the Employer to acknowledge and comply with this obligation could give rise to a violation of the *Act*.

LRB File No. 177-10 – Mr. Button's Rescission Application:

[108] The events relevant to Mr. Button's rescission application are relatively straightforward. Prior to going to work for the Employer, Mr. Button worked for some 45 years and was a long-standing member of the International Union of Steelworkers before retiring from his previous employer. Mr. Button became bored with retirement and commenced employment at the Employer's store in Weyburn in February of 2008. Mr. Button testified that he became part of the "in-stock" team, looking after stock in the back of the store, logging stock into a computer system and operating a forklift and power jack. At the time of filing his application, Mr. Button held the position of "In-Stock Supervisor", a position we are satisfied is within the scope of the bargaining unit.

[109] Mr. Button testified that he was not present when the Union commenced its organizing drive in 2004, nor did he have any direct knowledge with respect to the Union's certification application before the Board at that time. Mr. Button did testify that other employees complained that the Union had harassed them and misled them during the organizing drive. While Mr. Button had no direct knowledge of any of these events, they were part of the reason he wanted an opportunity to vote on whether or not the workplace should be represented by the Union.

[110] Mr. Button testified that he was approached by two (2) other employees in the workplace, Ms. Jackie Smith and Ms. Darlene Bisson, about concerns regarding the Union as early as April of 2009. It was not clear from the evidence who approached whom but it was clear from Mr. Button's testimony that the two (2) women were not supporters of the Union and they also wanted the employees to have a vote. Although previously a long-time member of, and an elected officer within, the Steelworkers Union, Mr. Button appeared to share the women's views regarding the presence of the Union in the workplace. Mr. Button testified that, although he never had a falling-out with his previous union, over-time he became less convinced as to the need or value of a trade union in a workplace. Following the decision of the Court of Appeal to reinstate the Union's certification Order, a decision was made to bring a rescission application. While the idea for this application appeared to have been Ms. Smith's, Mr. Button agreed to be the named applicant. Mr. Button testified that the Court's decision to reinstate the certification

Order without a vote was a major concern for employees. In cross-examination, when asked why he had been asked and why he had agreed to bring the rescission application, Mr. Button stated rather proudly because *"I have a big mouth*", because "*I'm not afraid to stand up and talk*", and because "*I'm not easily intimidated*".

[111] From Mr. Button's testimony, it was apparent that his rescission application was a team effort, with Ms. Bisson and Ms. Smith doing much of the work and most of the research. For example, it was Ms. Bisson who determined what documents were required and obtained an application package from the Board's offices. It was clear from the evidence that Mr. Button had little knowledge as to the Board's procedures and forms and was not personally involved in acquiring the forms he used for his application or the information he needed to complete the forms. Also, Ms. Bisson and Ms. Smith obtained most of the signatures on support cards.

[112] Mr. Button testified that the rescission application was not talked about at work; that he made copies of the support cards at home on his computer; and that signatures were collected outside of the workplace. While support was being gathered for the rescission application, the Employer posted the following communication at the workplace on October 22, 2010 and attached to this document were the names of the employees in the bargaining unit, as well as their respective contact information:

> *October 22, 2010*
>
> *To All Weyburn Wal-Mart Associates*
>
> *As we advised, the Court of Appeal has certified the UFCW Local 1400 as the bargaining agent for a group of Associates in the store without a vote ever being held.*
>
> *As part of the certification process, Walmart is required to bargain with the Union, and the law requires that we release some information respecting our Associates.*
>
> *The Union has demanded Associate information, and Walmart has complied with the law by disclosing the attached information pursuant to the bargaining process. We believe the Union is entitled at law to the information we have released. The Union has requested additional information and we are still considering these requests.*
>
> *Rest assured that Walmart will protect your personal information to the extent permitted by law. As usual, your management team will be available to discuss this or attempt to answer any other questions that you may have.*
>
> *Troy Langford, Store Manager*

[113] Mr. Button testified that a coworker (and supporter of his rescission application) took a picture of the employee list posted by the Employer on October 22, 2010 and that they had this information for at least a portion of the time when they were seeking support for the rescission application. Mr. Button testified that they knew they needed support from at least 50% of the employees in the workplace and that they simply tried to obtain as many as they could. Mr. Button signed his application on October 25, 2010 and Ms. Bisson delivered the application to the Board's office in Regina on October 29, 2010.

[114] Mr. Button filed evidence of support from employees in the bargaining unit pursuant to the requirements of the *Act*. On December 9, 2010, the Board directed that a pre-hearing vote be conducted to capture the wishes of the affected employees. However, in doing so, the Board also directed that the ballot box be sealed until such time as the issues in dispute between the parties were resolved.

[115] The Union argued that these ballots should not be counted and asked this Board to dismiss Mr. Button's rescission application on three (3) grounds, namely: that Mr. Button's application was filed out of time; that it was the result of management interference and thus should be dismissed pursuant to s.9 of the *Act*; and/or that the Board should exercise its discretion and delay or dismiss Mr. Button's rescission application for other reasons, including the fact that the Union did not have an opportunity to properly represent its members in collective bargaining or otherwise.

Calculating the Open Period:

[116] Mr. Button's application was received by the Board during what would normally be considered the "open period" in a workplace where there is no collective agreement in existence; being the eleventh month following this Board's Order (or the anniversary thereof) certifying a Union as the bargaining agent for the unit of employees of which Mr. Button was a member. The Union, however, argued that the unique circumstances affecting this workplace and the Union's certification Order are exceptional and, as such, this Board should not calculate the open period in the normal fashion.

[117] The Union relied upon this Board's decision in *Richard Beaupre v. Communications, Energy and Paperworkers Union of Canada (CEP) and Maxim Transportation Services Inc.*, [2001] Sask. L.R.B.R. 553, LRB File No. 094-01, as standing for the proposition

that, in exceptional circumstances, the Board can modify the temporal benchmarks for calculating the open period.

