AMENITY HEALTH CARE L.P., Applicant v. WORKERS UNITED CANADA COUNCIL, TANYA PARKMAN and GWEN APRIL BRITTON, Respondents

LRB File No. 160-17; July 20, 2018

Chairperson, Kenneth G. Love Q.C.; Members: Laura Sommervill and Maurice Werezak

This decision has been completed pursuant to section 6-94 of *The Saskatchewan Employment Act*

For the Applicant: Kevin Wilson Q.C.
For the Respondent: Heather Jensen

Section 6-63(1)(a) of *The Saskatchewan Employment Act* – Employer brings application to Board alleging irregularities in the organizing campaign by Workers United Canada Council and named employees - Board reviews evidence from employees regarding the conduct of the organizing campaign and its jurisprudence regarding this provision of *The Saskatchewan Employment Act*.

Section 6-63(1)(h) of *The Saskatchewan Employment Act* – Board reviews testimony of witnesses regarding voting procedure utilized by employees – Employees voted in public while seated around dining table in restaurant – Board finds this procedure incompatible with requirement that the vote be conducted by secret ballot as set out in section 6-22 of *The Saskatchewan Employment Act*.

Evidence – Board reviews testimony of witness recanting previous written statement provided to employer regarding intimidation during organizing campaign – Board determines that prior statement admissible.

Evidence – Board invited to infer that evidence from a witness not called by the Union would not be beneficial to Union's case in accordance with the rule in *Murray v. City of Saskatoon* – After reviewing facts and jurisprudence Board draws inference that evidence would not be supportive of Union's case.

REASONS FOR DECISION

Background:

[1] Amenity Health Care L.P. ("Amenity") brought an application to the Board alleging that the Workers United Canada Council (the "Union") and/or the named individuals engaged in an unfair labour practice, contrary to section 6-63(1)(a) and (h), in respect to an application by the Union to represent employees employed by Amenity at a Tim Hortons franchise restaurant in Canora, Saskatchewan.

[2] The final hearing of the application was delayed due to an application for non-suit brought by the Union at the close of Amenity's case. By its decision dated April 20, 2018, this panel of the Board dismissed the Union's application for non-suit resulting in the final hearing of this matter on May 30, 2018.

[3] Throughout the hearing of this matter, all of the various individuals at the Tim Horton's in Canora were referred to by their first names. For ease of reference, I have continued to use first names to reference the various individuals.

Facts:

[4] The Board heard testimony from 2 witnesses for Amenity and 2 witnesses for the Union. The testimony heard by the Board was unusual insofar as one witness testified to recant previous written communication she had provided to Amenity, saying, in her testimony to the Board, that she had lied in that communication. The other was a failure by a witness to testify, notwithstanding that her testimony could have been helpful and that she had been subpoenaed by the Board. We will deal with those two situations in our recitation which follows regarding the witnesses testimony.

[5] The following is a summary of some of the testimony heard from the witnesses at the hearing. We will make reference to additional testimony or facts found by the Board as necessary during the analysis portion of this decision.

Testimony of Melanie Hill:

[6] Melanie testified that the Union's organizing effort began in April of 2017 when April Britton (Ms. Britton was referred to as "Gwen" throughout the hearing and will be referred to as "Gwen" throughout these reasons) and Connie Pidscalny ("Connie") came to see her at her home to speak to her about forming a union at the Tim Horton's franchise restaurant in Canora, Saskatchewan. She testified that the "inside organizer" for the union was Gwen, but that she had also met the outside organizer, Rabia Syed ("Rabia"), in late April, early May of 2017.

[7] In cross-examination she acknowledged her initial enthusiasm for formation of a union at the workplace. She also acknowledged that she then travelled with Gwen and Connie to visit with another co-worker, Yinban Hu ("Gracie") in respect to formation of the union.

[8] She testified with respect to discipline imposed upon her during May and June of 2017 by Tanya Parkman ("Tanya") who was her acting Manager. She testified she was disciplined on 4 separate occasions by Tanya for indiscretions at work, 3 of which she did not feel were totally fair. She testified that by imposing discipline upon her, Tanya was "making her life a living hell".

[9] She testified that Tanya was acting as Manager of the store during a transition between Managers. She testified that the new Manager, Gianina Soreta ("Gia") took over responsibility as Manager near the end of June, 2017 and Tanya reverted to her former supervisor position.

[10] She testified as a result of the imposition of the 4 discipline events that she was frightened that she would be terminated from her job. At that time she indicated she had mixed feelings towards the Union organizing drive which she supported at some times, but didn't support at other times. She testified concerning a telephone call made in early June, 2017 to Rabia from Connie's home in which Tanya asked Rabia if Melanie would be "safe" if a union came into the workplace due to all the discipline that had been imposed.

[11] She also testified concerning an email[1] sent to her from Gwen dated June 30, 2017. That email directed the others to not open their ballots when they were received from the Board, but to wait until they could all be together and that they would open them together,

She testified that she read the Board's directions regarding how to vote at a gathering of herself, Connie, Tanya, Gwen and Gracie at the Silver Leaf Restaurant in Canora run by Gracie's family. Her testimony, and later testimony from Union witnesses, established that Gracie had limited English language skill both oral and written.

[12] She testified that she found the request to not open and mark her ballot until they all could be together at the Silver Leaf restaurant to open and mark their ballots. She testified that she went along with the others to avoid any further incidents of discipline which she was concerned about because she might lose her job. When she received her ballot from the Board she testified that she did not open it as requested by the email.

[13] She also testified concerning receipt of another email dated July 3, 2017[2] from Gwen. The email indicated that Gwen had gone to see another co-worker, Sue Park ("Sue") "and told her not to accept registered mail and to tell the postie to send it back."

[14] She also testified about another meeting at the Silver Leaf on July 7, 2017[3]. In addition to herself, Gwen, Connie, Tanya and Gracie, Tanya's spouse Patrick was there as was Gracie's husband and young son. Melanie's husband was also present. They were all seated around a table in the restaurant.

[15] She also described strange behavior by Patrick. He would come to Tim Horton's every time that Tanya was working and would either sit in the restaurant or outside in the parking lot for lengthy periods of time watching the restaurant. She found this behavior unusual. She testified that she thought that Tanya was being abused and that she found Patrick to be "creepy". She testified that she was intimidated by Patrick's behavior. She testified that she didn't think that Patrick should have been at the June 30th or July 7th meeting. She testified that he was there watching that people did what Tanya and Gwen wanted them to do.

[16] She testified that all of the employees at the July 7th meeting marked their ballots at that meeting. She testified that because of the way they were seated at the table, everyone could see how the others voted. She said she could see where the others who voted had put their "X". She said she did not object to the process because she was again

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[1] Exhibit A-5
[2] Exhibit A-6
[3] Later, in cross-examination, she acknowledged that the date could have been July 5, 2017

concerned that if she strayed from the expected line that the others would make her life a living hell.

[17] Tanya and Gwen then took the ballots to mail them. Melanie testified that she was concerned about that because she would not be able to change her vote if she wished prior to mailing it. She testified that she would not have participated in the process for voting that resulted if she hadn't been fearful of for her job.

