MARY-ANNE BEARDY, Applicant v SEIU-WEST and SASKATOON TWIN CHARITIES INC., operating as CITY CENTRE BINGO, Respondents

SEIU-WEST, Applicant v SASKATOON TWIN CHARITIES INC., operating as CITY CENTRE BINGO, Respondent

LRB File Nos. 044-23 and 051-23; December 14, 2023
Vice-Chairperson, Barbara Mysko; Board Members: Phil Polsom and Laura Sommervill

Counsel for Mary-Anne Beardy:	William Vavra
Counsel for SEIU-West:	Shannon Whyley
Counsel for Saskatoon Twin Charities Inc., o/a City Centre Bingo:	Steve Seiferling

Decertification Application – Union Objections Based on Allegations Against Employer – Failure to Provide Information – Failure to Abide by Statutory Freeze.

Unfair Labour Practice Application – Union Allegations Against Employer – Same Allegations as Raised in Decertification.

Findings – Employer Committed Unfair Labour Practices – Failed to Provide Information – Failed to Abide by Statutory Freeze.

Remedy – Unfair Labour Practice Application Granted – Notice to Post – Decertification Application Dismissed.

REASONS FOR DECISION

Introduction:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to two applications: the first is a decertification application filed by Mary-Anne Beardy on March 13, 2023, seeking decertification of SEIU-West, the Union representing employees at Saskatoon Twin Charities Inc. operating as City Centre Bingo [Employer]. The second is an unfair labour practice application filed by the Union on March 27, 2023.

[2] The Union replied to the decertification application, raising Employer interference by way of wage increase(s) contrary to the statutory freeze and failure to cooperate in providing necessary information. The Union asks the Board to exercise its discretion to dismiss the

decertification application pursuant to section 6-106 of *The Saskatchewan Employment Act* [Act]. In its unfair labour practice application, the Union relies on the same facts and submits that the Employer has breached sections 6-62(1)(b), (d), (n), (r), and 6-7 of the Act. The Employer has denied that it has engaged in any interference and seeks that the votes be counted. Beardy also asks that the Board proceed to count the votes.

[3] For the following reasons, the Board has found that the Employer committed unfair labour practices. The cumulative effect of the Employer's actions was to compromise the ability of the employees to make an informed decision about whether to be represented by the Union.

Background:

[4] When this matter first came up on appearance day in May 2023, Beardy was not in attendance. The Board set dates for the hearing of the unfair labour practice application and adjourned the determination of next steps on the decertification application. The dates set for the hearing were September 13, 14, and 15, 2023.

[5] Then, when the matter was next on appearance day in June, the parties agreed to have the two matters heard concurrently on the dates that were already set for the unfair labour practice application. It was also agreed that Beardy could participate fully in the unfair labour practice application. A case management conference (CMC) was set for August 18, 2023.

[6] Before the CMC, the Employer brought a production application in relation to the unfair labour practice application. The Board dismissed most of the requests made by the Employer in *City Centre Bingo v SEIU-West*, 2023 CanLII 63941 (SK LRB) (July 18, 2023).

[7] On August 18, 2023, the Board held the CMC to assist the parties with logistical issues. Beardy attended as a self-represented litigant.

[8] At the CMC, the Employer sought that the vote be counted, stating that the primary interest in a decertification application is to determine the wishes of the employees, that the allegations made by the Union did not involve Beardy, and that the Union's allegations against the Employer should not impact whether the employees' wishes are respected. The Board sought to clarify whether the Employer was only seeking to know the results of a tabulation before proceeding to hear the substantive issues that were raised in the Union's reply. This was not the Employer's intent.

[9] The Union objected, indicating that it was the first time that it had heard this request, that the CMC was not set for that purpose, that the issues in the two applications were intertwined, that the parties had previously agreed to have the matters heard together, and that the Employer's argument went to the heart of the issues that needed to be determined at the substantive hearing.

[10] Beardy commented on an evidentiary matter.

[11] The Board dismissed the Employer's request, indicating that the Employer was raising substantive matters for the hearing of which the dates had already been set aside, and that it would not be appropriate for a variety of reasons, including fairness, to address those substantive matters at that time.

[12] During the CMC, it was again agreed by the parties that Beardy would have full participation rights in the upcoming hearing.

[13] Also at that conference, the Board heard the parties' positions and submissions with respect to the order of proceedings. The Employer took the position that the Union should call evidence first so that Beardy could respond to the Union's allegations. The Union proposed a complex proceeding in which the two applications would be separated and Beardy would proceed first in respect of the decertification and last in relation to the unfair labour practice application.

[14] Following the conference, the Board issued an Order outlining the order of the proceedings, being Beardy, the Union, and then the Employer, not differentiating between the applications. In that Order, the Board also indicated that "applications for rebuttal evidence will be considered at the time they are made".

[15] Through this Order, all rights of the parties were maintained. Beardy would testify first, allowing the Union to then cross examine the applicant about the circumstances under which the application had been filed. Normally, the applicant would be in the best position to testify to those facts. Requiring the Union to proceed first, before hearing from the applicant about the making of the application, would have put the Union at an unfair disadvantage. The Employer's rights to cross examine any witnesses would remain intact. Furthermore, if any party were taken by surprise, the opportunity to apply to rebut the evidence was expressly provided. The process by which the Board would determine those applications was not predetermined.

[16] At the CMC, the Board indicated that Beardy may want to consider bringing a support person to the hearing.

[17] In an email to the Board on August 21, 2023, counsel for the Employer requested written reasons for the Order made in respect of the order of proceedings. On August 22, 2023, the Board responded that it would not be providing reasons “at that time”. The following day, counsel for the Employer repeated its request for reasons, indicating that the Board had a duty to provide them.

[18] On September 6, 2023, the Board was contacted by William Vavra indicating that he had been retained by Beardy for the upcoming decertification hearing. Vavra indicated that he was unavailable on September 14, 2023 and hoped that something could be arranged to accommodate his availability if all parties were amenable. The Employer took the position that it was prepared to proceed with the remaining two days and schedule additional days if needed, and asked to be informed if the Board wanted to schedule a call to discuss additional dates. The Union took the position that all three dates should be vacated.

[19] The Board decided to vacate the September 14 date but to proceed on the remaining two dates as scheduled. The hearing proceeded on those dates.

Hearing – Procedure:

[20] At the outset of the hearing on September 13, the Board set an additional date for argument - October 20, 2023.

[21] Also at the beginning of the hearing, the Board made a point of highlighting the second clause of the Order, indicating that applications for rebuttal evidence could be made, particularly if, as alleged by the Employer, the evidence at the hearing disclosed that the Union’s pleadings had been “opaque”.

[22] As a preliminary matter, the Employer sought an order excluding witnesses until after they had testified. The Board sought the positions from the parties as to whether they preferred an order consistent with the Board’s prior practice (excluding only witnesses of a party during that party’s case) or an order consistent with a more recent trend in which the Board was excluding all witnesses for the duration of the hearing. The Employer asked for clarification about who it should exclude if the Board were to make the latter order; the Board explained that it would exclude anyone who might be called as a witness (other than instructing parties). The Employer indicated that it had no objection to that. The Union had no objection to the order as long as it applied to everyone involved. Beardy also had no objection.

[23] The Board made the Order, reiterating to the Employer that anyone who might be called as a witness should be excluded.

[24] Next, counsel for the Employer repeated the request for reasons for the Board's Order pertaining to the order for proceedings.

Hearing – Evidence:

[25] Two witnesses testified – Beardy on her own behalf and Cam McConnell for the Union. The Employer called no witnesses.

[26] Beardy has been employed with City Centre Bingo for over 12 years. She is in a "Supervisor" position. At the time of the certification application in 2019, the statutory supervisory employee exclusions were in effect. The Board determined that the "Supervisors" were not supervisory employees under the Act and therefore included them in the scope of the certification order.[1] Beardy is the highest paid employee and has been since at least March 2021. She was a member of the bargaining team.

[27] McConnell was the lead negotiator for the Union in this matter. His title is Negotiations Officer. He has been working for the Union for 13 years. Prior to this, he bargained on behalf of the musicians' association for six to eight years. With the Union, he has been in the bargaining role since 2016, has been involved in three other sets of first collective agreement negotiations (with other employers), and one partial set.

[28] McConnell explained that, in his experience, first collective agreement negotiations are more challenging than others. It is necessary to find out from the members what caused them to seek representation. It is necessary to educate the members and to set expectations. It is difficult to secure a vote for job action because doing so takes a level of education that is often not present early on in a bargaining relationship. As such, the next steps after impasse are complicated.

[29] He stated that when a union becomes certified to a workplace, it is necessary to learn about the employees' hours of work, how those hours are awarded, how overtime works, why some classifications are paid more than others, general working conditions, and what it is that the employees want. There is frequently reluctance from employers to bargaining.

[30] The basic chronology of bargaining is as follows.