[118] The Union argued that one of the statutory objectives of the open period is to provide a representative trade union with ten (10) months within which to demonstrate its effectiveness to the employees. The Union observed, as this Board has[34], that because of the stays and other restrictions imposed on the Certification order, the ten (10) months contemplated by the legislature (i.e.: before the open period occurred) had been shortened to just a few days. The Union argued that the drafters of the *Act* could not have anticipated the possibility that a certification Order would be suspended in such a way or for such a duration that a trade union would be prevented from being able to represent its members for all but a few days before members of the bargaining unit would be called upon to revisit the representative question. The Union took the position that, to fulfill the legislative intent of the open period (i.e.: to give the Union a 10 month period of representation to consolidate its support), the Board should modify its calculation of the open period in the present application. The Union suggested a couple of examples for calculating the open period, including having the period start to run from the decision of the Saskatchewan Court of Appeal.

[119] The Employer argued that the open period is not something that is amendable to change and disagreed with the Union's interpretation of *Beaupre v. CEP and Maxim Transportation, supra*. The Employer argued that this case does not stand for the proposition that the Board has authority to modify the calculation of the open period; rather, in the Employer's opinion, this case stands for the proposition that there is only one (1) anniversary date relevant or applicable to an application pursuant to s. 5(k)(ii) of the *Act* and that is the anniversary date of the original certification Order of the Board (i.e.: the Order to be rescinded).

[120] Also, the Employer disagreed with the Union's assertion that the legislature could not have intended that a certification Order could be stayed or restricted in the fashion which occurred in the present case. The Employer argued that the language used in s. 5(k) clearly demonstrated that the legislature anticipated that a certification Order could be stayed or otherwise restricted by court proceedings and that the open period should be calculated in

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[34] See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.*, [2011] CanLII 27607, LRB File No. 166-10 (Vice-Chairperson Schiefner, Reasons for Decision dated February 8, 2011) at paras 9, 10 & 11.

accordance with the prescriptions in that section "notwithstanding" the occurrence of court proceedings.

[121] Having considered the argument of the parties, we are satisfied that Mr. Button's application was filed during the open period prescribed pursuant to s. 5(k) of the *Act*. We disagree with the assertion that this Board has authority to modify the calculation of the open period in the fashion suggested by the Union. To do as the Union suggests would be to place the Board into the impractical position of having to assess the facts of each case to determine if exceptional circumstances exist sufficient to justify a modified calculation of the open period. Firstly, in *Robert Monahan v. United Steel Workers of America and Capital Pontiac Buick Cadillac GMC Ltd.*, [1993] 3rd Quarter Sask. Labour Rep. 121, LRB File No. 169-93, this Board cautioned against adopting a procedure that would immerse the Board in "*open period politics"*. Secondly, we agree with the position advanced by the Employer that the legislature anticipated that a certification Order of the Board could be subject to a stay or restriction affecting a trade union's right to represent its members during the ten (10) month period and that, notwithstanding these intervening events, the open period is to be calculated in accordance with the formula set forth in s. 5(k).

[122] In coming to this conclusion, we agree with the Union's position that one of the goals of s. 5(k) of the *Act* was to provide a recently certified trade union with an initial ten (10) month period as the exclusive representative of employees in a newly formed bargaining unit. In addition, this Board has already acknowledged that a number of forces have interfered with and delayed the Union's clear desire to represent the members of this bargaining unit[35].

[123] However, we disagree with the Union's position that s. 5(k) of the *Act* somehow guarantees that a trade union will have a ten (10) month period within which to consolidate support within the bargaining unit before employees could be asked to revisit the representative question. Simply put, we do not agree that this Board has discretion, and if we have discretion that we should exercise such discretion, to modify the calculation of the open period to achieve that singular goal. For example, in *Darryl Markowski v. United Food and Commercial Workers, Local 1400 (UFCW) and 612362 Saskatchewan LTD (o/a National Hotel)*¸ [2011] CanLII 27488, LRB File Nos. 153-10 & 160-10, this Board was called upon to determine whether or not s. 19 of

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[35] See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.*, [2011] CanLII 27607, LRB File No. 166-10 (Vice-Chairperson Schiefner, Reasons for Decision dated February 8, 2011) at para. 34.

the *Act* could be used to cure the late filing of a rescission application. At paragraphs 19, 20 and 21 of that decision, the Board had the following comments with respect to the legislative purpose of the open period:

> *[**19**] The Board has considerable sympathy for the Applicant. It was obvious to the Board that he was unfamiliar with the forms he was trying to complete, as well as the requirements of the Act and the procedures of the Board. In this regard, the concerns of counsel for the Employer are well taken; employees wishing to decertify a trade union are at a[n] information disadvantage. A long standing goal of the Board (and arguably its reason for existence) is to provide a simplified and efficient process whereby employers, trade unions and individuals alike may exercise their rights under the Act without fear of overly technical objection. To which end, the Board's procedures and processes attempt to accommodate both laypersons and seasoned professionals. Furthermore, the Legislature has seen fit to grant the Board with generous authority to cure technical defects or irregularities in applications for the purpose of determining the real questions in controversy in proceedings. Unfortunately for the Applicant, in our opinion, the late filing of a rescission application is not the kind of technical defect or irregularity that the Board can cure pursuant to s. 19 of the Act.*
>
> *[**20**] Applicants seeking to rescind a certification Order of the Board must file their applications with the period of time prescribed by s. 5(k) of the Act. The Province of Saskatchewan, through The Trade Union Act, has prescribed the procedure for employees to become organized and represented by a trade union. In doing so, the Legislature has also recognized and established a procedure for members of a bargaining unit to revisit the representative question. Part of the prescribed procedure is a statutory limitation on the period of time when employees may bring rescission applications. The legislative goal of doing so is to promotion stability in an organized workplace; whereby a trade union's exclusive right to represent the members of a certified bargaining unit is unassailable other than during specific, annually-occurring periods. In the Board's opinion, s.19 of the Act does not provide sufficient authority to allow the Board to accept the late filing of a rescission application.*
>
> *[**21**] Even if the Board could find sufficient authority in s. 19 to cure a defect of late filing, we would not have been persuaded to do so. In our opinion, allowing for the late filing of a rescission application, even under the somewhat unusual and sympathetic circumstances of this case, would create an undesirable precedent and would undermine the certainty and predictability of a trade union's representative rights. In coming to this conclusion, the Board is very mindful of the informational disadvantage faced by employees seeking to decertify an incumbent trade union relative to the depth of assistance available to employees seeking to become organized. Nonetheless, in our opinion, the temporal limits prescribed in the Act serve an important role in promoting industrial peace and stability in the workplace. In our opinion, it would represent both an error in law and policy to allow rescission applications to be filed outside of the period prescribed by the Act.*