[18] She testified that some of the employees began wearing a recording device, prior to July 7, 2017, in their bras, to capture management comments against the union. She testified that she thought it was an invasion of privacy and that the recordings could also be used to capture comments she may make. While she had taken the device herself, she testified that she declined to wear it.

[19] She also provided the Board with an email from Gwen dated January 8, 2018 from Gwen ostensibly with respect to her dogs, but which she testified, she felt was an attempt to get in contact with her so as to stop her testifying at this hearing. She also identified another email from Gwen on January 22, 2018, inviting people to come to the hearing before the Board.

[20] In cross-examination, she testified that she had been promoted to a baker position in July of 2015 and her wage rate increased by $1.00 per hour. She also testified that she was promoted to the position of temporary supervisor, with no further wage increase, when Tanya was absent from work due to an injury she had suffered. Tanya later resigned and Melanie's position as supervisor was made permanent in August, 2017.

[21] Melanie also testified that she prepared a letter to her employer at Connie's house using Connie's computer in late July or early August, 2017 about her concerns regarding the voting process. She testified that she emailed the letter to her Director of Operations, Doug. She testified that she sent the letter because she didn't want to be involved in "this union stuff" any longer.

[22] She also testified that she was aware that Sue had resigned her employment with the Tim Hortons restaurant in late June-early July of 2017.

[23] She testified that she had received justified discipline since the union organizing event when she failed to turn off certain pieces of equipment which was her responsibility.

[24] She testified that she and Connie went to see Doug in early July, 2017 to complain that some of the employees were making secret recordings. She testified that Doug asked her and Connie to put something in writing regarding the recordings[4]. She also testified that following that discussion a notice was posted by management advising that employees were not permitted to record while working. She acknowledged meeting two more times with Doug at her initiative. At each of those meetings, Doug advised her to put her concerns in writing.

[25] She testified that she had asked Gwen to stop talking to her about "union stuff" sometime after the meeting at the Silver Leaf Restaurant where they had all marked their ballots. She made this request while she and her husband were assisting Gwen to move to a different home in Canora. That request was honoured by Gwen.

Testimony of Donna Fisher:

[26] Donna testified that she was an employee at the Tim Hortons restaurant in Canora. She was aware of the union organizing drive, but did not participate with the others, ie: Gwen, Tanya, and Connie with respect to the organization. She was contacted once or twice by Tanya and Connie with respect to her support for the unionization. She told them she was not interested and she testified they left her alone.

[27] She testified that Tanya told her to "rip up her ballot and put it in the garbage". She testified that Tanya made that comment to her prior to her having received her notice that she had received registered mail. She testified that she picked up the registered mail, opened it, glanced at the contents, and then put it away.

[28] She described Patrick and his visits to the restaurant as being intimidating and scary. She testified that he gave her the "hebby jebbies". During cross-examination, she acknowledged that she, herself, was not fearful for her safety.

[29] She also acknowledged, in cross-examination, that she gave no thought to completing and returning her ballot.

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[4] See paragraph [19] above

Testimony of Tanya Parkman:

[30] Tanya testified concerning each of the discipline incidents referenced by Melanie in her evidence. He evidence was that she imposed the discipline only after consultation with and approval from the General Manager, Eric. She testified that when she was filling the position of supervisor that she had no authority to discipline employees, but had that authority while acting as Manager.

[31] She testified that the unionization effort began about June 22, 2017 after she was no longer the acting Manager for the restaurant. She testified that by that date, she had reverted to her position as supervisor and the new Manager, Gia, had taken over.

[32] She provided testimony concerning the voting meeting at the Silver Leaf restaurant. She said that she arrived at the restaurant with Patrick in her car. Others, she said also came separately. She described the meeting as "somewhat of a celebration". She said that one of those present started to read the voting instructions provided by the Board, but that Melanie interjected and took over reading those instructions.

[33] She testified that everyone voted while seated at the dining tables. She noted that there were still plates on the table when they voted. She noted that the voting only took a couple of minutes. She denied that she told anyone how to vote. She testified that Gwen explained to Grace, whose English skills were rudimentary, that one box was for "yes" and one box was for "no". She testified that she did not see how anyone else voted, nor did she attempt to see how the others had voted.

[34] She testified that Connie offered to pick up Melanie's and Grace's envelopes and take them to the post office to mail the following day as the post office was closed when the voting occurred. She testified that she mailed her ballot the following day from Buchanen, Sask. where she resided. She testified that she did not show anyone how she had voted.

[35] In cross-examination, she testified that she did not deal directly with Rabia that she could recall and that contact with Rabia was through Gwen. She acknowledged that she had asked Rabia during a telephone conversation whether the union could "save Melanie's job". She testified that the response from Rabia was that it would depend on what Melanie did in the future.

[36] Tanya also testified concerning her relationship with Patrick. She testified that she did not think that Patrick was abusive to others, only her and that others were not intimidated by him. She testified that she had since left the relationship. She acknowledged that Patrick's behavior was not normal behavior.

[37] She also testified in cross-examination that Sue was not at the voting meeting, and that she was aware that Michaela Casselman ("Mickey") did not receive a ballot. She testified that she may have mentioned that Mickey did not get a ballot to Gwen. She testified that she was aware that Gwen had requested a new ballot from the Board for herself, but was not aware if any request had been made on behalf of Mickey.

[38] She testified that the purpose for the voting meeting was to vote as a "team" and to celebrate their voice being heard. She acknowledged that there was no attempt to insure confidentiality in the process. She also acknowledged that she was aware that the voting process was to be a secret process.

[39] She testified that Gwen did not have her voting package at the meeting and did not vote with the rest of them.

Testimony of Connie Pidscalny:

[40] Connie was a supervisor at the Tim Hortons in Canora when the union certification drive was ongoing. She testified that she was approached by Gwen with respect to her interest in being represented by a union at the workplace. She could not recall when this contact occurred and refused to be "pinned down" with respect to any dates as to when events occurred.

[41] She testified that she had ordered the food for the voting meeting in advance of the meeting. She also testified that the decision to vote at the meeting had been a "team" decision. She testified that she did not tell anyone how she voted and no-one asked her how she voted. She also testified that she could not see how the others voted because they were not seated close together at the dining table. She noted that there was no discussion about how people had voted at the table. She testified that neither Melanie nor Gracie had the money to mail their ballots by priority post, so she volunteered to mail them using her credit card in payment.

[42] Connie testified concerning her, and others, participation in an attempt to record conversations with management in the workplace. She, and others attempted to secretly record conversations at the workplace, particularly any anti-union comments by the management of the restaurant. She testified that Gwen, Tanya, Melanie and herself participated in the attempt to record conversations, but that the recording equipment did not work.

[43] She and Melanie decided that recording conversations at work was not something they wanted to be involved in. They went to Doug and advised him that the recording was occurring. He requested them to put their concerns in writing and that he would turn their concerns over to the company's lawyer. After several conversations with Doug and reminders, she complied with the request and provided a letter to Doug outlining her concerns. Melanie also provided a letter.