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[1] *SEIU-West v Saskatoon Twin Charities Inc. (City Centre Bingo)*, 2019 CanLII 98487 (SK LRB). Upheld: (18 June 2021) Saskatoon, QBG 1775/2019 (Sask QB).

[31] On December 12, 2019, the Board certified the Union in relation to the employees of this Employer.

[32] On December 18, 2019, McConnell wrote to the Employer (Gordy Ouellette):

> *Please provide me with the names and contact information for all the current employees of City Centre Bingo that are covered by the new certification order number 113-19 in order that we may proceed to fulfill our obligations to [those] employees for bargaining and representation.*

[33] He was seeking this information to prepare for bargaining, to stay in contact with the employees, and to invite the employees to provide the Union with information to assist with bargaining.

[34] Ouellette had said he would gather the information and provide it. McConnell testified that, shortly after, counsel for the Employer started communicating directly with McConnell.

[35] On January 10, 2020, McConnell wrote (this time to Ouellette and counsel):

> *I have requested information regarding working conditions, job duties, and pay rates for the employees of City Centre Bingo who fall under the recent certification order as well as their names, addresses, and contact information but I haven't gotten anything yet. It will be necessary for me to have this information in order to prepare comprehensively for bargaining. Please forward it to me as soon as convenient in order that our upcoming bargaining can be successful for both parties.*

[36] Ouellette responded a few days later with names, addresses, positions, hire dates, and wage rates. He provided no additional contact information – no phone numbers and no emails. McConnell explained that, without email addresses or phone numbers, the Union could not contact the employees directly. Mail is less effective.

[37] Shortly after, there was an exchange about bargaining dates. At some point, McConnell was informed that counsel for the Employer was the Employer's lead negotiator. The lead negotiator indicated that he had tentatively blocked off May 5-7 but that those dates should be evaluated closer to the time. McConnell suggested that they would have to evaluate whether to meet in person or virtually.

[38] On May 6 and 7, 2020, there was an exchange of proposals, however, the parties did not meet.

[39] On May 6, the Employer wrote to McConnell:

> *Please find attached the proposed CBA on behalf of City Centre Bingo. I will wait to hear from you regarding our virtual bargaining session tomorrow.*

[40] McConnell responded with the Union's proposal.

[41] On May 7, the Union was prepared to meet virtually to negotiate. However, the Employer wrote:

> *As noted in my email yesterday, we are looking to meet in-person, at the bingo hall, with appropriate distancing in place. We are not prepared to use a virtual meeting for negotiation purposes.*
>
> *Please advise on an in-person meeting. We can be available very soon for such a meeting.*

[42] McConnell testified that the Union did not want to meet in person, that they were not meeting in person at their own offices for work, and that it was unclear what precautions or sanitation measures had been taken at the bingo hall.

[43] On February 16, 2021, McConnell wrote to the Employer again, seeking:

- *"a current employee list with classifications, wage rates, hire dates and weekly hours (a schedule of hours – if such exists – would be very helpful"*
- *details about notice provided and alternate employment offered in relation to layoffs*
- *"a brief outline of the current operations of the bingo hall including the services provided and the hours of operation"*

[44] McConnell explained that the bingo hall had been shut down and that, around this time, they had begun to operate again, but the Union did not have a clear picture of what they were doing.

[45] Two days later, McConnell asked about the latest information request. The Employer responded, stating that the "wage information with start date, etc, has already been submitted to SEIU-West, and is also available directly from your members, including those on your bargaining team…" He also offered that "[t]he information regarding the operation of the hall is available from your members, including those on your bargaining team." Later that day, McConnell replied:

> *…With respect to other employees my understanding is that there has been some turnover in the recent past and that there are quite a few new employees not accounted for on the information directly provided. I also understand that it has been the Employer's practice to exercise considerable discretion with respect to starting and continuing wage rates. In*

> *order for our proposals to reflect the Employer's actual economic circumstances and associated practices (and therefore be realistic as a position for discussion) it is key that we have reliable and comprehensive information. The information regarding the hall's current operations would likewise be a lot more useful if it were as reliable as possible.*
>
> *[…]*
>
> *Anyway, thanks again for the information that you have provided to date and please be advised that the Union continues to require fuller information in order to proceed with our representation of the members employed at City Centre Bingo both with respect to bargaining and their current conditions of work.*

[46] The second paragraph of McConnell's email stated, in relation to a newly laid off employee that other, related discussions about changes to his working conditions would have breached the statutory freeze.

[47] The Employer's response to the request for information was that they "have no further documents to provide at this point".

[48] During the bargaining round, on February 24, 2021, the Union provided the Employer with a document containing outstanding proposals that the Union was willing to address in the context of monetary negotiations. The Union included the following comment in the document:

> *The Union requests that the Employer provide a detailed monetary proposal including responses to the within articles and a proposal concerning wage rates. The Union reserves the right to table a proposal regarding wage rates at a later date in these negotiations but declines to table same at this stage of these discussions as the Union has not been provided sufficient information to formulate an appropriate starting point for the discussion. The information required includes but is not limited to the current wage rates and classifications of all employees.*

[49] On February 25, 2021, McConnell wrote to the Employer again:

> *We are working on a proposal for the wage rates and the term of the collective agreement that may have some appeal for the Employer. However, in order to proceed we will need more information regarding the current classifications and wage rates specific to each classification for all employees to be red circled. We have noted that there are a few instances in which people are currently working (or were prior to Covid) in multiple classifications and had identified wage rates for each. That was also evident in the discussion of [employee]'s positions as caller/supervisor and IT. Please provide us with whatever you can as soon as is practical.*

[50] In or around March 2021, the Employer provided a list of current employees, including names, wage rates, and departments, but no classifications. During this month, the parties exchanged offers for settlement but did not reach an agreement.

[51] On May 12, 2021, the Union filed an application for assistance with a first collective agreement pursuant to subsection 6-25(1) of the Act. On July 6, 2021, the Board ordered the parties to jointly request the Minister to appoint a labour relations officer, special mediator, or conciliation board. Kenton Emery was appointed as conciliator. On July 23, 2021, he reached out to the parties to arrange dates. The parties met with him on November 8, 2021, January 12, 2022, and January 13, 2022.

[52] On September 6, 2022, McConnell reached out to the Employer to initiate further discussions. He also asked for "the names, classification and contact information for all current employees". The Employer did not respond to the information request. No dates were set.

[53] Beardy stated that after the conciliation session, she heard nothing from McConnell. For some reason, the email address that the Union had for Beardy was an address that she did not check very often. However, McConnell did have a cell phone number for her as well. She also said that she hadn't attempted to contact the Union. She said that she had never even thought of contacting the Union.

[54] During the Fall of 2022, she was asked to post a form to invite her coworkers to provide contact information to the Union; she never did it. She did not explain why not.

[55] Counsel for the Employer asked McConnell if he was aware that he could have had communications posted in the workplace. McConnell replied that he was unsure, given the state of the CBA, and that, anyway, the effectiveness was reduced during the pandemic given the uncertain attendance of workers on site. Although there was an agreed clause about notice boards, the CBA was not completed or ratified, making it less reliable.

[56] As far as bargaining was concerned, Beardy testified that nothing was happening, but she did not know why. She acknowledged that the Union had not been deducting any union dues. When she was asked by the panel whether she could articulate the downsides to having a union she said that she could not. She did not know what the downsides were.

[57] Sometime between December 31, 2022 and August 17, 2023, Beardy and the other employees received a pay increase. Beardy testified that she could not remember when exactly the pay increase occurred. It was not mentioned by management, and she never looked at her pay stub. She heard about the pay increase from a coworker. According to her testimony, when she asked Ouellette about it, he stated that everyone got a raise because of the cost of living and the passage of time.

[58] Beardy testified that she began working on the decertification application after two previous employees (who no longer work for the Employer) had either considered or initiated a decertification application but had failed to follow through. She started it about a week or two before she filed it. At some point, a few of her coworkers asked her if she would do it because nothing had been happening (with the Union). She said she did it because no one else would "step up" and "they wanted it to be done". She testified that most of the employees with whom she interacted did not even know that they had a union. Even though she was a member of the bargaining unit, she did not know why nothing was happening.

[59] In preparing the decertification application, she stated that she spoke with her coworkers on her own time, outside of the workplace, and that she already had their contact information because she had to call people into work. She testified that she did not use any of the Employer's materials or equipment.

[60] She said it took a few weeks to get the support evidence. Ashley Williams gathered the support evidence on the concession side. She is the highest paid concession employee and, like Beardy, was on the bargaining committee.

[61] The decertification application was filed on March 13, 2023. After it was filed, the Employer provided the Board with a current list of employees containing names, start dates and occupations. The list (redacted of address information) was forwarded to the Union by the Board.

[62] After the decertification application was filed, the Union showed up at the workplace.

[63] In cross, McConnell was presented with a flyer that counsel had suggested was distributed in the workplace by the Union. He was not aware that a flyer had been distributed and had not previously seen the document. He indicated that he was aware that Union representatives, likely from the organizing department, showed up at the personal homes of employees. He was not among the representatives that did this.