[124] In our opinion, certainty and predictability are the other legislative goals of the open period as prescribed by s. 5(k). The legislature has created an annually-occurring opportunity for certified employees to revisit the representative question. This is a fundamental

right of employees. To be able to meaningfully exercise this democratic right, the open period must be fixed and known. It cannot be subject to case by case determinations as to whether or not a particular occurrence of the open period is inconvenient, unfair to one party or another, or that it occurred before the representative trade union had a fulsome opportunity to demonstrate its effectiveness. The open period may well occur before the parties have had an opportunity to conclude a collective agreement and, thus, before the employees have had an opportunity to experience the benefits of collective bargaining. Notwithstanding intervening events, including stays or restrictions on a trade union's authority or capacity to represent its members, the open period will annually occur and employees have the right to revisit the representative question, should they seek to do so during the prescribed period.

[125] In our opinion, it would be both an error of law and policy for the Board to modify the calculation of the open period in the fashion suggested by the Union even in the exceptional circumstances of this case. For the foregoing reasons, we are satisfied that Mr. Button's rescission application was filed with the prescribed open period.

Allegation of s.9 interference by the Employer:

[126] With respect to the Union's allegation of employer interference, the Union argued essentially the same evidence as it did in support of its four (4) unfair labour practice applications. In this regard, the Union took the position that it was not necessary that an unfair labour practice be found to have occurred, for s. 9 of the *Act* to be engaged. The Union argued that, regardless of how the Board ruled on its various unfair labour practice applications, there was overwhelming evidence of employer interference through the Employer's conduct in undermining the Union in the workplace and in the fostering of an anti-union environment sufficient to trigger the application of s. 9 of the *Act*.

[127] The Union asked the Board to take into consideration the totality of the Employer's conduct over the past seven (7) years, including all of the various communications posted at the workplace, including those dating back to 2004; the closure of the Jonquiere store; the Employer's refusal to bargain collectively with the Union until Order to do so by the Board; and the Employer's refusal to advise new employees of their statutory obligation to join the Union as a condition of employment. The Union argued that, in addition to this conduct, an aggravating factor was the Employer's ongoing refusal to permit representatives of the Union to attend to the workplace to communicate direct with members of the bargaining unit. The Union relied on the

decision of this Board in *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. Limited, et. al.* [1994] 1st Quarter Sask. Labour Rep. 169, 22 C.L.R.B.R. (2d) 123, LRB File Nos. 148-93, 151-93, 192-93, 193-93 & 194-93, as establishing the Union's right to have representatives attend to the workplace and to conduct lawful union business with members.

[128] The Union argued that, although the employee list posted by the Employer at the workplace on October 22, 2010 was the information that the Employer provided to the Union, the Employer posted this information at the workplace so that the employees would have the names and contact information of other employees in the bargaining unit to facilitate communication for the purpose of preparing and/or seeking support for a rescission application. The Union argued that this information, together with the communication posted by the Employer on October 20, 2010, which informed employees that the employees had the right to decertify; advised employees that they could contact the Registrar of the Labour Relations Board to obtain information on how to decertify; and provided employees with the deadline for a decertification application, provided employees with a roadmap to decertification and thus represented an example of direct assistance by the Employer. The Union argued that the communications posted by the Employer at this workplace were very similar to the employer communications that were found by the Board to be in violation of the *Act* in *Prairie Bus Services, supra*.

[129] In addition, the Union took the position that Mr. Button was merely the "nominal" applicant and that the true applicants were Ms. Smith and Ms. Bisson, individuals whom the Union argued would have been perceived as closely aligned with management. The Union also argued that Mr. Button offered a scanty explanation for bringing his application; noted that he gathered relatively few of the support cards; and pointed out that he did not appear to understand where the information necessary to complete his application, including the date of the certification Order, came from. In light of the fact that neither Mr. Smith nor Ms. Bisson were called to testify, the Union asked the Board to draw an adverse inference of employer interference. In this regard, the Union relied upon this Board's decisions in *Susie Mandriak v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Remai Investments Co. Ltd. (Imperial 400 Motel)*, [1987] December Sask. Labour Report 35, LRB File No. 162-87, and *Larry Rowe and Anthony Kowalski v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Canadian Linen and Uniform Service Co.*, [2001] Sask. L.R.B.R. 760, LRB File No. 104-01.

[130] The Union propounded numerous cases wherein the Board applied s. 9 of the *Act* and dismissed pending rescission applications on the basis of employer interference, including the cases of *Larry Rowe & Anthony Kowalski v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union & Canadian Linen and Uniform Service Co.*, [2001] Sask. L.R.B.R. 760, LRB File No. 104-01; *Steven Huber & Glen Stevenson v. Sheet Metal Workers' International Association, Local 296 & Reinhardt Plumbing, Heating & Air Conditioning Ltd.*, [2002] Sask. L.R.B.R. 593, 2002 CanLII 52919, LRB File No. 195-02; *Ben Schaeffer v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union & Loraas Disposal Services Ltd.*, [2002] Sask. L.R.B.R. 657, 2002 CanLII 52920, LRB File No. 196-02; *Tyler Nadon v. United Steelworkers of America & X-Potential Products Inc. (Impact Products)*, [2003] Sask. L.R.B.R. 383, 2003 CanLII 62864, LRB File No. 076-03; *Martyn Arnold v. United Steelworkers of America, Local 5917 and Westeel Ltd.*, [2005] Sask. L.R.B.R. 5, 2005 CanLII 63100, LRB File No. 275-04; *Valerie Jones and Kendra Memory v. Saskatchewan Government and General Employees' Union & Hill View Manor*, [2006] Sask. L.R.B.R. 404, 2006 CanLII 62940, LRB File No. 144-06; *Marlys Janzen v. Service Employees International Union, Local 336 & Prairie Care Developments Inc.*, [2007] Sask. L.R.B.R. 48, 2007 CanLII 68753, LRB File No. 004-07; and *Kim Paproski v. International Union of Painters and Allied Trades, Local 739 & Jordan Asbestos Removal Ltd.*, [2008] Sask. L.R.B.R. 1, 2008 CanLII 47038, LRB File No. 173-06.