[44] Connie's letter was entered as exhibit A-11 in these proceedings. In her letter, dated August 1, 2017, she says:

> *I felt very unsure and uncomfortable about going to Gracie's restaurants [sic] with my ballot, but I went anyways, cause of the pressure and intimidation Gwen and Tanya and Tanya's boyfriend Patrick. The 3 of them didn't trust Mel and myself. Gwen, Tanya and her boyfriend Patrick, definitely wanted us there, to make sure we marked "YES" on our ballots. They wanted to see us mark the "x" on the yes box and than [sic]we were allowed to seal it. Tanya and Gwen had said to me that i [sic] better take Mel to the post office the next day and make sure our ballots were mailed. Not to mention that they have Gracie in the middle of their charade.*

[45] In her testimony, Connie recanted these comments, saying that she "did it because she was scared that they were going to lose their jobs". She testified that she went along with it as well, because Melanie wanted to attack Tanya. She testified that her main concern was with the surreptitious recording that was going on. She testified that she had been "caught up in a lie". She testified that she called the Board to advise them of her error and also wrote a letter to the Board prior to April 12, 2018.

[46] She testified that she was fired twice by Tim Hortons in Canora. The first time, she was re-instated and the second time was on April 12, 2018. At the time of the hearing she

remained terminated from her position. In cross-examination, she acknowledged that the union was challenging her April 12, 2018 termination.

[47] She testified that she did not give a copy of her August 1, 2017 letter to the Union and that she hasn't looked at it since she emailed it to Doug.

[48]

Relevant statutory provisions:

> ***6-5*** *No person shall use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue to be or to cease to be a member of a union.*
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> ***6-22****(1) All votes required pursuant to this Part or directed to be taken by the board must be by secret ballot.*
>
> ***6-63****(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*
>
> > *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten or coerce an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization;*
> >
> > …
> >
> > *(h) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to a union or an employee*

Employer's arguments:

[49] Amenity argued that the evidence showed that the Union had committed an unfair labour practice contrary to section 6-63(1)(a) of the *SEA*. Amenity argued that the tactics utilized by the organizers in this case, including the voting exercise at the Silver Leaf restaurant, precluded the exercise of the employee's free will. Amenity also argued that the team approach to voting allowed for no deviation from the expected result.

[50] Additionally, Amenity argued that the actions of the union and the other named respondents precluded the employees from exercising their right to vote by secret ballot as

required by the *SEA*. By adopting the process which they did, the Union and the other respondents removed all secrecy and anonymity from the voting process.

[51] Amenity also argued that the Union or the named Respondents engaged not only in a campaign to corral some votes, but also took steps to insure that others did not vote or, when a voter did not obtain the ballot from the Board, took no steps to assist that employee to obtain a ballot to vote.

[52] Amenity pointed to the numerous incidents of discipline against Melanie coupled with the ongoing surveillance of employees through the secret recording process as evidence of the tactics utilized to control not only Melanie, but also Connie. Additionally, Sue was told to not open her ballot and to "tell the postie to return it".

[53] Amenity argued that the named respondents acted as agents of the Union and their misconduct was therefore the misconduct of the Union. Amenity also argued that section 6-63(1) included "any other person" as being liable to sanction for the coercion or intimidation under section 6-63(1).

[54] Amenity also requested the Board consider drawing an inference in accordance with the *Murray v. City of Saskatoon*[5] regarding the failure of Gwen to testify.

[55] Amenity argued that the proper remedy in the circumstances was to dismiss the certification application and/or cancel any Order made with respect to the application. Alternatively, it argued that a new vote should be ordered.

Union's arguments:

[56] The Union argued that Amenity had failed to prove the commission of an unfair labour practice by either the Union or the named respondents. It argued that the employees were, in this case, exercising their right of association and communication. The Union argued that there was nothing in the actions taken by the employees that had the effect of intimidating or coercing any of the employees, nor did it control them such as to deprive them of the right to a secret ballot vote.

[5] 1951 CanLII 202 (SK CA), 1951, 4 W.W.R. (N.S.) 234 @ p. 240

[57] The Union argued that the process for voting employed by the employees satisfied the secret ballot provision of the act and that Amenity was trying to conduct a collateral attack on the mail in voting process utilized the Board consistently for the conduct of votes under the *SEA.*

[58] The Union argued that there was no reason to have called Gwen to testify and that no adverse inference should be drawn as a result of her not testifying.

[59] The Union argued that the relief sought by Amenity was wholly inappropriate and that the application should be dismissed in its entirety.

Analysis and Decision – Evidentiary Issues:

[60] Before embarking upon our analysis of the issues to be decided in this case, we must look at two evidentiary issues that presented at the hearing. The first of these is the testimony of Connie and her recantation of her previous letter to the employer. The second is to consider if an inference should be drawn from Gwen's failure to testify and what inference, if any, should be drawn.

The testimony of Connie Pidscalny:

[61] The Supreme Court of Canada has varied what was known as the "orthodox rule" with respect to use of prior inconsistent statements in its decisions in *R. v. K.G.B.*[6]*, R. Khan*[7] *and R. v. Smith*[8]. That variation was with respect to the use of such statements in criminal proceedings. In *Khan v. College of Physicians and Surgeons of Ontario*[9] the Ontario Court of Appeal concluded that the principled approach to hearsay, as outlined by the Supreme Court of Canada should be applicable in civil, as well as criminal cases. That decision was adopted by our Saskatchewan Court of Queen's Bench in its decision in *John Phillip Murray v. The Council of the Saskatchewan Veterinary Medical Association*[10].

[6] 1993 CanLII 116 (SCC)
[7] 1990 CanLII 77 (SCC)
[8] 1992 CanLII 79 (SCC)
[9] 1992 CanLII 2784 (ON CA)
[10] 2008 SKQB 424

[62] The orthodox rule which was overturned by the Supreme Court in *R. v. K.G.B.* was stated by the Ontario Court of Appeal in that case[11] as follows:

> *That prior inconsistent statements of a witness may only be used in assessing the credibility of a witness, and may not be used as evidence of the truth of the matters stated therein, is a principle of criminal law in Canada of long standing which was recognized in Deacon v. The King [1947 CanLII 38 (SCC), [1947] S.C.R. 531]. In R. v. Mannion [1986 CanLII 31 (SCC), [1986] 2 S.C.R. 272], the rule was restated by the Supreme Court of Canada. In that case, the court was invited to review the rule so as to make admissible as evidence of their contents such past contradictory statements by nonparty witnesses where it is shown that they had been made under oath and subject to cross-examination, but the court found it unnecessary to deal with that issue. In Corbett v. The Queen [1988 CanLII 80 (SCC), [1988] 1 S.C.R. 670], the rule was again restated, and more recently in R. v. Kuldip [1990 CanLII 64 (SCC), [1990] 3 S.C.R. 618], a judgment of the Supreme Court of Canada, released December 7, 1990, the principle appears to have been once again reaffirmed.*

[63] Chief Justice Lamer, in his reasons in *R. v. K.G.B* adopted two factors to be considered in reviewing prior inconsistent statements. He said:

> *I am of the view that evidence of prior inconsistent statements of a witness other than an accused should be substantively admissible on a principled basis, following this Court's decisions in Khan and Smith. However, it is clear that the factors identified in those cases -- reliability and necessity -- must be adapted and refined in this particular context, given the particular problems raised by the nature of such statements. Furthermore, there must be a voir dire before such statements are put before the jury as substantive evidence, in which the trial judge satisfies him or herself that the statement was made in circumstances which do not negate its reliability.*
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> *As a threshold matter, before discussing the specific requirements of the reformed rule, I would adopt the requirement embodied in the provision proposed by the Law Reform Commission of Canada, and in the English Civil Evidence Act 1968, that prior inconsistent statements will only be admissible if they would have been admissible as the witness's sole testimony. That is, if the witness could not have made the statement at trial during his or her examination-in-chief or cross-examination, for whatever reason, it cannot be made admissible through the back door, as it were, under the reformed prior inconsistent statement rule.*

[11] (1991) 49 O.A.C. 30 @ p. 32

[64] A threshold consideration in determining if the prior statement should be admitted is that the statement must have been otherwise admissible as the witness's sole testimony. That threshold is satisfied in this case. The statements in Connie's letter to her employer, Amenity, are not hearsay and are direct evidence that she felt intimidated and controlled with respect to her freedom to make an independent choice respecting whether or not to be represented by a trade union for collective bargaining. The statements are Connie's direct evidence as to her state of mind at the time the voting took place. They would have been admissible as her sole testimony had they not been recanted under oath.

[65] Chief Justice Lamers in his reasons in *R. v. K.G.B.* said the following with respect to the reliability issue.

> *The reliability of prior inconsistent statements is clearly a key concern for law reformers and courts which have reformed the orthodox rule, and, as I have outlined, this concern is centred on the hearsay dangers: the absence of an oath, presence, and contemporaneous cross-examination. The reliability concern is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered. In other words, the focus of the inquiry in the case of prior inconsistent statements is on the comparative reliability of the prior statement and the testimony offered at trial, and so additional indicia and guarantees of reliability to those outlined in Khan and Smith must be secured in order to bring the prior statement to a comparable standard of reliability before such statements are admitted as substantive evidence.*
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> *In my opinion, and as my discussion of these dangers above indicates, only the first two of these dangers present real concerns in this context, and if these two dangers are addressed, a sufficient degree of reliability has been established to allow the trier of fact to weigh the statement against evidence tendered at trial by the same witness. The ultimate reliability of the statement and the weight to be attached to it remain, as with all evidence, determinations for the trier of fact. What the reliability component of the principled approach to hearsay exceptions addresses is a threshold of reliability, rather than ultimate or certain reliability.*

[66] In her sworn evidence to the Board, Connie admitted that she had prepared the letter[12] herself, using her computer, and transmitting it via email to Doug. Her testimony, and that of Melanie, confirmed that there was no pressure exerted upon her to make the statement,

nor to include any particular information within the statement. She was asked to put her concerns in writing after she voluntarily went to Doug with her concerns about the recording of conversations.

[67] Her explanation for why she made the written statement at the time was that she did it to assist Melanie, who she testified wanted to attack Tanya. She also acknowledged Doug told her when he requested that she put her concerns in writing that her statement would be "going to the lawyer". She also suggested that she wrote the letter because she was "scared that they were going to lose their job", but gave no testimony to support any suggestion that her job was then in jeopardy.

[68] When she testified, the situation was much different. She had been terminated from her job, not once, but twice. She had been re-instated after her first termination through the efforts of the Union and was currently being assisted by the Union with respect to the latest termination.

[69] Additionally, her testimony was unreliable insofar as she was not willing to be pinned down on details such as dates or times. Her recollection of events was not as clear as it could have been and she often was unable to recall when asked about specific events.

[70] Based upon the above analysis, we are of the opinion that the letter[13] which she wrote is sufficiently reliable as to be admissible in these proceedings.

[71] In addition to reliability, there is a requirement that there be some necessity for the prior statement to be admitted. Under the former "orthodox rule" that necessity was normally satisfied where the witness was unavailable or deceased. Mr. Justice Lamers refused to accept a strict interpretation of unavailability being an indispensable condition to satisfy necessity. He made reference to the Supreme Court's decision in *Ares v. Venner* where the Court allowed the use of contemporaneous nurses' notes as being *prima facie* proof of the facts stated therein.

[72] In *R. v. K.G.B.*, the Supreme Court adopted a flexible approach to the necessity requirement. In this case, however, we have the prior statement and the recantation of that

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[12] Exhibit A-11
[13] Exhibit A-11

statement under oath at the hearing. In those circumstances, we are directed by Mr. Justice Lamers as follows:

> *In the case of prior inconsistent statements, it is patent that we cannot expect to get evidence of the same value from the recanting witness or other sources: as counsel for the appellant claimed, the recanting witness holds the prior statement, and thus the relevant evidence, "hostage." The different "value" of the evidence is found in the fact that something has radically changed between the time when the statement was made and the trial and, assuming that there is a sufficient degree of reliability established under the first criterion, the trier of fact should be allowed to weigh both statements in light of the witness's explanation of the change.*

[73] The explanation given by Connie for changing what she wrote to Doug does not, in our opinion, show a radical change between the time the statement was made to Doug and her testimony at the hearing. In our view, the original statement in Exhibit A-11 was made more freely than was the recantation of that letter in her testimony, clouded as it was by the circumstances in which she found herself beholden to the Union. Nor did her explanation of why she wrote the letter to assist Melanie to attack Tanya make much sense. At the time that she wrote the letter, Tanya would have been off work as the result of injuries which she suffered. At that time, Melanie was the acting supervisor at the Tim Horton's restaurant. The evidence is that Tanya never returned to the workplace following her absence. Melanie then became the supervisor when Tanya left the workplace.

[74] Additionally, this Board is not bound by the strict rules of evidence as are the Courts. While the Board tries, as much as possible and practical to follow those evidentiary rules, the *SEA* provides specifically that the Board can pursuant to section 6-111(1)(e) "receive and admit any evidence and information on oath, affirmation, affidavit or otherwise that the board considers appropriate, whether admissible in a court of law or not".

[75] For these reasons, we find that exhibit A-11 is admissible for the purposes of this hearing.