[64] He agreed that the Union used a variety of methods for attempting to contact the employees. The organizing department had asked him for anything he had been provided in bargaining, including the contact information for the bargaining committee members.

[65] To contact employees by phone, the Union had had to rely on the list of names. They consulted Canada411 and called anyone whose information was a potential match. To be sure, this was what McConnell knew based on what the organizing department had told him.

[66] Finally, Beardy's counsel asked her how he came to be retained by her. She offered that it was through an acquaintance. Her counsel asked, "through an acquaintance?" and Beardy replied, "well I don't know…you just got ahold of me one day and said 'hey'." When she was later asked by the panel about her use of the word "acquaintance", she offered that the connection had to have been made through someone who she knew but "I just don't know".

[67] The substance of her testimony, in chief, cross, and in response from the panel members, was that she did not know her lawyer, did not have any history with him, but then received a text or a phone call from him one day (to her personal phone number), and they had a conversation. She could not remember if it was a text or a call. She claimed that she did not know why he contacted her and did not know how he came to have her personal cell phone number. She stated that she was not expecting his phone call. She did not ask him why he contacted her. She acknowledged that he contacted her, not the other way around. After she received his phone call, she thought that maybe she should have counsel assist her.

[68] Beardy recalled the panel (at the CMC) having suggested that she bring someone with her to assist at the hearing but stated that she had made no efforts to find anyone. Despite this, when she received the call from Vavra and after she spoke with him, she decided to retain him. She retained Vavra as her legal counsel the week prior to the hearing. She testified (further to a question from Employer's counsel) that she was not being charged legal fees.

[69] After the Employer indicated that it didn't plan to call any witnesses, the Board asked counsel for Beardy if he wished to apply to present any additional evidence; he declined, indicating that they had nothing to provide to the Board. Beardy's participation throughout the hearing was minimal. Beardy engaged in no cross examination and filed no written argument.

Arguments:

[70] What follows is a brief synopsis of the parties' arguments:

Beardy:

[71] Beardy's submissions were oral, not written, and were brief.

[72] The decertification application speaks for itself. The employees decided there was no value in being members of the Union. Beardy went through the proper process to file the application. This Board has the authority and the obligation to recognize the application for what it is and, pursuant to that, to tabulate the votes so that the employees' wishes can be recognized and acted upon. It is as simple as that.

[73] It was surprising that Beardy was subjected to this process in which she had to justify her reasons for bringing the application. There are many things she would rather do than be questioned by lawyers on her day off. This could have a chilling effect on employees who wish to bring a decertification application in the future. People are allowed to change their minds. Employees should not have to justify why they no longer want a union in the workplace. There is no evidence that Beardy's motives or actions were corrupted or impure.

Union:

[74] By its conduct, the Employer has obstructed collective bargaining, frustrated the Union's ability to represent its members, and damaged the Union's reputation, thereby impairing the employees' ability to decide the representation question for themselves.

[75] A union requires information about the membership of a unit during negotiations to facilitate bargaining. Contact information ensures that the union is on an equal, or more equal, footing with the employer. An employer's unwillingness to provide information is particularly egregious during the period before the conclusion of a first agreement. This is a sensitive and vulnerable period during which a union is attempting to gain a foothold in the workplace.

[76] The lack of information has hindered bargaining resulting, directly or indirectly, in the parties having failed to conclude an agreement. New members were kept at a distance from the Union. The Union did not know who was in the unit at any particular time (because the Employer was not providing updates on new employees or any contact information). This made communication with the employees very difficult. In addition to its failure to provide updated employee lists, the Employer provided only limited contact information for employees of whom the Union was aware. This made communication even more difficult.

[77] At the bargaining table, the Union has been at an informational disadvantage. It has struggled with putting together monetary proposals because it lacked information to allow it to rationalize the wage rates with the classifications. The Employer was repeatedly asked to provide

classifications and instead provided departments only. Departments and classifications are not the same thing.

[78] The Union was not informed of pay increases until after the decertification application was filed. McConnell should not have received this information “anecdotally”. These circumstances mean that the wage information that the Employer was providing to the Union had become outdated, but without more information from the Employer, it is not possible to know when.

[79] It is logical to infer that, cumulatively, these issues would undermine the reputation of the Union.

[80] It is valid for the Union to approach its information requests informally instead of using the formal enforcement method provided by the statutory security clause provisions. The Union was choosing where to put its resources and it chose to focus on negotiations. This does not relieve the Employer from its obligation to bargain in good faith.

[81] Next, the Employer admitted to having provided unilateral wage increases. During the statutory freeze, unilateral changes in the conditions of work undermine the Union’s role as the exclusive bargaining agent and its ability to represent the employees.

[82] The Employer suggests that its wage increases were consistent with business as before. However, there is no evidence about business as before. There was no consistency or available rationalization to the pay increases that were provided.

[83] The Board can draw an adverse inference from the Employer’s decision not to call any witnesses to respond to the allegations about the pay increase. The adverse inference could relate to the Employer’s motivation in providing the increase.

[84] There is no plausibility to the applicant’s motives for bringing the decertification application. Beardy was asked by other employees to bring the application. She agreed to follow through with it because nothing had been happening. And yet, she was not able to articulate a downside to having a union. And, she was not paying union dues, which means she was not losing anything (monetary) while the Union continued to negotiate.

[85] Finally, the circumstances around the retainer of Beardy’s lawyer raise many questions that have not been answered.

[86] The absence of any satisfactory motive combined with the unusual circumstances surrounding the retainer suggest that the Employer was the motivating force behind the decertification application. While there is no direct evidence of this, it is rare that such evidence is available in decertification hearings.

Employer:

[87] The Union has not established that the Employer committed unfair labour practices.

[88] First, the Employer acknowledges that there is an informational duty on the Employer. However, the Union did not use the resources it had in the workplace. It did not seek information from members of the bargaining team. Information was provided on a number of occasions and was never refused. The Employer provided the information that was pertinent to bargaining.

[89] Most significantly, the Union chose not to exercise its union security rights. It chose not to require membership cards to be filled out.

[90] *Bernard v Canada (Attorney General)*, 2014 SCC 13 (CanLII), [2014] 1 SCR 227 [*Bernard*] is not applicable to this case. It dealt with a Rand formula employee. Information for all new hires was being provided. The Supreme Court of Canada held that the employer had an obligation to provide information in relation to Rand formula employees. For the Union to rely on *Bernard*, it would have had to have relied on the union security clause. The certification is almost four years old, and the Union could have asked that the membership cards be filled out at any time during those years.

[91] The Union's failure to enforce the union security clause is a full answer to whether the Employer committed an unfair labour practice.

[92] Next, the Employer's wage increases were consistent with business as before practices. Here, cost-of-living raises were provided on multiple occasions. There were raises provided sometime between December 31, 2022 and August 2023. There were also raises given between 2021 and 2022. These earlier raises (for all employees except for one) are disclosed by the documents in evidence. Beardy was told that the raise was a cost-of-living increase and testified that she had received wage increases in the past. There is a pattern of cost-of-living increases. There is also evidence that this pattern of wage increases continued after certification.

[93] When asked, the Employer acknowledged that "business as before" refers to "before the certification". It indicated that the evidence on this issue consists of Beardy's testimony that she has previously received raises. The Employer acknowledged that there was no clarification of what Beardy meant by "the past".

[94] There is no evidence to support a remedy pursuant to section 6-106. The Union has called no evidence to show that the application was made on the advice, influence, interference or intimidation by the Employer. The Union did not call a single bargaining unit member. There is no evidence related to the period prior to the decertification application having been filed. The Board should draw an adverse inference from the Union's failure to call evidence that comes within the literal meaning of section 6-106.

[95] Beardy was a member of the bargaining team. She was asked to bring the application. The employees simply do not want a union anymore. An applicant does not need a reason to bring a decertification application. An applicant can even be wrong.

[96] Next, given the lack of evidence to support unfair labour practices, there is nothing for the Employer to attempt to contradict. Under these circumstances, the Employer has no obligation to present evidence and the Board is unable to draw an adverse inference based on the Employer's decision not to call any evidence.

[97] Employees are presumed to have reasonable fortitude and to be capable of independent thought or action. With the implementation of the secret ballot vote, employees are able to vote their conscience. The wishes of the employees must be respected. Representation issues must be decided by employees through a vote. This was confirmed by the Board in *RWDSU v Saskatoon Co-operative Association Limited and UFCW, Local 1400*, 2018 CanLII 68443 (SK LRB).