[131] In reply, Mr. Button denied that he was assisted or intimidated or influenced in any way by the Employer. Simply put, Mr. Button believed that employees in the workplace deserved a chance to vote (by secret ballot) on whether or not they wanted to be represented by a trade union. In response to the Union's challenges to his application, Mr. Button indicated that, if he did anything wrong in preparing or completing his rescission application, he would correct the mistake and bring a new application during the next open period.

[132] The Employer argued that there was no evidence that Mr. Button's rescission application was the result of management interference or that anyone in management encouraged or talked to him or anyone else about decertifying the Union.

[133] With respect to the communications it posted in the workplace, the Employer noted that, following the 2008 amendments to *The Trade Union Act*, employers are now entitled to communicate facts and opinions to employees. In this regard, the Employer cautioned that all

of the cases cited by the Union as demonstrative of employer influence were decided by the Board prior to the 2008 amendments to the *Act*.

[134] After having considered the evidence in these proceedings and the argument of the parties, we are not persuaded that the evidence demonstrates conduct on the part of the Employer of a kind or of a degree sufficient for this Board to exercise its discretion pursuant to s. 9 of the *Act* to dismiss Mr. Button's application.

[135] In coming to this decision, we are mindful of the numerous decisions of this Board, including those cited by the Union, that caution about the need for the Board to be "alert" to signs that an application for decertification has been initiated, encouraged, assisted or influenced by the actions of the employer and to "vigilantly" guard against applications to decertify a Union that in reality reflect the will of the employer instead of the wishes of employees of the workplace. On the other hand, this 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.

[136] In *Garry Shuba v. International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 & Gunnar Industries Ltd.*, [1997] Sask. L.R.B.R. 829, LRB File No. 127-97, the Board cautioned that, in considering the exercise of the discretion granted pursuant to s. 9 of the *Act*¸ we 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 an employer has not used coercive power to improperly influence the outcome of that choice. As a consequence, it has been the policy of the Board to respect the fundamental right of employees to decide the representative question in rescission applications and to only exercise our discretion pursuant to s. 9 of the *Act* to withhold that right in circumstances where the Board has lost confidence in the capacity of the employees to independently decide the representative question because of the employer's conduct.

[137] Mr. Button appeared to the Board as an assertive, confident and honest individual; a person with strongly-held beliefs and opinions. Furthermore, Mr. Button was no stranger to a unionized workplace, having served in various functions within his former trade union. We are satisfied that Mr. Button was a person entitled to bring a rescission application

and that he did so for his own independent reasons. Unlike the applicants in *Rowe & Kowalski v. RWDSU, supra*, Mr. Button's evidence did not contain any "remarkably inadequate" explanations. Also, Mr. Button would not reasonably be perceived as having a close relationship with management and there was certainly no evidence that he was receiving special treatment from the Employer, as was the case in *Paproski v. Painters and Allied Trades*, *supra*.

[138] The Board is also not prepared to draw an adverse inference because Mr. Button did not call either Ms. Bisson or Ms. Smith. While these two (2) individuals clearly played a significant roll in the preparation and completion of Mr. Button's application, we are satisfied that they were properly members of the bargaining unit and would also have been entitled to bring applications in their own right. There is nothing inherently suspicious in a significant endeavor, such as completing and obtaining support for a rescission application, being undertaken by a team of employees. Certainly trade unions routinely use teams of individuals to conduct an organizing campaign but do not call their key organizing people in the workplace to testify in support of their certification applications. In our opinion, the fact that Mr. Button did not call the members of his team to testify in support of his application is not indicative of employer influence.

[139] While we may agree with the Union that some of the Employer's communications[36] were similar to the communications found to be in violation of the *Act* in *Prairie Bus Services, supra*, in our opinion, the Employer's communications were more balanced and factual and did not contain the kind of anti-union message found by the Board in *Prairie Bus Services, supra*. In any event, these communications are now simply too old for the Board to reasonably conclude that they could have any significant residual impact in terms of influencing the current employees in the workplace.

[140] With respect to the balance of communications posted by the Employer at the workplace, as we have already stated, we find that the Employer's communications were responsive to developments affecting employees in the workplace; that they were factual; and that they did not campaign against the Union or otherwise contain any anti-union messages. We also note that the bulk of the Employer's communications occurred after May 14, 2008; the date when the 2008 amendments to *The Trade Union Act* came into force. In our opinion, the amendment to s. 11(1)(a) of the *Act*, which granted employers the right to communicate facts

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[36] For example, those dated April 7, 2004, April 19, 2004, and January 5, 2007.

and opinions to their employees, also modified the application of our discretion pursuant to s. 9 of the *Act*. We note that s. 11(1)(a) now states that "*nothing in this Act precludes an employer from communicating facts and its opinions to its employees"*.

[141] The Union was particularly concerned about the communication posted by the Employer on October 20, 2010 (the communication that advised employees of their right to decertify the Union, informed employees on how to get information about decertifying the Union, and informed employees of the deadline associated with doing so), which the Union argued provided a roadmap to decertification. It is entirely possible that the provision of this type of information by an employer could have been sufficient for the Board to exercise its s. 9 discretion in the past; particularly so following the 1994 amendment[37] to *The Trade Union Act* that removed the general right of employers to communicate with their employees that had been added to the *Act* in 1983[38].

[142] However, with the 2008 amendments to *The Trade Union Act*, employers were again granted the right to communicate with their employees; on this occasion, the right to communicate facts and their opinions to their employees. As the impugned information posted by the Employer was factual, this Board is left with the interesting (and potentially difficult) question of the extent to which this new right granted to employers ought to modify the exercise of our discretion pursuant to s. 9 of the *Act*.

[143] The provisions of *The Trade Union Act* are to be interpreted along the lines laid down by section 10 of *The Interpretation Act, 1995*[39] and by the decision of the Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd. (Re)*[40]. Section 10 states that every enactment is to be interpreted as remedial and "*given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects."* The decision in *Rizzo and Rizzo Shoes* states that words of an enactment are to be read in their entire context and in their grammatical ordinary sense harmoniously with the scheme of the enactment, the object of it, and the intention of the Legislature. In addition, we note that this Board faced a similar interpretive challenge following

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37 See: *The Trade Union Amendment Act, 1994,* S.S. ch. 47 of 1994, s. 8(1)(a) (Assented to June 2, 1994).