***Murray v. The City of Saskatoon* – Should we draw an inference?**

[76] The Board reviewed the jurisprudence with respect to drawing inferences from the failure to call a witness who was available to testify in *RWDSU v. Sakundiak Equipment*[14]. At paragraphs [85] and [86], the Board said:

> **[86]** The rule in *Murray v. Saskatoon* was stated succinctly by the Saskatchewan Court of Queen's Bench in *Marlowe Smith v. General Recorders Ltd. et al* as follows:
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> > *… When a witness who could testify to facts in issue is not called, an inference may be drawn that the testimony would be contrary to, or at least would not support, the case of the party making assertions that might best be proved through that witness. Murray v. City of Saskatoon (No. 2) (1951), 1951 CanLII 202 (SK CA), 4 W.W.R. (N.S.) 234….*
>
> **[87]** This rule has been established law for some time. The history of the rule was recounted by the Supreme Court of Canada in *R. v. Jolivet**[17]***. At paragraph 25 - 28, Mr. Justice Binnie, speaking for the Court says:
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> > *25 The general rule developed in civil cases respecting adverse inferences from failure to tender a witness goes back at least to Blatch v. Archer (1774), 1 Cowp. 63, 98 E.R. 969, where, at p. 65, Lord Mansfield stated:*
> >
> > *It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.*
> >
> > *26 The principle applies in criminal cases, but with due regard to the division of responsibilities between the Crown and the defence, as explained below. It is subject to many conditions. The party against whom the adverse inference is sought may, for example, give a satisfactory explanation for the failure to call the witness as explained in R. v. R*ooke 1988 CanLII 2947 (BC CA), (1988), 40 C.C.C. (3d) 484 (B.C.C.A.), at p. 513, quoting Wigmore on Evidence (Chadbourn rev. 1979), vol. 2, at § 290:
> >
> > *In any event, the party affected by the inference may of course explain it away by showing circumstances which otherwise account for his failure to produce the witness. There should be no limitation*

[14] 2011 CanLII 72774 at para [85] et seq.

> *upon this right to explain, except that the trial judge is to be satisfied that the circumstances thus offered would, in ordinary logic and experience, furnish a plausible reason for nonproduction. [Italics in original; underlining added.]*
>
> *27 The party in question may have no special access to the potential witness. On the other hand, the "missing proof" may lie in the "peculiar power" of the party against whom the adverse inference is sought to be drawn: Graves v. United States, 150 U.S. 118 (1893), at p. 121. In the latter case there is a stronger basis for an adverse inference.*
>
> *28 One must also be precise about the exact nature of the "adverse inference" sought to be drawn. In J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at p. 297, § 6.321, it is pointed out that the failure to call evidence may, depending on the circumstances, amount "to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it" (emphasis added), as stated in the civil case of Murray v. Saskatoon, 1951 CanLII 202 (SK CA), [1952] 2 D.L.R. 499 (Sask. C.A.), at p. 506. The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony. Other jurisdictions also recognize that in many cases the most that can be inferred is that the testimony would not have been helpful to a party, not necessarily that it would have been adverse: United States v. Hines, 470 F.2d 225 (3rd Cir. 1972), at p. 230, certiorari denied, 410 U.S. 968 (1973); and the Australian cases of Duke Group Ltd. (in Liquidation) v. Pilmer & Ors, [1998] A.S.O.U. 6529 (QL), and O'Donnell v. Reichard, [1975] V.R. 916 (S.C.), at p. 929.*

[77] In the present case, we are asked to draw an adverse inference that the evidence which would have been given by Gwen would be contrary to, or at least would not support the Union's case.

[78] Gwen was an integral component in the organizing drive and was the main impetus for the union drive. She was the one who organized the voting process and was the person who instructed that no-one should open their ballots until they could all mark them

together at the Silver Leaf restaurant. She was the person who told Sue not to accept any registered mail and that she should instruct the "postie" to return it. She was the person who sent the email[15] which included the following:

> *Let Melanie and I talk to Mickey and treat Donna like nothings happen* [sic] *You don't want her to do something out of spite. Maybe she is too scared and has other reasons..maybe family members are giving her a hard time too.*

[79] She was also the main contact with Rabia and was the conduit for communication between her and the other employees. She was subpoenaed by the Union to testify, as were Connie and Tanya. We were given no explanation by any of the witnesses as to why she was unavailable to testify, notwithstanding that she had been subpoenaed to do so.

[80] Given these circumstances, we believe that the testimony of Gwen would have been beneficial to the Board and that we should have heard from her as a part of the Union's case. Given that she did not testify and no explanation was advanced as to why, and especially, after being subpoenaed, she failed to testify. We conclude that we must draw the inference that her testimony would be contrary to, or at least would not support, the Union's case.

Other Issues to be determined:

[81] In this application we are asked to determine if the Union committed an unfair labour practice pursuant to either section 6-63(1)(a) or (h). If we find that an unfair labour practice has been committed, we are then asked to consider the appropriate remedy for that breach.

Section 6-63(1)(a)

[82] For ease of reference, section 6-63(1)(a) provides as follows:

> ***6-63****(1) It is an unfair labour practice for an employee, union or any other*

[15] Exhibit A-5

person to do any of the following:

> *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten or coerce an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization;*

[83] This provision mirrors the provision in section 6-62(1)(a) regarding unfair labour practices by employers. It reads as follows:

> ***6-62****(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*

[84] In *Re: Cypress Regional Health Authority*[16], former Vice-chairperson, Schiefner reviewed the Board's jurisprudence regarding unfair labour practices under section 11(1)(a) of *The Trade Union Act,* the legislation which was replaced by the *SEA*. At paragraph [93] et seq he says:

> **[93]** In 2007, this Board conducted a comprehensive review of its jurisprudence on the application of s.11(1)(a) at that time in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc.,* 2007 CanLII 68,775 (SK LRB), [2007] Sask. L.R.B.R. 76, LRB File No. 162-06. In doing so, the Board made the following observations regarding permissible employer communications and the test(s) applied by the Board for determining when communication by an employer go beyond the bounds of permitted speech:
>
> > *[**43**] 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:*
> >
> > *…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*

[16] 2014 CanLII 17405

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.

*[**44**] 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**.*

For example, in Super Value, a division of Westfair Foods Ltd. and Alberta Food and Commercial Workers Union Local 401 (1981) 3 Can LRBR 412 this Board commented on the special susceptibility of most employees to employer comment and conduct during a union organizing campaign.

The Ontario Labour Relations Board also examines the objective factors of what has occurred and draws reasonable inferences to determine the probable effect of employer conduct upon employees of average intelligence. In Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Greb Industries Limited (1979) OLRB, February, 89 at 98 the Board stated:

*"In evaluating conduct which leads up to the holdings of a representation vote so as to determine whether that vote ought to be set aside, the Board has sought to establish whether the employees were capable of freely expressing their true wishes in that representation vote. The party which seeks to set aside a representation vote is required to establish that the impuned conduct has deprived the employees of the ability to freely express their true wishes . . . **The effect of impuned conduct upon the employees is determined by looking at the objective factors of what has occurred and drawing reasonable inferences as to what is a more probable effect of such conduct upon the employees in all these circumstances** . . . **This is an objective test. The Board's approach is to determine the likely effect of the impuned conduct upon an employee of average intelligence and fortitude**."*

*[**45**] The Board went on in Saskatoon Co-operative Association to apply the test to the communications in question, utilizing the objective test and considering the context in which the communications took place. The Board stated at 40:*

The Board has considered the circumstances surrounding the communications in this case in an effort to determine their probable effect. All of the communications occurred during the strike and, with the exception of the second and third communications, all of them were received by employees while they were on the picket line. In that situation it cannot be said that the employees were a highly sensitive captive audience for the employers' representations. 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.*
>
> ***[emphasis in original]***