Applicable Statutory Provisions:

[98] The following provisions of the Act are applicable:

> ***6-1****(1) In this Part:*
>
> *…*
>
> *(e)* ***"collective bargaining"*** *means:*
>
> *(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;*

> *(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part*
>
> *(iii) executing a collective agreement by or on behalf of the parties; and*
>
> *(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union;*

6-7 *Every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to this Part or by an order of the board.*

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:*

> *…*
> *(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;*
> *…*
> *(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;*
>
> *…*
> *(n) before a first collective agreement is entered into or after the expiry of the term of a collective agreement, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in a bargaining unit without engaging in collective bargaining respecting the change with the union representing the employees in the bargaining unit;*
>
> *…*
> *(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.*

6-106 *The board may reject or dismiss any application made to it by an employee or employees if 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.*

Analysis:

Preliminary Matters:

Witness Request and Exclusion:

[99] During McConnell's cross examination, the Employer asked questions about two documents which appeared to have originated with the Union, but which McConnell was unable

to authenticate. One of those documents bore the name of Graham Mitchell[2], the Director of the Union's organizing department. Mitchell had been present at the time of the exclusion order and throughout the hearing. Another of those documents bore the name of another individual.

[100] The Employer sought that Mitchell be called as a witness to speak to those two documents. The Employer argued that any benefit from Mitchell having sat through the hearing would accrue to the Union. By calling him, the Employer was waiving its objections to the Union gaining that benefit. To be sure, however, the Employer would be applying to treat Mitchell as an adverse witness in its examination. The Employer indicated that it could not call any other person to speak to having received these documents (documents which appear to be communicative in nature) but did not explain why it could not.

[101] The Union objected to Mitchell being called as a witness for the following reasons: Mitchell was not under subpoena; there was an order excluding witnesses; Mitchell had been present for the entire proceeding; and, the Employer had ample opportunity to prepare its case, had the documents in its possession and distributed them to the parties at the beginning of the day. The Union indicated that it was not concerned about providing the Employer with additional time to find other witnesses. The Union indicated that it had not received advance notice that the Employer might seek to call Mitchell as a witness.

[102] Beardy had no comments about this issue.

[103] The Board took a break to consider the submissions of the parties. Ultimately, the Board decided not to allow the Employer to call Mitchell to testify, indicating that the Board had made an exclusion order at the beginning of the hearing, the Union had closed its case earlier that day, Mitchell had been in the room during the hearing, and it would be unfair to allow the Employer to call Mitchell given the exclusion order. The Board indicated that it had to apply the order consistently.

[104] Counsel for the Employer asked for a written decision on this issue, both at the hearing and in writing after the hearing. In the second request, the Employer sought "a separate decision on this issue",[3] indicating that it did "not wish to wait for the hearing to conclude on October 20, 2023, for a decision on this issue".

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[2] Not a sitting Justice of the Court of King's Bench, and former Vice-Chairperson, with the same but differently spelled name.
[3] And in relation to another issue, dealt with subsequently in these Reasons.

[105] The Board responded that it would provide reasons in the substantive decision.

[106] The Board provided oral reasons for its decision not to allow the Employer to call Mitchell. These Reasons are supplementary. First, the Union had a legitimate expectation that an individual who had been in attendance throughout the hearing would not be called as a witness, especially after the Union had closed its case. With that, it would have been unfair to allow the Employer to call that individual, especially without compelling reasons. The Employer was in possession of the documents and provided no information as to why it could not call any other witness who might have been on the receiving end of those documents. Finally, there is no way of knowing what a witness will say until the witness testifies; therefore, it was not possible to determine whether the individual's attendance in the hearing was necessarily a benefit only to the Union. Eroding the integrity of the exclusion order by choosing not to enforce it without a compelling reason would be harmful to the Board's process.

Renewed Application to Tabulate:

[107] At the end of the hearing, the Employer made an application to tabulate the votes and to make a determination with respect to the decertification application. In support of this application, the Employer argued that the Board should process decertification applications as soon as possible to give effect to the wishes of the employees. The Employer indicated that there was nothing in the evidence to demonstrate that Beardy or any other member of the bargaining unit had been influenced, intimidated, or interfered with by the Employer prior to the filing of the decertification application. Absent that evidence, there was no reason not to tabulate the vote.

[108] The Employer suggested that the date for argument would still be used to make argument with respect to the unfair labour practice application. The Employer conceded that it had agreed to hear the applications together because the facts and the allegations were virtually identical. However, the tests under each of the applications were different. If there had been evidence of interference, then it would be worth proceeding to argument on both applications (on October 20). But there was no such evidence, and so the determination on the decertification application should be made now.

[109] The Board asked the Employer about its consent to the rescheduling of the September date. The Employer submitted that the position it had taken was irrelevant because the parties had managed to complete the evidence during the two days (instead of three).

[110] The Union objected to the application, making the following arguments. First, there would be a procedural unfairness in deciding the decertification application at this time. The applications are intertwined – a point the Union had made throughout the proceedings. The Union and the Employer had agreed that the two applications could be heard together. The Employer's application could now dispose of the issues that were at the heart of the matter in the absence of closing submissions from the parties. The Union had been made aware that the Employer was intending to bring this application (at the outset of the hearing), but the Union was not prepared to make its full argument on both substantive applications and had been under the impression that they would be given the opportunity to do so on October 20.

[111] Second, there was evidence of influence. The pay increases were a form of influence. The lack of information sharing damaged the Union's reputation in the eyes of its members. The Union had planned to address both of these issues in closing arguments.

[112] The Board dismissed the application to tabulate, indicating that it would include reasons for that decision if appropriate, within these Reasons. The Employer indicated that it wanted the reasons to be delivered "now". When the Board asked the Employer for clarification, the Employer indicated that it wanted the reasons to be "started now, not after the final argument, because the application has been made now." After the hearing, the Employer wrote to the Board:

> *We are writing this email to confirm the request for written reasons, on this issue, to be delivered as soon as possible. We are requesting a separate decision on this issue – we do not wish to wait for the hearing to conclude on October 20, 2023, for a decision on this issue.*

[113] The Board responded that it would "provide reasons in relation to these two issues with the substantive decision." After the Board provided that response, the Employer repeated the request by sending another email to the Board.

[114] What follows are those Reasons.

[115] The Board dismissed the application to tabulate for reasons of fairness, expediency, and to allow for due consideration of the arguments of all of the parties. The Board had set aside a date for argument with respect to both applications. Both parties knew that the matters were being heard together, the evidentiary issues were inextricably intertwined, and it was necessary for the Board to consider those evidentiary issues to determine how to dispose of each of the applications. The delay that had occurred was occasioned by the employee, who was the applicant in the decertification application and the person whose wishes the Employer proposed

to advance by seeking an early tabulation. The employee had requested that a third date be vacated so that she could have counsel attend the hearing at the last minute. There was no unfairness in proceeding to use the third hearing date for full argument on both applications - to either the Employer or the employee. To do otherwise would have been unfair for the Union.

[116] Nor was there any unfairness in the Board providing the reasons for this decision (or the witness exclusion decision) in these Reasons. The Board must have discretion to decide when to provide reasons in interim matters, especially in the course of a hearing that is being heard expeditiously and in the face of multiple, similar requests.

Informational Duty:

[117] It is well established that an employer who is subject to a certification order owes an informational duty to the union who is the exclusive bargaining agent.

[118] With respect to contact information, the leading case is *Bernard*. There, the majority of the Supreme Court of Canada upheld the decision of the Public Service Labour Relations Board that required the employer to disclose home contact information for a Rand employee – an employee who had opted out of the exclusive bargaining relationship. The Board had found that work contact information was insufficient to enable the union to carry out its representational duties. The majority agreed with the Board's rationale:

> *[27] The Board's conclusions are clearly justified. The union's need to be able to communicate with employees in the bargaining unit cannot be satisfied by reliance on the employer's facilities. As the Board observed, the employer can control the means of workplace communication, can implement policies that restrict all workplace communications, including with the union, and can monitor communications. Moreover, the union may have representational duties to employees whom it cannot contact at work, such as employees who are on leave, or who are not at work because of a labour dispute.*
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> *[28] The second rationale — equality of information between the employer and the union — further supports the Board's conclusion. The tripartite nature of the employment relationship means that information disclosed to the employer that is necessary for the union to carry out its representational duties should be disclosed to the union in order to ensure that the union and employer are on an equal footing with respect to information relevant to the collective bargaining relationship.*

[119] The majority considered the Ontario Labour Relations Board's decision in *Millcroft Inn Ltd. and CAW-Canada, Local 448*, 2000 CarswellOnt 3073, 63 CLRBR (2d) 181 [*Millcroft*], in particular, the following passage:

> *31 A consequence of the union possessing exclusive bargaining status on behalf of the employees is that the union is placed in an equal bargaining position with the employer in its collective bargaining relationship. To the extent that the employer has information which is of value to the union in its capacity to represent the employees (such as their names, addresses and telephone numbers), the union too should have that information. The employees' privacy rights are compromised (no doubt legitimately) by the employer having details of their names, addresses and telephone numbers. The union's acquisition of that information would be no greater compromise, nor any less legitimate.*

[120] In *Millcroft*, the Board observed that, during first contract negotiations, it has required an employer to provide names, addresses, and telephone numbers for employees, but that such relief was not limited to those situations.[4] The Board explained that, to the extent that a union has statutory duties, it also possesses statutory rights which enable it to fulfill those duties. It is well established that "a refusal by an employer to provide the names, addresses and telephone numbers of employees during the negotiation of a collective agreement may constitute an unfair labour practice".[5] A union may need to communicate with employees to make informed decisions and represent their interests, including to obtain their input and to verify information provided by the employer.[6]

[121] The Board rejected the employer's argument that the union had alternative methods for acquiring the information sought. The Board found that there was no justification for requiring the union to exert the effort: "The employer has the information, the union needs it, the union is entitled to it and it should have it. The employer is best placed to provide it, and it should do so".[7] The obstacles placed in the union's way only served to frustrate the union's ability to fulfill its duty.