38 See: *The Trade Union Amendment Act, 1983*, S.S. ch 81 of 1983, s. 6(1). (Assented to June 17, 1983).

39 R.S.S. 1978, c.I-11.1

40 1998 CanLII 837 (S.C.C), 1998 1 S.C.R. 27.

the 1983 amendments[41] to the *Act*, which granted employers a similar right to communicate to their employees.

[144] Although the amendment to s. 11(1)(a) might appear on its face to grant employers an unrestricted right to communicate facts and opinions, in our opinion, such an interpretation would create disharmony in the scheme of the *Act*. If the legislature had intended to grant employers the right to communicate any fact or any of their opinions to their employees, regardless of the consequences of those communications, it would have also been necessary to modify various other provisions of the *Act*, including the balance of the paragraphs in s. 11(1) and s. 9, all of which are generally violated by means of employer communications.

[145] We note that this Board has modified the scope of permissible or objectionable communication by an employer, as the case may be, pursuant to s. 9 of the *Act* concomitant with legislative changes to s. 11(1)(a). For example, in considering the impact of employer communications in a s. 9 allegation following the 1983 amendments to the *Act*, the Board came to the following conclusion in *Robert Schan v. United Brotherhood of Carpenters and Joiners of America, Local 1805 and Little-Borland Ltd.*, [1986] Feb. Sask. Labour Rep. 55 at p. 58, LRB File No. 275-85:

> *If an employer has a right to communicate with his employees in ways that do not interfere with their rights under The Trade Union Act, then his employees must be able to receive, to consider, and to be influenced by those communications without losing those same rights, one of the most important of which is the right to choose their own bargaining representative. The purpose and intent of Section 9 is to ensure that applications made by employees do not succeed if they are made in whole or in part as a result of employer influence – not any influence, but influence that so compromises the employees' ability to make an informed, reasoned decision that their basic right to decide should be removed by the Board. In the Board's opinion, employer influence of that kind was not present in this case.*

[146] While the scope of an employer's right to communicate to its employees following the 2008 amendment has yet to be determined, it seems apparent that an employer may not ask or advise its employees to seek to decertify their union or encourage them to do so through financial reward, for example, as was the case before this Board in *Kim Leavitt v. United Food and Commercial Workers, Local No. 1400 and Confederation Flag Inn (1989) Limited*, [1990] Summer Sask. Labour Rep. 61, LRB File No. 225-89. While employers now have the right to

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[41] See: *The Trade Union Amendment Act, 1983*, S.S. c.81 of 1983 (Assented to June 17, 1983).

communicate facts and their opinions, such communications may not contain an anti-union animus or amount to a campaign against a union. In the application of s. 9 of the *Act*, the primary concern for this Board is the capacity of the subject employees to independently decide the representation question and, if we are persuaded that an employer's communications have likely impaired the capacity of employees in the exercise of their rights under the *Act*, then s. 9 continues to be available to the Board to guard against such abuses notwithstanding the recent amendments to s. 11(1)(a) of the *Act*.

[147] Having reviewed the communications posted by the Employer in the workplace, we were not satisfied that these communications motivated Mr. Button to bring his application nor were we satisfied that these communications could deprive the employees in the bargaining unit of their capacity to independently determine the representation question. As we have already indicated, in our opinion, the Employer's communications were factual and did not contain an anti-union animus or amount to a campaign against the Union.

[148] On the other hand, the information posted by the Employer on October 20 and 22, 2010 may well have assisted Mr. Button in completing his rescission application; in the case of the October 20th communication, by calculating the open period for him; and in the case of the October 22nd communication, by providing him with a convenient listing of all employees. However, in our opinion, neither of these communications could reasonably been seen as capable of impairing the capacity of an employee of sufficient intelligence and fortitude from exercising his/her rights under the *Act*. While the communication of facts that are capable of assisting employees in decertifying their trade union (such as the deadline for filing a rescission application and the names and address of coworkers) may well have previously represented inappropriate communications by an employer[42], following the 2008 amendments to the *Act*, the communication of this kind of information, *per se*, is no longer sufficient to trigger the application of s. 9 of the *Act*. While such information may well assist an employee in completing an application to the Board, it is not the kind of information likely to motivate him/her to do so; nor is it the kind of information that could reasonably impair the capacity of other employees in the bargaining unit to decide the representation question.

[149] With regard to the closure of the Jonquiere store, the fact that speculation continued to exist in the workplace (that the Employer could close the Weyburn store if the Union

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[42] Particularly so during the period from 1994 until 2008.

remained) represented a concern for this Board, as it clearly did for the Union. On the other hand, does the presence of this kind of speculation in the workplace provide a basis for the application of s. 9 so as to prevent the employees from exercising their democratic right to determine the representative question? The Union asserted that the speculation in the workplace was exactly what was intended by the Employer and was for the purpose of encouraging anti-union attitudes in the workplace. The Union argued that the speculation was pervasive and sufficient to deprive the employees of the capacity to decide the representative question.

[150] As we have already noted, employers has the right to close-up shop and cease operations if they chose to do so. Furthermore, it is not entirely clear who was responsible for the rumours and speculation in the workplace. Certainly, there was evidence that the Employer denied the rumours and attempted to counter the speculation in the workplace. All of the factors weigh against the Board exercising its s. 9 discretion.

[151] Furthermore, the Jonquiere store was closed in 2005 and, if the closure of a store six (6) years ago can continue to influence employees in the workplace, how long does that influence last? The Union argued that the employees should not be called upon to determine the representative question until such time as they have had a reasonable opportunity to enjoy the benefits of collective bargaining. To which end, the Union argues that Mr. Button's rescission application should be dismissed or, at least, delayed until the Union's first collective agreement application has been determined. In this regard, we note that the Board has fashioned this type of remedy in the past; for example, in the cases of *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; and *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, the Board exercised its discretion to delay the final determination on pending rescission applications in the face of inappropriate conduct on the part of a resistant employer sufficient to cause the Board to be concerned that an atmosphere or environment may exist such that the employees could not reasonably make an informed decision with respect to the representative question. See also: *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.