[94] The Board in *Temple Gardens Mineral Spa, supra*, then went on to quote from portions of this Board's decision in *Retail, Wholesale and Department Store Union, Local 558 v. Canadian Linen Supply Company Limited*, [1991] 1st Quarter Sask. Labour Rep. 63, LRB File No. 029-90. In our opinion, this decision is helpful in understanding the Board's jurisprudence on permissible and impermissible communications by an employer at a time when s. 11(1)(a) read much as it does today:

> *Counsel for the Union argued that Section 11(1)(a) and (c) prohibit an employer from communicating with his employees about any matters that are the subject of collective bargaining, whether the communication in question is accurate or inaccurate. We do not agree. This Board has repeatedly taken the position that the Union's argument in this regard is not in keeping with the express terms of Section 11(1)(a) of The Trade Union Act nor has it generally been accepted by Labour Boards throughout Canada.*
>
> *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.*
>
> *See: inter alia, UFCW v. Saskatoon Co-operative Association Limited LRB 255-83; RWDSU v. Canada Safeway LRB 392-85; Saskatchewan Government Employees' Union v. Government of Saskatchewan LRB 250-88 and 290-88; SJBRWDSU and Teamsters v. Dairy Producers Co-operative Limited LRB 181-89; CUPE, Local 59 v. City of Saskatoon LRB 253-89.*
>
> *The determination of whether, in the particular circumstances, a communication has interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of a right conferred by the Act is an objective one. The Board's approach in such cases is to ascertain the likely effect of the communication on an employee of average intelligence and fortitude.*

> *An employer is not considered to have bargained directly with his employees, or failed to have negotiated in good faith with the union by fairly and accurately informing employees of its version of the negotiations taking place; see: Saskatoon Co-op (supra); Dairy Producers Co-op (supra).*
>
> *The Union also argued that proposals like the present one are fairly and accurately put to its membership in the normal course and therefore meetings such as were held by the Employer in this case were at once unnecessary and interventionist and constituted an attempt to circumvent the Union as bargaining agent or otherwise undermine its ability to represent its employees.*
>
> *In the present case, the Employer was careful to provide a measured and consistent explanation of the status of negotiations and the proposals which were previously put to the Union's bargaining committee. At the time that the communications occurred, the Employer was faced with the Union's impending meeting to vote on its proposal and the forceful position taken by the negotiating committee that they would not recommend its passage. The committee did not intend to remain neutral; nor are they required to do so. Quite the contrary, they made clear their intention to attempt to convince the employees to vote against the Employer's proposal. All things being equal, it was this committee who would be burdened with the responsibility of presenting the Employer's last proposal to the employees. This would be done against a backdrop of some lingering resentments that remained from the negotiating sessions surrounding the previous collective agreement.*
>
> *The Employer, meanwhile, believed that acceptance of the proposal was crucial to the continued economic viability of the Company in Saskatoon. When all of the circumstances are viewed through the prism of reality, one can hardly be surprised that the Employer wished to ensure that its proposal was put to the employees accurately, fairly and in a positive manner prior to their voting on the same. In doing so, the Employer was careful to ensure that the employees were provided with the same information that the bargaining committee had and that nothing occurred at the meetings with the employees that would amount to bargaining directly with them. In our view, he was successful in ensuring that both took place.*
>
> *In conclusion, we find nothing in the documents or in the oral presentation made by Jolly, in and of themselves, which indicates an attempt by the Employer to either bargain collectively with the employees or to circumvent the Union in the collective bargaining process. Further, there is nothing in the Employer communication, either oral or written, that could interfere with, restrain, intimidate, threaten or coerce an employee of average intelligence and fortitude in the exercise of any rights conferred by the Act.*

[85] While these comments relate specifically to communications by the employer to employees, other actions by an employer, trade union or other persons could also give rise to interference with, restraint upon, intimidation, threats or coercion of an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization.

Review of the testimony of the witnesses:

[86] We have the testimony of Melanie that she felt intimidated by Tanya's discipline of her to the extent that she testified it made her life a living hell. We also have her testimony that she felt threatened by Patrick due to his behavior towards Tanya and his repeated attendances at the workplace.

[87] We also have the concerns expressed by Connie in her letter[17] wherein she says:

> *I felt very unsure and uncomfortable about going to Gracie's restaurants [sic] with my ballot, but I went anyways, cause of the pressure and intimidation Gwen and Tanya and Tanya's boyfriend Patrick. The 3 of them didn't trust Mel and myself. Gwen, Tanya and her boyfriend Patrick, definitely wanted us there, to make sure we marked "YES" on our ballots. They wanted to see us mark the "x" on the yes box and than [sic] we were allowed to seal it. Tanya and Gwen had said to me that i [sic] better take Mel to the post office the next day and make sure our ballots were mailed. Not to mention that they have Gracie in the middle of their charade.*

[88] Connie later recanted these statements in her testimony, but we have determined that the original letter is admissible in these proceedings for the reasons given above.

[89] In addition to this evidence, we have the evidence of Tanya who testified that she was not trying to intimidate Melanie, and only imposed discipline on her on the direction of her general manager. She also testified that she was not the Acting Manager at the time the union organizing drive was underway, as Gia had already taken that position.

[90] Donna's testimony was less direct with respect to a breach of section 6-63(1)(a). Her testimony was that she was contacted by Tanya about the union organization drive, but expressed disinterest. She testified that Tanya told her to rip up her ballot when it arrived. In the end result, she did not vote, but she did not suggest in her testimony that it was because she was intimidated, threatened or coerced.

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[17] Exhibit A-11

[91] Finally, we have the failure to testify by Gwen. For the reasons given above, we have concluded that we should draw the inference that Gwen's testimony would not have supported the union's position or would have been contrary to it.

[92] In *Re: Western Automotive Rebuilders Ltd.*[18] , the Board considered the meaning of the word "interfere" as used in then section 11((2)(a)[19] of the *Trade Union Act*. At page 5 of that decision, former Chairperson Bilson says:

> *It is our conclusion that the concept of "interference in section 11(2)(a) must be broad enough to include conduct on the part of a trade union which, while not coercive or intimidating, is improper in some other way. Willful misrepresentation which is not coercive would, in our view, constitute an illustration of this.…The next phrase in Section 11(2)(a) – "with a view to encouraging or discouraging membership" – indicates that the intention of the section is to prohibit conduct which is undertaken with a conscious purpose, and does not catch conduct which is innocent of such calculation.*

[93] We have the testimony of Donna respecting any interference of her rights by Tanya in telling her to rip up her ballot. We are satisfied from Donna's testimony that she was not interfered with by Tanya and that she made her own decision not to become involved in the union organizing effort.

[94] There was also evidence that Mickey was left without a ballot. Gwen arranged to have a new ballot sent to herself, but no-one provided any assistance to Mickey to obtain a new ballot. We have no direct testimony from Mickey with respect to what steps, if any, she took to obtain a ballot and to vote in respect of the union organizing campaign. We also have the acknowledgement from counsel for Amenity at the outset of the hearing that Mickey had left her employment at Tim Horton's Canora prior to the vote and was not to be counted as an employee.