[122] *Millcroft* is clear that, even where there is "no suggestion of maliciousness, caprice or other improper motive on the part of the employer" this does not stand in the way of the Board finding that the refusal to provide information was interference with the union.[8]

[123] In *General Teamsters, Local 362 v Monarch Transport Inc*., 2003 CarswellNat 4213, 2003 CIRB 249 [*Monarch*], the CIRB found that the employer's refusal to provide names, addresses and home telephone numbers constituted interference in the union's capacity to represent the employees. The Board reviewed the relevant case law and characterized the two basic principles arising therefrom:

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[4] *Millcroft*, at para 14.
[5] *Millcroft*, at para 24.
[6] *Millcroft*, at para 29.
[7] *Millcroft*, at para 32.
[8] *Millcroft*, at para 34-5.

> *22 These decisions underline two basic principles which have governed the disclosure of employee information. The first is the union's interest in obtaining requested information is related to a legitimate labour relations interest and second, whether the employer's refusal to give the information to the union amounts to interference with the union's capacity to represent employees of the bargaining unit.*

[124] The Board found that the information to contact employees for bargaining and representation purposes was related to its "representational capacity"[9] and that its capacity to represent its members fairly and "the whole process of collective bargaining" would be "frustrated" if the requested information were denied. The Board explained that, "[t]o be effective, contacts with employees to determine their bargaining concerns and for representation purposes are a legitimate and necessary part of the labour-management relationship".[10] The Board also observed that "[w]hile the parties may be encouraged to agree on a disclosure clause in the collective agreement, its absence is not a bar to obtaining such information through a simple request".[11]

[125] In *P. Sun's Enterprises (Vancouver) Ltd. v CAW-Canada, Local 114*, 2003 CarswellBC 2859, [2003] BCLRBD No. 301 [*Sun's*], the B.C. Board found that an employer had breached the Code when it refused to provide an updated list of names, addresses, and phone numbers.[12] The parties' collective agreement contained a union security clause and the membership application asked for addresses and phone numbers. There was significant turnover in the workplace. The union had written to the employer and asked for a current list.

[126] This Board has confirmed that an employer's duty to bargain in good faith includes an informational component. In *Saskatchewan Government Employees' Union v Government of Saskatchewan*, [1989] Winter Sask Labour Rep 52 [*SGEU v Saskatchewan*], the Board explained:

> *It requires the union and the employer to make every reasonable effort to conclude a collective bargaining agreement, and to that end to engage in rational, informed discussion, to answer honestly, and to avoid misrepresentation. More specifically, it is generally accepted that when asked an employer is obligated:*
>
> *(a) to disclose information with respect to existing terms and conditions of employment, particularly during negotiations for a first collective bargaining agreement;*
>
> *(b) to disclose pertinent information needed by a union to adequately comprehend a proposal or employer response at the bargaining table;*

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[9] *Monarch*, at para 23.
[10] *Monarch*, at para 24.
[11] *Monarch*, at para 25.
[12] *Sun's*, at paras 29, 32.

> *(c) to inform the union during negotiations of decisions already made which will be implemented during the term of a proposed agreement and which may have a significant impact on the bargaining unit; and*
>
> *(d) to answer honestly whether it will probably implement changes during the term of a proposed agreement that may significantly impact on the bargaining unit. This obligation is limited to plans likely to be implemented so that the employer maintains a degree of confidentiality in planning, and because premature disclosure of plans that may not materialize could have an adverse effect on the employer, the union and the employees.*[13]

[127] This Board has also found that an employer's failure to provide contact information to a union is an unfair labour practice.

[128] In *F.W. Woolworth Co. v U.F.C.W., Local 1400*, 1994 CarswellSask 765, [1994] 1st Quarter Sask Lab Rep 169 [*Woolworth*], the union became aware that the new employees were not applying for membership and sought from the employer names, addresses and telephone numbers of all employees hired since certification.

[129] The Board acknowledged the emergence of an obligation on an employer to provide the union with certain kinds of information, including employee names. The Board found that there was no reason to draw a distinction between names and contact information (addresses and telephone numbers). The Board found that this was "especially justifiable where the Employer is restricting access at the workplace and the work force is large with a high frequency of turnover."[14]

[130] The Board found that the employer's refusal to provide this information was a breach of the union security provision of the Act but was also unlawful interference with the employees' right to be represented by a union and with the administration of a union (the right of the union to collect dues).

[131] The Board noted that an employer has "no inherent right to resist or obstruct the exercise" of rights presumed and *The Trade Union Act* expected "a certain level of acceptance and cooperation from an employer" and that a measure of cooperation was necessary to "breathe life" into a statutory provision, "provided that doing so does not infringe any legitimate interest of the employer".[15]

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[13] Relied upon in *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*, 2014 CanLII 17405 (SK LRB), at para 134. Rev'd on other grounds in 2015 SKQB 222, aff'd in part in 2016 SKCA 161.
[14] *Woolworth*, at para 36.
[15] *Woolworth*, at para 35.

[132] The Board concluded:

> *38 In the final analysis, considering the intent of Section 36(1), and the general objectives of the Act to legitimize and to require employers to accept a regime of collective bargaining, we cannot see any reason to sanction a practice which fails to serve any legitimate interest of the employer and is designed merely to frustrate and obstruct the union's access to rights clearly accorded to it by Section 36(1). There was absolutely no attempt by the Employer to explain or defend its conduct on the basis of its legitimate interests. Its sole purpose was to frustrate and interfere with the administration of the Union and the rights of employees. This part of the application is accordingly granted under Sections 11(1)(a) and 11(1)(b) of the Act. ...*

[133] Apart from contact information, this Board has also commented, in *United Food and Commercial Workers, Local 1400 v Madison Development Group Inc*., [1996] Sask LRBR 75, on the Employer's duty with respect to wage rates and classifications:

> *In our view, the conduct of the Employer in responding to the requests by the Union for information was unreasonable, and did constitute an unfair labour practice within the meaning of Section 11(1)(c). There can be no serious argument that the Union is entitled to this information, and that they are entitled to receive this information from the Employer. Though individual employees may be in possession of partial information, it is unlikely that they would know, for example, whether they are regarded as part-time or casual in terms of the definitions proposed at the bargaining table by the Employer, or that they would all be certain of their precise job title or classification.*
>
> *The defense offered by the Employer - that the provision of this information was not a high priority because the issues were not at a particular stage of discussion at the bargaining table - cannot be accepted. The information sought by the Union with respect both to wage rates and to the categorization of employees was of a basic kind, and it is difficult to see how the Union could expect to formulate an overall bargaining position without it. Whether or not the Employer thought the time was ripe for discussion of these issues as such, the Union was entitled to have the information promptly when it was requested in order to proceed with devising bargaining priorities and a bargaining strategy. We do not accept that there was any complexity or sensitivity about the information which would justify the delay in providing the information, or the failure to provide all of the information which was sought by the Union.*

[134] In *U.F.C.W., Local 1400 v Impact Security Group Inc*., 2006 CarswellSask 836, [2006] Sask LRBR 517, the parties were engaged in bargaining for a first collective agreement but were unsuccessful. The union had requested names, addresses and telephone numbers, job sites, occupational classifications, wage rates, and dates of hire, along with other information relating to employees. The employer provided some but not all of the information requested.

[135] The Board considered as a component of the employer's failure to bargain in good faith its failure to provide information that was "relevant to understanding existing terms and conditions

of employment, for the purposes of engaging in rational, informed discussion, and for understanding any response or proposal by the Employer".[16]

[136] The Board found that if an employer chooses not to provide the union's application for membership to new employees and return the completed card to the union, it is still required to provide the union with "the names and contact information for new employees so that the union may attempt to have the employee join the union".[17] The Board found that the employer failed to comply with subsection 36(1) of *The Trade Union Act* and that its actions were an attempt "frustrate and undermine the Union in its representation of the employees", and therefore constituted unfair labour practices in violation of clauses 11(1)(a) and (b) of the Act (interference with employee rights and interference with a union).