[152] While this Board has fashioned this type of remedy in the past, for the reasons stated by this Board in *Colin Lesyk v. United Food and Commercial Workers, Local 1400 & Barrich Farms (1994) Ltd., et. al.*, 2009 CanLII 44583, LRB File Nos. 094-09 & 111-09, in our opinion, following the 2008 amendments, *The Trade Union Act* no longer permits that kind of intervention by the Board. In *Lesyk, supra*, the Board wrote came to the following conclusions:

> *[**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.*

[153] In this Board's Reasons for Decision on the Procedural Matters[43], the Board observed that, in coming to the above conclusion, we were not "*mechanically applying new statutory prescription but rather the Board [had] redefined its policy with respect to the conduct and timing of representative votes in general"*. In our opinion, the changes to *The Trade Union Act* in 2008 signaled a new legislative balance; a legislative balance that has now been integrated into the general policy of the Board by placing a greater emphasis on the fundamental right of employees to determine the representation question without intervention by the Board save through the application of s. 9 of the *Act*.

[154] For the foregoing reasons, we were not satisfied that the employees in the workplace should be deprived of their right to decide the representative question because of events that occurred in Quebec six (6) years ago. Simply put, we are not satisfied that the employees have lost the capacity to independently determine the representative question even in the face of the rumours and speculation circulating in Weyburn.

[155] The Union also asked the Board to note that the Employer hired a number of employees after the Union was certified to this workplace and that none of these employees

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[43] See: United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp., et. al., 2010 CanLII 90104, LRB File Nos. 096-04, 038-05, 001-09, 166-10, 177-10 & 184-10 (Vice-Chairperson Schiefner, Reasons for Decision dated December 9, 2010). Corrigendum released March 31, 2011.

applied for or maintained membership in the Union following the security demand made by the Union. The circumstances of the present case are distinguishable from the circumstances before the Board in *Huber v. Sheet Metal Workers and Reinhardt Plumbing, supra*, or in *Paproski v. Painters and Jordan Asbestos, supra*. For the reasons already stated herein, the Employer's failure to properly advise employees (i.e.: of their statutory obligation to join the Union) that were hired during the period that the Union's certification Order was suspended is not indicative of employer interference. Since no employees eligible to participate in the representative questions were hired outside of this period, the Board is not persuaded by this argument.

[156] Finally, if we were not persuaded by any individual action of the Employer to exercise our discretion pursuant to s. 9, the Union then asked the Board to weigh the totality of the Employer conduct over the past seven (7) years, which the Union described as a deliberate and concerted effort to avoid unionization of its Weyburn store and to discourage the employees of that store from supporting the Union. In reviewing the evidence before the Board in these proceedings, there were certain factors that were of concern to this Board and tended to encourage the Board to exercise our discretion pursuant to s. 9 of the *Act*. For example, as we have indicated, the persistent speculation in the workplace regarding the potential that the Weyburn store could close was a concern for the Board. The Board was also concerned that representatives of the Union were not permitted greater access to the workplace following the reinstatement of the Board's certification Order. As this Board has previously indicated, in light of the statutory responsibilities on the Union following certification, the Union is no longer a stranger to the workplace[44]. As such, in our opinion, the Employer's non-solicitation policy ought to have made some accommodation for Union officials attending to the workplace on union business.

[157] On the other hand and as we have already indicated, the right of employees to decide the representation question is a fundamental right and that right ought not be taken away from employees unless we have lost confidence in the capacity of the employees to independently exercise their rights under the *Act*. In considering the evidence presented in these proceedings, which included a period of time spanning over the past seven (7) years, we ultimately were not persuaded that the totality of this evidence, notwithstanding the above

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[44] See: United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp., et. al., 2010 CanLII 90103, LRB File No.184-10 (Vice-Chairperson Schiefner, Reasons for Decision dated December 10, 2010) at para. 40. Corrigendum released March 31, 2011.

captioned concerns of the Board, was sufficient for the Board to lose confidence in the capacity of the employees of the bargaining unit to independently decide the question of their representation.

[158] Having carefully considered the evidence in these proceedings regarding the conduct of the Employer, both as individual impugned actions and after considering those actions collectively, we were not persuaded that the evidence demonstrates conduct on the part of the Employer of a kind or of a degree sufficient for this Board to exercise its discretion pursuant to s. 9 of the *Act* and dismiss Mr. Button's application.

Discretion to dismiss over and above s.9:

[159] The Union argued that the Board has discretion to delay or dismiss Mr. Button's rescission application over and above the authority set forth in s. 9 of the *Act*. With all due respect, we are not persuaded by this argument. For the reasons stated by this Board in *Lesyk, supra*, following the 2008 amendments to *The Trade Union Act*, the exercise of this Board's discretion to withhold the representative question from affected employees in an application pending before the Board must now find its genesis in s. 9 of the *Act*. In our opinion, no residual authority of the kind suggested by the Union exists for this Board outside of s. 9 of the *Act*.

Conclusions:

[160] For the foregoing reasons, the Union's applications alleging unfair labour practices on the part of the Employer are dismissed. In addition, the Union's application that Mr. Button's rescission application be dismissed or delayed on the basis of employer interference is also dismissed.

[161] Finally, it is noted that the Union filed an objection to the conduct of the vote directed to by the Board on December 9, 2010 and conducted on December 22, 2010[45]. The Union's objection was filed with the Board on December 23, 2010. The Union objected to the participation in the vote by any employees who were hired by the Employer after the date of the original certification of the Union (December 4, 2008) and who had not applied for or maintained membership in the Union following the security demand made by the Union. In our opinion, the Union's objection to the conduct of the vote must be dismissed. For the reasons already stated

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[45] LRB File No. 224-10.

by this Board, no employees hired by the Employer during the period that the Union's certification Order was suspended are ineligible to participate in the representative question because of a failure to apply for and maintain membership in the Union.

[162] As a consequence, the ballot box shall be unsealed and the ballots counted in the ordinary course.

[163] Board Member Wagner dissents from these Reasons.