[95] We also have the evidence from Exhibit A-6 wherein Gwen advised her co-workers that she "…went to talk to Sue at the hotel today and told her not to accept registered mail and to tell the postie to send it back. She said she would.". Exhibit A-5 also an email from Gwen to Connie, Grace, Melanie and Tanya, contained the following:

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[18] [1993] S.L.R.B.R. No. 11, LRB File Nos. 239-92 & 263-92
[19] Now section 6-63(1)(a)

> *Let Melanie and I talk to Mickey and treat Donna like nothings happen. [sic] You don't want her to do something out of spite. Maybe she is scared and has other reasons..maybe family members are giving her a hard time too.*

The Test to be applied:

[96] In *Re: Cypress Regional Health Authority*[20] , the Board adopted an objective standard with respect to whether the conduct of the Union would interfere with, restrain, intimidate, threaten or coerce an employee of average intelligence and fortitude.

Decision regarding section 6-63(1)(a) application:

[97] We have concluded that the evidence does not show an unfair labour practice in violation of section 6-63(1)(a) of the *SEA*. We have reached this conclusion based upon the following considerations.

[98] We do not find the evidence that Patrick intimidated either Melanie or Connie persuasive. Patrick may have been abusive to Tanya, but there was no evidence to suggest that this abusive nature would transfer over to any of the other employees at Tim Hortons. He had no stake in the union organizing drive and had no involvement, based upon the email communications which we have received, in that drive. While he was present at the voting meeting at the Silver Leaf restaurant, there was no evidence that he took an active role in the meeting. It was more likely in our opinion that his presence was more to "control" Tanya than it was to act as an enforcer or to coerce those present to vote in a particular manner.

[99] Nor are we satisfied that Melanie was being threatened, intimidated, interfered with, restrained or coerced by the discipline she suffered while Tanya was the acting Manager. In our opinion, after hearing Melanie's testimony and the various accounts of the meeting at the Silver Leaf restaurant, we are of the view that at the time of that meeting, Melanie was in support of the union drive, but subsequently changed her opinion and, like Connie wished to recant her support of the union. However, this is not the way to accomplish a recall of the union or a change in representation. The *SEA* makes specific provision for employees to either change their representation or to choose to have no representation through either an amendment to the certification order or through a decertification application.

[100] Nor do we see any evidence of coercion or intimidation with respect to how the campaign was organized, ie insofar as the organizers identified those employees who were likely to support the union and those that may not. They then concentrated their efforts on those employees that they identified as being likely to support the certification application and worked with those employees to achieve their goal.

[101] The treatment of Sue, Mickey and Donna is consistent with this concentration on supporters vs. non or unknown supporters as are the emails which were entered as exhibits in this case.

[102] Also consistent with this analysis is the evidence heard with respect to how the ballots were mailed and the control of this process, particularly by Gwen, but also, in part, by Connie in mailing Melanie's, Gracie's and her ballots the following day.

[103] There is nothing in the evidence before us to show that an employee with reasonable intelligence and fortitude would have been interfered with, restrained, intimidated, threatened or coerced by the actions of the Union or the named respondents in this case.

[104] The application under section 6-63(1)(a) is denied.

Section 6-63(1)(h)

[105] Amenity also engaged section 6-63(1)(h) along with sections 6-5 and 6-22(1). Again, for ease of reference, I will repeat these provisions below:

> ***6-5*** *No person shall use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue to be or to cease to be a member of a union.*
>
> ***6-22****(1) All votes required pursuant to this Part or directed to be taken by the board must be by secret ballot.*
>
> ***6-63****(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*
>
> …..

[20] Supra Note 16 at para. 96 & 101

> *(h) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to a union or an employee*

[106] Section 6-63(1)(h) brings into play sections 6-5 and 6-22(1) of the *SEA.* Given our findings above with respect to coercion or intimidation, we do not think that section 6-5 can be engaged in this case.

[107] However, the requirement that all votes are required to be by secret ballot is certainly applicable in this case. The test used by the Board to determine if a vote was impaired was set out in both the *Re: Samaritan Place Corp.*[21] decision and *United Food and Commercial Workers Union, Local 1400 v. The North West Company LP*[22] as "whether or not the conduct of the vote was such that it was tantamount to making it impossible for employees .. to freely express their choice".

[108] The Court of Queen's Bench considered the requirement for a secret ballot vote in W.C. Wells Construction Company v. Sloney[23]. In that case, a single member of the Plasterers and Cement Masons Local Union 442 was employed at a construction site. The union called a meeting of its members to consider taking strike action in support of positions taken by the union in collective bargaining. However, it became apparent at the meeting that the only person who would be impacted and entitled to vote was the single employed member.

[109] It was realized that if only the single member voted, that it would be apparent with a single vote, how the member had voted. It was then determined that all persons present at the meeting would be permitted to vote along with the single member. The vote was in favour of strike action. The court found this process to be improper.

[110] The Saskatchewan Court of Appeal considered the secret ballot process in its decision in *SFL v. Saskatchewan*[24]. At paragraph 112, the Courts said:

> *[112] I do not accept this submission. Section 2(d) does not oblige legislatures to build statutory schemes which make certification as easy as possible. The secret ballot, after all, is a hallmark of modern democracy. As the trial judge pointed out at para. 269 of his decision, four other Canadian jurisdictions utilize a secret ballot system: Ontario, British*

[21] LRB File No. 092-13 & 103-13
[22] 2013 CanLII 84315 (SK LRB)
[23] 1968 CanLII 514 SKQB
[24] 2013 SKCA 43 (CanLII)

> *Columbia, Alberta and Nova Scotia. I am unable to agree that such a system for selecting union representation can be seen as something which substantially impairs s. 2(d) freedoms. Surely, in and of itself, a secret ballot regime does no more than ensure that employees are able to make the choices they see as being best for themselves.*

[111] In *IBEW, Local 2038 v. JLB Electric Ltd*[25], the Board considered a union's request for a new secret ballot claiming that the earlier vote was tainted by actions taken by the employer. The Board declined to order a new vote, but at paragraph [20] made the following comment regarding the conduct of secret ballot votes:

> *[20] What becomes clear from the reading of this case, the SEA and the decisions of the Courts regarding freedom of expression under the Canadian Charter of Rights and Freedoms is that this Board must be vigilant to insure that the rights of employees are not rendered meaningless by the actions of employers in interfering with the right of employees to determine freely, their choice of bargaining representative by secret ballot.*

[112] The secret ballot process promotes anonymity for those engaged in the voting process. Anonymity has historically been recognized as facilitating freedom of expression in the face of intimidation. A secret ballot process not only is required by the *SEA*, but also is, in our opinion, essential to ensure meaningful democratic participation. As noted by the Saskatchewan Court of Appeal, a secret ballot process is a hallmark of democratic process.

Did the voting process at the Silver Leaf restaurant offend the requirement for a Secret Ballot?

[113] A secret ballot system is utilized in order to insure that voters are not influenced by improprieties such as intimidation, blackmail or vote buying schemes. It has a goal of insuring political privacy. One of the aspects of a secret ballot is the use of a voting booth or some other means to insure that the choice of a voter is not revealed.