[137] More recently, an employer was found to have breached clause 11(1)(c) of *The Trade Union Act* (failure or refusal to bargain collectively) for failing to disclose current classification and wage rates, and updated information when employees receive promotions or changes in wage rates, and when employees left the workforce: *United Food and Commercial Workers, Local 1400, v Wal-Mart Canada Corp*., 2012 CanLII 61524 (SK LRB) [*Wal-Mart*]. The parties had not yet entered into a first collective agreement. The Board explained that the "corollary of an employer's duty to bargain collectively is an obligation to convey to the trade union such information as may be necessary to make collective bargaining possible".

[138] The employer had argued that the union did not need the information for collective bargaining and to the extent that it wanted it, it could have obtained it directly from its members. The Board found the employer's argument unconvincing:

> *[50] With all due respect, there can be no serious argument that the Union was not entitled to the information it sought and to receive this information directly from the Employer. The information regarding the specific wage rates of individual employees may well be personal information but it is also the type of information that trade unions require to effectively represent their members and to formulate collective bargaining strategies. See: United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc., [1996] Sask. L.R.B.R. 75, LRB File No. 131-95. We are also satisfied that the Union is entitled to receive timely updates from the Employer regarding changes in the positions held by members of the bargaining unit, including promotions and departures. As we have stated previously, the Union is not a stranger to this workplace; it is the certified bargaining agent for in-scope employees. As such, it has the right (and in fact is bound by the duty) to represent the employees of this workplace unless and until this Board orders otherwise. In light of the restrictions on the Union's access to the workplace (restrictions discussed later in these Reasons for Decision) and in light of the ongoing changes in the workplace, the*

[16] *Impact*, at para 41.
[17] *Impact*, at para 47.

Union is entitled to receive from the Employer timely information regarding any changes in the employment status or contact information of its members.

[139] In summary, an employer's informational duty, including in relation to contact information, arises from its duty to bargain in good faith and to recognize the union as the exclusive bargaining agent on behalf of the unit members.[18] An employer is required to provide information with respect to existing terms and conditions of employment (especially during first CBA negotiations) and to disclose pertinent information needed by a union to adequately comprehend a proposal or response. A union is entitled to information about working conditions, including but not restricted to wage rates and classifications of employees.

[140] A union is also entitled to know who is in the bargaining unit and to have adequate contact information for those individuals. Again, the employer's duty arises from its duty to bargain in good faith and to recognize the union as the exclusive bargaining agent.[19] The Union's choice not to provide membership application forms does not absolve the Employer of its duty. Application forms would not have provided ongoing information, which is clearly required in the context of bargaining. Nor would they have provided contact information for existing employees who did not become members. Just as contact information for existing non-members is required for a union to carry out its representational duties, so is contact information for new employees.

[141] Contact information allows the union to connect with the employees and request that they join the union if they haven't already; but it also is critical to ensure that the union has the resources necessary to canvass the employees' wishes and can act as a genuine representative of the employees.

[142] The Employer draws a distinction based on the Union not having provided forms, but never during its dealings with the Union did it suggest that this was the real obstacle. Nor did it suggest that it could facilitate the provision of information if only it had the forms. Instead, it flatly refused to provide the contact information at all.

[143] In these circumstances, it was sufficient for the Union to ask for the information to which it was entitled and to expect that the information to which it was entitled would be provided.

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[18] *Bernard*, at paras 22, 26; *Millcroft*, at para 13.

[19] To be sure, if an agreement has been reached and the informational duty forms a part of the agreement, then a jurisdictional question may arise (pertaining to whatever grievance procedure is outlined in the concluded agreement).

[144] Next, the Union has the onus to demonstrate that the Employer committed unfair labour practices.

[145] In the present case, the information that is in issue consists of information about working conditions, job duties, and pay rates for the employees as well as names, addresses, and contact information. The Employer provided names, addresses, positions, hire dates, and wage rates early on - in January 2020, following the first request made in December 2019 - but no additional contact information – no phone numbers and no emails.

[146] Despite the Employer refusing to provide full information about working conditions and employee information, the parties began to bargain. In May 2020, the Union provided an initial proposal based on a template that it had used for a charitable organization. Other than monetary provisions, including a schedule of wages, it was relatively comprehensive. To be sure, the term of the agreement was not set out. McConnell explained that the Union was able to put this together based on information provided by the bargaining committee members, the organizing department, and a unit meeting with the members. McConnell wasn't sure how this meeting was organized, but he knew that the organizing department had contacted some members to organize it.

[147] The unit meeting suggests that the Union had the ability to communicate with the members, or some of the members, at the outset of bargaining. This is not indicative, however, of the information available to the Union during the later stages of bargaining.

[148] Furthermore, McConnell testified that, at some point during bargaining, he asked the organizing department for the contact information in their possession, but it was not complete.

[149] There is no question that the Union was at an informational disadvantage throughout most of bargaining. After the parties met virtually, the Union pointed this out. The Employer continued to take the same positions – that is, it had all the information the Employer was willing to give and if the Union wanted more, it could get same from the members.

[150] The Union's disadvantage was particularly serious given the reason that the Union had become involved in the workplace to begin with. The employees had expressed a concern that the Employer was showing favoritism to certain employees. As such, it was important for the Union to address this issue. To do so, it had to understand the nature of the employees' jobs, and especially, their classifications (not just their departments). Only with the benefit of this information would the Union be in a position to rationalize the wages that were proposed.

[151] The Union provided a monetary proposal in February 2021, representing “outstanding proposals tabled by the Union”. It reserved its right to “table a proposal regarding wage rates at a later date in these negotiations” but declined “to table same at this stage” because “the Union has not been provided sufficient information to formulate an appropriate starting point for the discussion”. The Union went on to explain that “[t]he information required includes but is not limited to the current wage rates and classifications of all employees”.

[152] This was a reasonable position to take. In the absence of an updated employee, classification, and wage rate list, it would have been difficult to determine the basis for wage rate negotiations. In particular, there would be no way for the Union to know whether it was agreeing to reduce the wages of some employees, particularly given the discretion that the Employer had been exercising in assigning different wages to different employees.

[153] To the monetary proposal, the Union also attached the Employer’s proposed wage schedule template (apparently provided on May 6, 2020). The Union pointed out that the template did not include all of the classifications (or positions) that had been included in the information previously provided to the Union. The Union also observed that the Employer’s template had not included seniority pay steps.

[154] The Union wrote to the Employer indicating that it was working on a proposal for wage rates and a term of the CBA, but that it needed more information about the current classifications and wage rates “specific to each classification for all employees to be red circled”. It also observed that some employees had been working in multiple classifications.

[155] To be fair, the Employer provided the Union with an employee list (with wage rates) shortly after it made its request. However, the list included 24 employees (10 fewer than could be deduced from the series of names provided on January 13, 2020). In other words, the Employer’s proposed wage schedule could not have been assessed with the information initially provided.

[156] Furthermore, although the employee list listed the departments in which the employees were working (there were two) it did not indicate their classifications. The Union would have needed more information (ie, classifications) to rationalize its proposals with respect to wage rates (especially for employees working in more than one position/classification at multiple rates). Despite the Union having asked for this information, the Employer did not provide it.

[157] As of March 15, 2021, the agreed upon articles were: purpose, scope, interpretation, recognition, management rights, union security, dues check off, labour relations, probation, strike and lockout, grievance procedure, arbitration, statutory holidays, annual vacations, OHS and accommodation, notice and bulletin boards, provision of names of officers and stewards, technological and organizational change, and duration of agreement. Although some progress had been made in bargaining, many of the provisions of these articles simply confirmed the Employer's duties under the Act, either explicitly or implicitly.

[158] Despite the lack of information on classifications, the Employer insisted on moving to a vote.

[159] On March 15, the Employer tabled an offer for settlement and asked the Union to take it to a vote. In the preamble to the offer, the Employer indicated that if it was not accepted it reserved the right to revisit all bargaining items, citing, in part, "the fact that the CCB hall has not been open for most of the last year". At some point, the Employer presented the Union with a deadline by which the Union would present its offer to the membership.

[160] The offer included many articles to which the parties had not yet agreed. It also included more classifications than were initially proposed and added seniority steps. It included wage rates for all employees at the time of ratification for red circling purposes, consistent with the list provided three weeks earlier. Again, although it indicated the departments in which the employees were working it did not indicate their classifications.

[161] The Union struggled with the wage rate proposal. First, harmonizing the rates was an issue. Second, the term of the agreement was longer than the Union had wanted. The Employer was seeking a longer term because it wanted wage rate certainty, that is, no change in the pay steps. A shorter term would have allowed the Union to revisit the wage rates early on if they were unsatisfactory.

[162] The Union's responded with its last position. Based on the Union's position, there were many matters that were not yet settled. In particular, the parties had not agreed on the term of the agreement. The Union sought a one-year term. However, included in the Union's position were classifications, wage rates, and steps.