DATED at Regina, Saskatchewan, this **23rd** day of **June, 2011.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson

Dissent of Hugh Wagner

[164] Having considered the evidence, the provisions of the *Trade Union Act* and the Reasons for Decision, I am submitting the following dissenting opinion with respect to the herein matters. As the Board's Reasons for Decision say:

> *This matter began with a union organizing drive and application for certification by UFCW, Local 1400 to represent the employees of Wal-Mart Canada who were working at the employer's Weyburn, Saskatchewan store.*

It is interesting and telling, in my opinion, that subsequent to the Union's application for certification on or about April 7, 2004, the Employer posted a notice to employees in the Weyburn store. This notice is reproduced in the Reasons for Decision.

[165] In my opinion, the Employer's April 7, 2004 communication and a second communication posted on or about April 19, 2004, also reproduced in the Reasons for Decision, were designed to negatively influence employees by leaving the impression that the Union was engaged in sinister, suspicious and untoward conduct. In particular, the Employer's April 19, 2004 communication suggests that the Union was doing something improper by contacting employees at their residences and had somehow illicitly obtained employee addresses. In addition, the April 19, 2004 communication leaves the impression that the Union's organizing methods had raised issues of safety and harassment, even though was no credible evidence to suggest that anything of the sort had happened.

[166] It is my respectful opinion that Wal-Mart's April 19, 2004 communication to employees in the Weyburn store went beyond opinion and should be characterized as a deliberate attempt to influence employees and incite them against the Union. In addition, the communication ended with an invitation to employees to discuss the issues raised by the Employer with management. As I see the facts, from the outset Wal-Mart engaged in communications designed to insert the Employer in the employees' decision making for the purpose of influencing the outcome of the question of union representation. The Employer's actions, in my view, contradict the expression of employees' rights as set out in s. 3 of the *Trade Union Act*.

[167] Following the decision of the Board to certify the Weyburn store in December of 2008, the Employer resumed placing communications on the employee notice board regarding the issue of union representation. Between the date of certification and November, 2010, as the Reasons for Decision say, the Employer posted approximately twenty-eight (28) communications on the employees' notice board. As cited in the Reasons for Decision, on December 9 and 23, 2008, the Employer posted communications, which in my view, were intended to call into question the legitimacy of the Union's certification, including maligning its efforts to obtain employee contact information, which it was rightly and legally entitled to demand as a matter of law and practical labour relations balance. Once again the Employer's communications invite employees to discuss the subjects of the communication with management. In my view, this goes far beyond communication of an opinion. In addition, the December 23, 2008 communication refers to a meeting which suggest some form of captive audience gathering organized by the Employer.

[168] As referenced in the Reasons for Decision, following the decision of the Saskatchewan Court of Appeal to reinstate the Board's certification Order, the Employer posted communications on October 15, 2010 and October 20, 2010 which, in my opinion, disingenuously portrays the Employer as the defender of employees rights with regard to unionization and portrays the Union as being on the wrong side of the issue. Furthermore, the Employer's October 20, 2010 communication erroneously claims to be protecting employee privacy while including the names and addresses of each of the employees in the bargaining unit. And, to cap it off, the October 20, 2010 Employer communication practically invites the employees to decertify the Union and specifies a deadline of November 2, 2010. It is clear to me, from the evidence of Mr. Button, that the employee contact information posted by the Employer was used in assembling support for the rescission application and the decertification work was pursued with uncommon haste. Even if nothing else had been communicated by the Employer regarding the application for certification by UFCW, Local 1400 and all of the subsequent events, in my respectful opinion the October 15 and 20, 2010 communications stand as solid evidence of unfair labour practices and employer influence as contemplated by s. 9 of the *Trade Union Act*.

[169] The above communications from the Employer, in my opinion, invites employees to discuss the question of unionization with management. Similar iterations in Wal-Mart communications to employees in Weyburn suggest to me that there was an overwhelming

preoccupation on the part of the Employer with influencing the thinking and actions of employees against UFCW, Local 1400. As I have said above, these actions are, in my respectful opinion, sufficient to cause the Board to invoke s. 9 of the *Act* with regard to Mr. Button's rescission application.

[170] With regard to the issue of union membership as required by s. 36 of the *Act*, I do not find the Employer's arguments to be persuasive. It is my respectful submission that the effect of the Board's December 4, 2008 decision to certify the union placed an obligation to obtain union membership on employees' hired after the date of the original application for certification. Furthermore, the reinstatement of the certification Order by the Court of Appeal means that employees hired between April 2004 and the date of the Court of Appeal decision were bound to apply for membership in the Union. If the membership provisions of the *Act* are not applicable by virtue of the interregnum resulting from the post 2004/05 litigation, reconsiderations and other appeals, then it would stand that the time frame for determining whether Mr. Button's application for rescission was estopped and, therefore, his application is not timely.

Analysis and Conclusion:

[171] It is my respectful opinion that the Employer's actions and communications can not and should not be considered separately since they were, as the Union argued, part of an evident strategy to influence the employees in Weyburn. The central purpose of expressing an opinion is to influence the people to whom it is communicated. The fact that the Employer's communications were separated by the passage of time does not diminish the equally compelling fact that all of said communications were joined by the central theme of opposition to being unionized.

<u>LRB File No. 096-04 – Communications to Employees in 2004</u>

[172] The Reasons for Decision say that LRB File No. 096-04 ought to be dismissed since the allegations, "are now too old to form the basis of a violation under the *Act*." However, there is no evidence that the complainant did not pursue its complaints in a timely fashion. The only aspect of this element that the Board heard (aside from the disagreement over whether or not an unfair labour practice had occurred) is whether it was old news. The fact that the Union

was certified, albeit four (4) plus years after the application, does not by law, in my view, vindicate the Employer nor obviate the original unfair labour practice complaint.

[173] With regard to the impugned Employer communications from 2004, the Union asked the Board to find that a violation of the *Act* had occurred. The Reasons for Decision say that, "the Board is inescapably drawn to the conclusion that seven (7) years is too much delay for this Board to subject the Employer's actions in 2004 to the scrutiny of the *Act*." I do not agree and ask what harm and disadvantage would the Employer suffer, save and except for being found to have violated the *Act*?

[174] Furthermore, I find that the Employer communications were designed to denigrate the Union and suggest without any objective proof or basis in fact that the Union's conduct was suspect and/or illegitimate. The Employer's communications, in my respectful opinion, were laced with anti-union animus that went beyond any reasonable balance and were designed to galvanize employees into abandoning attempts to unionize.