[114] The public process employed at the Silver Leaf restaurant did not, in our opinion comply with the requirements for a secret ballot. Melanie testified that voters could see how the others had voted, Connie testified that the table were too far apart for others to see how she voted. Tanya testified she did not see how the others had voted.

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[25] 2015 CanLII 90527 (SK LRB)

[115] The testimony of Connie is not in our view reliable. She was evasive in her answers and did not remember key dates or times. In cross examination she was less than candid as to how the tables were arranged at the restaurant as to prevent others from witnessing what others had marked on their ballots.

[116] As between the evidence of Melanie and Tanya, we are of the view that the evidence of Melanie is to be preferred. There was no evidence that anyone attempted to insure the privacy of those voting. In fact, the whole voting process was designed to avoid secrecy. Connie and Tanya testified that the whole intention was to vote as a "team". Individuals were, we think, expected to vote the way the "team" had determined. That process and the pressure upon those voting is precisely what a secret ballot process is intended to circumvent. What occurred at the Silver Leaf was, in our opinion, the equivalent of a show of hands vote, or an oral vote, neither of which would meet the test for a "secret ballot".

[117] This Board must be vigilant to insure that the rights of employees are not rendered meaningless by the actions of others which interferes with the right of employees to select a bargaining representative of their choosing. That vigilance extends to insuring that employees or trade unions do not highjack the secret ballot process to insure their desired result.

[118] The actions, particularly those of Gwen, and to a lesser extent, Tanya, in directing the ballots be cast only at the meeting at the Silver Leaf expropriated the right of the employees who voted there to freely, independently, and anonymously select their bargaining representative. Both the *SEA* and the *Charter of Rights and Freedoms* support choice being made freely, independently and anonymously. This offends section 6-22(1) and that breach supports a finding of an unfair labour practice under section 6-63(1)(h).

Do the actions of Gwen and/or Tanya constitute an Unfair Labour Practice?

[119] It is clear from the testimony that Gwen, at least and probably Tanya were the inside organizers for the Union. That is, they were the persons responsible, with the assistance of the Union to obtain support cards for the application, to rally support and to be the "on the ground" organizers for the campaign at Tim Hortons Canora.

[120] Section 6-63(1) is not limited to misconduct by the Union. It also applies to "any other person" who engages in activity that gives rise to an unfair labour practice. From our analysis above, it is clear that Gwen was the directing mind behind the process to adopt a "team" approach to the voting that occurred at the Silver Leaf restaurant. It was she who sent the email[26] to the others regarding how to deal with their ballots and to bring them to the restaurant for completion. However, even if it was a joint decision, as suggested by Connie in her evidence, that does not excuse the circumvention of the directions given by the Board Agent that the ballot be a "secret ballot".

[121] Amenity argued that we should consider that the named respondents, Gwen and Tanya should be treated as agents of the Union. If it were necessary, we would make such a finding, but, however, as noted above, section 6-63(1) applies equally to actions by the Union and "any other person". That is, in our opinion, sufficient to encompass the actions of the organizers to circumvent the requirement for a "secret ballot".

[122] The evidence did not establish that the Union was aware of the process adopted with respect to marking of the ballots at the Silver Leaf. However, we did not have the evidence of Gwen who could have provided insight into what Rabia may have known and whether or not she assisted in the design of the voting process.

Remedy:

[123] Amenity has advocated for the certification application by the Union to be dismissed or, alternatively, to have the certification Order cancelled. In support of their position, they relied upon the Board's authority contained in section 6-103 of the Act which provides the Board with broad powers conferred by the *SEA* or "which are incidental to the attainment of the purposes" of the *SEA*.

[124] The Union argued that we should not direct a new vote in the circumstances. If irregularities were found, they argued, those irregularities did not affect the outcome of the vote. The Union relied upon section 6-15(2) which they argued only permits the Board to nullify a representation vote and order a new vote "if the board is satisfied that the certification order would not have been granted but for the unfair labour practice or other

[26] Exhibit A-5

contravention of this part. They argued that even if Melanie and Connie had not voted for the Union that the result would still be 3-2 in favour of the granting of representational rights.

[125] In *Saskatoon Co-operative Association Limited v. United Food and Commercial Workers, Local 1400*[27] the Board considered its authority to grant an appropriate remedy for an unfair labour practice. At paragraph [54], the Board confirmed that is usual remedy is to place the parties in the position they would have been but for the commission of the unfair labour practice.

[126] In their arguments, Amenity argued that the Board should not sanction or encourage the type of "team" voting which occurred in this case. To do so, it argued would reward bad (and illegal) behavior. We agree with these comments.

[127] Secret voting is now enshrined as a principal requirement of obtaining representation rights, changing representation, or removing representational rights. A secret ballot vote can remediate some over jealous actions by both employers and unions in seeking or wishing to avoid employees being granted the right to bargain collectively through a union of their choice. This Board has excused conduct by both parties which may have resulted in an unfair labour practice prior to the 2008 amendments to the then *Trade Union Act*, as a result of an unbiased and fair secret ballot process wherein the true wishes of the employees could be determined.

[128] We cannot condone the "team" voting approach taken by the employees in this case. It offends the principal requirement for a secret ballot vote by the employees to determine their true wishes. We are of the opinion that the true wishes of the employees were not determined by the vote, as conducted.

[129] The only means that the Board has to remedy this misconduct and to return the parties to the position they were in prior to the unfair labour practice being committed is to permit the employees of Tim Hortons in Canora to properly vote by secret ballot as to whether or not they wish to be represented by the Union. To do that, our order will include that the certification Order granted with respect to this application be cancelled and that a new direction for vote be issued to capture the wishes of the employees. We will expect that both

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the Union and Amenity will respect the secret ballot process and will insure that employees are allowed to exercise their representational rights through that process.

[130] As there has been considerable turn over in staff since this application was first filed by the Union over one year ago[28], the Board's agent, appointed to conduct the vote will be required to determine which current employees are eligible to vote on the representational question.

[131] The unfair labour practice application by Amenity under section 6-63(1)(h) is granted. An Order in the following terms will be issued concurrently with these reasons.

1. THAT there will be a declaration by this Board that Workers United Canada Council and Gwen Britton and Tanya Parkman have committed an unfair labour practice contrary to section 6-63(1)(h) by promoting and encouraging voting in a manner which was not a secret ballot, contrary to section 6-22(1);

2. THAT the Certification Order granted in favour of Workers United Canada Council for representational rights for employees of Amenity Health Care LP and dated February 12, 2018 (LRB File No. 130-17) is hereby rescinded;

3. THAT Fred Bayer, Board Registrar, is hereby appointed as the Board's agent to conduct a vote of employees to determine their representational wishes.

4. That this decision shall be posted in a prominent location in the workplace within 7 days of the date of these reasons and shall remain posted until the conclusion of the voting process to be conducted pursuant to this Order.

Dissent by Member Werezak:

[132] Member Werezak dissents from this decision.

DATED at Regina, Saskatchewan this 20th day of July, 2018.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Chairperson

[28] Application filed August 8, 2017