[163] McConnell explained that it was not equipped for a ratification vote, in part, because it did not have the ability to compile a list of employees. The Union did not have current addresses or contact information to encourage people to vote. It did not want to conduct a vote at the

Employer's premises, in part, because it was not neutral territory. Moreover, most of the Union's votes had been conducted electronically, relying on email addresses. If the offer was rejected the Employer had undertaken to reexamine all proposals. In other words, the parties would be back at "square one".

[164] To be sure, there is no written explanation of these concerns. That being said, it was not unreasonable for the Union to assume that the Employer would continue to take the same position that it had previously taken with respect to contact information.

[165] The Employer argues that the Union could have brought a last offer vote application. While this is true the Union would not have recommended it. Further, the Employer could have brought a last offer application if it had wanted a vote to proceed. Instead, it insisted that the Union conduct a vote.

[166] The Union's position was confirmed by what happened next – its first collective agreement application, dated May 12, 2021. In it, the Union took the position that it could not recommend the Employer's offer. The bargaining unit information that the Union provided to the Board suggests that it was aware of the classifications, generally, but that it had not been made aware of the status of all of the employees on the original employee list. In other words, the Union was still unaware of how exactly it came to be that there were 10 fewer employees on the new list as compared to the old.

[167] Conciliation followed, was unsuccessful, and then starting in September, there were further exchanges about bargaining dates. Although there was a delay of some eight months, the Union representatives did not spend it twiddling their thumbs. The Union sought an internal review to determine whether to bring a "next stage" first collective agreement application. Around this time, there was also some turnover in available resources relevant to this review. The Union decided not to bring the application.

[168] Apparently, it decided instead to try to take a different approach. That approach suggests that it was possible (perhaps after receiving contact information) for the Union to attempt a vote (whether at the Employer's premises or otherwise), even if not ideal. The Union was adjusting. However, the Union would remain without the classifications and contact information it had previously requested, and which had been denied.

[169] When the Union next reached out to the Employer, McConnell explained that he wanted to meet to discuss some items in the Employer's last offer before deciding if it could "proceed to

present it to the membership for a vote". The Union listed a number of items that it wanted to discuss. To be sure, wage rates, steps, and classifications were not among them.

[170] The Union's request for information, on this occasion, did not include wage rates. The Union did, however, request names, classifications, and contact information. The Union wanted to reassess the Employer's proposal and contact the members. Although the Union had not identified "classifications" as an issue it was abundantly clear (from its request for classifications) that it was still concerned about rationalizing wage rates. It was also insisting on negotiating the term, which would have provided the Union with a cushion if the wage rates needed to be revisited.

[171] There was no response to this request. In the hearing, the Employer asked McConnell if he asked the Employer for the information again. He had not.

[172] There is no doubt that, in retrospect, the Union could have moved faster and communicated its requests (and its rights) more frequently and more assertively. However, the Union was left with the impression that the Employer was unwilling to provide contact information. This is consistent with the Employer's position, as stated in its reply to the ULP application at 5.q):

> *q) Overall, City Centre Bingo states that there is no obligation in the Act, or in any of the provisions of the Act claimed by the Union in this application, which would require City Centre Bingo to provide any further information to the Union, including addresses, email addresses, or phone numbers of the employees of City Centre Bingo.*

[173] It is simply not believable that the Union's second request would have made a difference. That is, it is highly unlikely that the Employer would have started to provide classifications and contact information in the Fall of 2022 after resisting the requests in the past. The Employer likely would have provided an updated employee list (prior to a meeting) but the subsequent exchange of emails suggests that the Employer was not serious about meeting.

[174] That exchange went like this. The Union sent its email in September. The Employer responded 13 days later directing the Union to provide its availability. The Union did that the following day. The Employer did not respond to that email for another 19 days. When it did, it identified two days that had been open three weeks earlier. Approximately 20 minutes later, the Union replied. One of those dates was no longer open. Meeting on the other day would have resulted in only a single day of bargaining, which was not ideal. The Union proposed dates in January instead. The Employer did not reply.

[175] Over the course of the Fall, the Employer succeeded in delaying and failing to respond to the Union about dates, frustrating the Union's attempts at coming to the bargaining table. The Union could have insisted on a reply to its final proposal for dates, but the matter was in the Employer's court. Instead, the next communication received by the Union was the decertification application.

[176] This exchange occurred at a time when the Union was reorienting its approach to bargaining, entertaining the notion of a vote, and indicating that reaching a CBA could finally be within reach.

[177] McConnell testified that he has never, before this experience, encountered an issue with obtaining information during first collective agreement negotiations. The work assignments and rates of pay have been provided by all of the other employers he has dealt with. Contact information that is sufficient to allow him to communicate with members and conduct votes has never been a problem.

[178] He also explained that, during bargaining, he was lacking information about pandemic-era working conditions. This is despite the Employer's express concerns about the impact of the pandemic on its operations. The Employer provided information about shifts, in sweeping terms. However, it did not present detailed information about its operations. It did not provide information about the ownership or lease of the building, the associated costs, or the average revenue, as a few examples.

[179] McConnell explained that when an employer is seeking concessions on the basis of economic concerns, it is the Union's job to understand the basis for those concerns, so that it can rationalize the proposals and then communicate the rationale to the membership. The Union, as representative, can ensure that the membership has an appreciation of what is realistic. Without the relevant information, again, the Union is at an informational disadvantage. The Union can sell a proposal if justified.

[180] Furthermore, an absence of information about the Employer's true economic circumstances (subject to all confidentiality limits) puts the Union at a reputational disadvantage. The period of first CBA negotiations is an especially vulnerable time for a union in normal circumstances. Here, where the Union had entered the workplace a few months prior to the onset of the pandemic, its vulnerability was especially high.

[181] It is generally accepted that when asked an employer is obligated to disclose information with respect to existing terms and conditions of employment (particularly during negotiations for a first collective bargaining agreement). As the exclusive bargaining agent, the Union is entitled to receive "timely updates from the Employer regarding changes in the positions held by the members". The Union is also entitled to adequate contact information for the members of the bargaining unit.

[182] The Employer had no legitimate interest in refusing to provide the information requested. Instead, the Employer's approach appeared designed to "frustrate and interfere" with the Union's representation of its members. From early on, the Union articulated its requests in the context of bargaining, explaining to the Employer that it needed the information to prepare for negotiations.

[183] The duty to provide information belongs to the Employer. It is not an answer for the Employer to direct the Union to obtain the information from the employees. The Employer does not fulfill its obligation by refusing and then redirecting the Union to another source.

[184] Also, it undermines the effectiveness of the bargaining agent to shift a duty, which belongs to the employer, onto the employees. As McConnell explained, seeking detailed information from employees about other employees risks incomplete and unreliable information and can result in friction within the bargaining unit.

[185] Nor should a union be expected to use the employer facilities for its business.[20]

[186] Finally, the Union's decision to seek contact information informally, rather than through the provision of membership application forms, does not change the Board's conclusions. The obligation to provide that information belonged to the Employer. It arose from its duty to bargain in good faith and to recognize the Union. To dismiss the allegations on this basis would be to apply an unduly narrow interpretation of Part VI.

[187] At times the Employer seemed to skate on the surface of its obligations and at other times it completely and overtly disregarded some of its obligations but continued to engage in discussions with the Union. Ironically, when an employer, instead, commits blatant and total violations of its duty to bargain in good faith, its conduct is easier to identify and address. Such cases are rare, especially with sophisticated parties. More commonly, anti-union animus is more skillfully concealed and can be identified only through an assessment of the entirety of the

[20] *Bernard*, at para 27.

circumstantial evidence. For these reasons, such conduct tends to prevail over longer periods of time and has greater potential to erode the effectiveness of the bargaining agent.

[188] Given the foregoing, the Employer has contravened section 6-7 and committed an unfair labour practice pursuant to clauses 6-62(1)(b), (d), and (r) of the Act. The duty to bargain in good faith requires the Union and the Employer to make every reasonable effort to conclude a collective bargaining agreement. The corollary of an employer's duty to bargain collectively is an obligation to convey to the union such information as may be necessary to make collective bargaining possible.