[175] On the facts of this case, I disagree with the Reasons for Decision regarding the Employer's communications to employees in 2004 and after the reinstatement of the December 2008 certification of the Union.

[176] In my experience and view, the Employer's communications would be seen by a person of average intelligence as vehement Employer disapproval of being unionized. I would find that the Employer's communications were intended to interfere with the average employee's exercise of her/his rights by repeatedly implying that the Union was up to no good.

<u>LRB File No. 038-05 – the Closure of the Jonquière store:</u>

[177] I disagree with the conclusion in the Reasons for Decision that the Employer's actions in Jonquière, Quebec are too old to be considered. Based on the evidence I heard, it is my finding that the prospect of the Weyburn store closing on account of unionization was a real and palpable consideration for employees and still is. On the evidence, including Mr. Button's testimony, I would find that there is a substantial connection between Wal-Mart's closure of the Jonquière store and the herein application for rescission. Measuring the precarious economy of these times into the whole consideration, I would find in favour of the Union's complaint.

[178] I also disagree with the Reasons for Decision wherein it is found that the Employer can be excused for failing to bargain collectively following the Board's interim Order of December 24, 2008. An obviously knowledgeable employer with sufficient resources to bring an application to stay a certification Order of the Board should not be assumed to be confused when the subsequent Order of the Board relieves the Employer from some, but not all, of its obligations under the *Trade Union Act*. Having said that, I also disagree with the interim Order of the Board which exempted the Employer from the full application of the *Act*.

[179] For the above reasons, I respectfully disagree with the Reasons for Decision of Vice-Chairperson Schiefner noted above. I would find and order that Wal-Mart enter the first collective agreement bargaining process with UFCW Local 1400; and that all other proceedings before this Board against unionization should be dismissed until there is a first collective agreement covering the employees in Weyburn and the subsequent open period occurs under the *Act* if the employees should choose to act.

LRB File No. 184-10 – Alleged Violations following the Reinstatement of Certification Order:

[180] I disagree entirely with respect to the Board's conclusions regarding the Employer's communications and conduct following reinstatement of the Union's certification Order. From the perspective of an officious bystander, when I read the Employer's communications and consider the evidence of its conduct the conclusion I reach, remembering the Employer's economic power over employees, is that Wal-Mart is attempting to influence and colour its employees' perspective, as well as doing its utmost to avoid the consequences of being unionized. Furthermore, I find that the motive for Wal-Mart's behavior to be a violation of s. 9 of the *Trade Union Act*.

Allegation that the Employer failed to comply with the Union's security demand were in violation of the *Act*:

[181] In my opinion, the majority decision fails to address when the certification Order was in effect and fails to address any retroactive consequences. If the December 2008 certification Order was truly stayed by the Courts, then the saw should cut both ways. See below.

LRB File No. 177-10 – The Rescission Application:

[182] I disagree that the application for rescission was filed within the prescribed open period for the same reasons cited in my dissent from the December 9, 2010 Board's Reasons for Decision on the Procedural Matters. It is my respectful opinion that the application for rescission is untimely.

[183] In my view, the Board's reluctance to rely on s. 5(k) to cure or address timeliness defects in applications, as expressed in past cases and in this Reasons for Decision, is good policy. However, the facts of this case are unique in that the Union has been denied its certified rights to represent the employees of Wal-Mart in Weyburn as a result of matters extraneous to the heart of any application for certification.

[184] UFCW, Local 1400's representation rights, I might add, were obtained legally and certified by this Board albeit after considerable delay. Furthermore, if there is a doubt, which I do not share, as to whether s. 5(k) can be relied on to amend the open period for filing an application for rescission, then the Board can rely on s. 5(i) and s. 5(j) (ii) to amend the period of operation of the original certification Order and the open period. It is my submission that the facts of this case provide the conditions precedent for a finding that it is necessary to amend the original certification Order as I have described.

Allegation of s.9 interference by the Employer:

[185] With respect, I draw a completely different conclusion as to the intent and effect of the communications posted by the Employer before and after October 20, 2010. Each of the Employer's communications on their own, or taken together, were intended to enlist and/or incite employees against union representation and to cast UFCW, Local 1400 and, occasionally this Board as well as the Court of Appeal, in a negative light. If not, then why were the communications issued and posted? In my opinion the Employer used its captive audience advantage and a "bully pulpit" to inveigh against claimed injustice when there is no evidence or proof that injustice had occurred. For these reasons I find, and would order, that Wal-Mart has violated ss. 11(1) (a), (b) and (g) of the *Trade Union Act*. For the same reasons I find, and would order, that the application for rescission should be dismissed since it was made in whole or in part on the advice of, or as a result of, influence of or interference by the Employer.

[186] With the greatest of respect, it is my opinion that the 2008 amendments to s. 6 of the *Trade Union Act* do not prohibit the Board from intervening to remedy a situation such as presented in this case. In my opinion, the amendments to s. 6 were intended to address applications for certification and not the issues raised by the present applications, including the application for rescission.

[187] While there are some similarities, procedural and otherwise, between applications to acquire union representation and applications to rescind representation, intervention by the Board is an important point of departure. For example, would the Board order a certification as a remedy as part of its quiver of remedial options as a result of the 2008 amendments to the *Trade Union Act*? Even though I think this could and should happen, I think it will not. Similarly, does the existence of the amended s. 6 trump s. 9? I think it does not.

[188] For the foregoing reasons, I am satisfied that the application for rescission should be dismissed and the employees of Wal-Mart in Weyburn should be granted their rights and opportunity to actually experience the benefits of union representation and collective bargaining. Furthermore, I am convinced on the facts of this case that the Board should exercise its full oversight and supervisory authority to make sure that the first collective agreement provisions of the *Trade Union Act* are actualized for the employees and the union certified to represent them. In the fullness of time, if the employees arrive at an independent opinion, free from Employer interference, that they do not wish to be represented by the Union some or all of them can bring an application for rescission.

Dissenting Conclusions:

[189] For all of the reasons expressed above, I would find in favour of the Union's unfair labour practice applications and would order the Employer to cease and desist. Had a claim for damages been submitted by the Union, I would award same. In addition, as I have said above, I would order the dismissal of the application for rescission.

Hugh Wagner,
Board Member