Statutory Freeze:

[189] The next issue pertains to the increase in employees' wages after certification took place. With respect to the unfair labour practice allegations, the relevant provision is clause 6-62(1)(n):

> ***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:*
>
> *. . .*
>
> *n) before a first collective agreement is entered into or after the expiry of the term of a collective agreement, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in a bargaining unit without engaging in collective bargaining respecting the change with the union representing the employees in the bargaining unit;*

[190] Much of the related case law was decided pursuant to the predecessor provision of *The Trade Union Act*, which was clause 11(1)(m). The Board in *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc*., 2017 CanLII 44004 (SK LRB) found "little, if any, substantive difference" between clauses 11(1)(m) of *The Trade Union Act* and 6-62(1)(n) of *The Saskatchewan Employment Act*. Given this, the Board's case law analyzing clause 11(1)(m) "provides helpful guidance" in the application of clause 6-62(1)(n) of the Act. [21]

[191] The intent of the freeze was described in *RWDSU v Regina Exhibition Association Ltd*., LRB File No. 179-00, as "to nurture collective bargaining, to set a solid basis of negotiations, to support the Union's role as the exclusive bargaining agent and to prevent unilateral changes of

[21] *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc*., 2017 CanLII 44004 (SK LRB), at para 69.

the sort that are destructive of collective bargaining". The Board in *Newspaper Guild v Sterling Newspapers*, [2002] Sask LRBR 180 also explained:

> *[22] The statutory purpose of s. 11(1)(m) is to require the employer to maintain the status quo with respect to the pre-certification terms and conditions of employment unless the union consents to a change…It stabilizes the bargaining relationship by fixing the terms and conditions of employment at their pre-certification state. The union is not required to bargain from a sliding scale and can anticipate that employees will retain their current level of pay and benefits until the union and the employer agree to something else.*

[192] The freeze becomes effective when a certification order is issued. A union may consent to the changes the employer wishes to make to the terms and conditions, but changes are not to be made unilaterally. It is not considered a relevant change for purposes of the statutory freeze if the change is consistent with business as it existed before certification. The "business as before" principle has been described this way:

> *The "business as before" standard allows for sensitivity to the exigencies of carrying on the employer's business while preserving the stability necessary to ensure good faith bargaining. An employer must operate the business in accordance with the pattern established before the freeze. The right to manage the business is maintained, circumscribed only by the condition that it be managed as before the freeze.*[22]

[193] The Employer has acknowledged that it increased wage rates during the period following certification and that it did so unilaterally. In its defense, it states that said wage rates were consistent with its business "as before". It has suggested that it increased wage rates to deal with market conditions or to adjust wages based in increases in the minimum wage.

[194] The Board is not persuaded that the Employer increased wages consistent with its prior business practices. First, there is no consistency in the increases, and no rational explanation has been provided in relation to the inconsistency. Second, most increases were provided for employees who were already making more than minimum wage. Third, there was no helpful evidence about the Employer's "business as before" practices. The only relevant evidence came from Beardy. She testified that she does not look at her pay stubs and had to be told that she had received a wage increase. Obviously, she was not a reliable source of information about past increases.

[195] Although counsel for the Employer argued that Beardy testified that she had received raises in the past, he conceded that no detail was provided about this.

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[22] *Canadian Union of Public Employees, Local 4152 v Canadian Deafblind and Rubella Association*, [1999] Sask LRBR 138 at para 55.

[196] Furthermore, in response to a cross-examination question about the raise she had received in 2023, Beardy testified that, “I couldn’t tell you the last time I had a raise before that”. Then, the following exchange occurred:

> *Counsel: Do you know how frequently you’ve been getting pay increases over the last, let’s say, four years?*
> *Beardy: Not frequently.*
> *Counsel: Have you seen more than one since, 2019, let’s say?*
> *Beardy: I don’t know. Truthfully.*

[197] All of this is apart from the concerns that the Board has about Beardy’s credibility. Those concerns arise primarily in relation to her testimony about the retainer of her lawyer. Beardy is obviously an intelligent person. And yet, her description was internally inconsistent, and the inconsistencies identified are not reconcilable based on the information she has provided. It is simply not believable that, after making no efforts to find a lawyer (or any support person), she received a text or call from a lawyer who she didn’t know, and didn’t ask why, but then decided to retain him without having any additional information to explain how that came about. The Board was left with the impression that Beardy was choosing to hold information back from the Board. Her willingness and ability to do this taints the rest of her evidence.

[198] Despite the obvious weaknesses in the evidence, the Employer suggests that there is evidence of a pattern of past increases, while acknowledging that “business as before” as a concept relates to the period before certification.

[199] The bare existence of wage increases since certification are not evidence of a pre-certification pattern.

[200] If anything, the evidence strengthens the assertion that the Employer has been violating the statutory freeze and had done so more than once. Furthermore, McConnell testified that, in consultation with the bargaining unit members, he was told that there was no uniform system of wage increases – that they were intermittent. It is unlikely that such intermittent, and unpredictable, wage increases could create legitimate expectations for employees that would qualify as business as before.

[201] Furthermore, the Employer had every opportunity to approach the Union to provide it with information about previous practices so that it could maintain these during the negotiations. The

Union would have had nothing to gain by standing in the Employer's way. And yet, there is no evidence that the Employer did this.

[202] Lastly, the Employer chose not to call any witnesses. The Employer admitted that it increased wages but then chose not to call any witnesses to explain a primary defense, that is, that it had increased wages consistent with its business as before practices. It presented no evidence to explain how post-certification evidence was relevant to pre-certification practices.

[203] This is a clear case for invoking the evidentiary rule outlined in *Murray v Saskatoon (1951)*, 1951 CanLII 202 (SK CA), [1952] 2 DLR 499 at 506 (Sask CA):

> *The subject is dealt with at length by the learned author in Wigmore on Evidence, 3rd ed., vol. II., pp. 162 et seq. On p. 162 it is stated in part:–"The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."*
>
> *The party affected by the inference may, of course, explain it away by showing circumstances which prevent the production of the witness; but, where the failure to produce the witness is not explained, the inference may be drawn that the unproduced evidence would be contrary to the party's case or at least would not support it. In the pages in Wigmore on Evidence following the above quotation many authorities are referred to which indicates that in the Courts of the United States the rule is of wide application.*

[204] The Employer could have explained why it didn't produce a witness (despite Ouellette's physical presence in the hearing) but did not. The Board has heard no explanation as to why a witness could not have been produced to provide evidence on point.

[205] Next, there is also an issue as to when the wage increases occurred. Beardy did not provide clear evidence on point. The Employer has conceded that a wage increase occurred between December 31, 2022 and August 2023.

[206] The decertification application was filed on March 13, 2023. On or about March 20, 2023, the Union learned that at least one employee had received a wage increase. The Union found out about this only after it reached out to the employees following the decertification application having been filed. In other words, in a matter of seven days (between the filing of the application and the receipt of this information), the Union learned of a wage increase. Given all of the

evidence, it is likely that said wage increase occurred after December 31 and before the decertification application was filed – a period of only two and a half months.

[207] Again, the timing of the wage increase was information in the Employer's possession, but the Employer chose not to call a witness to testify. The logical inference is that the Employer gave the increase before the application was filed.

[208] As well, the Employer has conceded that it gave an additional post-certification raise prior to the raise given in 2023. And, in its reply to the unfair labour practice application, the Employer admitted to having given raises "to all employees" between the date of certification and "the present date". This confirms that there was more than one general wage increase.

[209] Lastly, the Employer suggests that wage increases are a benefit to the employees, the Union has not asked for reductions, and there is no basis for finding that wage increases (as opposed to reductions) contravene the statutory freeze.

[210] This argument overlooks the intent of the statutory freeze. The intent is to "to nurture collective bargaining, to set a solid basis of negotiations, to support the Union's role as the exclusive bargaining agent and to prevent unilateral changes of the sort that are destructive of collective bargaining".

[211] The Union is the exclusive bargaining agent on behalf of the employees in the bargaining unit. A key aspect of its role as bargaining agent is the negotiation of wage increases. Wages feature prominently among the subject matter covered by a collective agreement.

[212] When an employer unilaterally increases the employees' wages, beyond business as before, the Union loses the opportunity to demonstrate to the employees its effectiveness and questions are raised about the need for the Union in the workplace. Such unilateral action undermines the role of the Union as bargaining agent and is destructive to collective bargaining. It can communicate to the employees that they are better off without the Union.

[213] Given the foregoing, the Employer contravened clause 6-62(1)(n) of the Act by, before a first collective agreement was entered into, unilaterally changing the rates of pay of the employees in the bargaining unit without engaging in collective bargaining respecting the change with the Union.

[214] Given the Board's finding that the Employer committed unfair labour practices, the Board will grant a declaration and an order to post in the workplace.

Influence on Decertification:

[215] Next, it is the Union's onus to prove, on a balance of probabilities, that the decertification application was made in whole or in part on the advice of, or as a result of the influence of or interference or intimidation by the Employer or Employer's agent.

[216] The application need only be made "in part" on the advice, influence, interference or intimidation of the Employer.[23] It is not necessary for the Board to find that the Employer's actions were the sole or even the primary influence in bringing the application.

[217] The Board starts with the premise that employees have the right to join a union, as set out in subsection 6-4(1) of the Act, and that joining a union is a matter of the employees' choice, as confirmed by section 2(d) of the Charter. As a function of that choice, employees are entitled to "periodically revisit the representational question".[24]

[218] The Board in *Williams v United Food and Commercial Workers, Local 1400*, 2014 CanLII 63996 (SK LRB) [*Williams*] explained the principles underlying section 9 of *The Trade Union Act* (the predecessor provision to section 6-106):

> *[31] Generally speaking, the cases where this Board has invoked s. 9 of The Trade Union Act have generally fallen into one of two (2) categories:*
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> > *1. Circumstances where the Board had compelling reason to believe that the real motivating force behind the decision to bring a rescission application was the will of the employer rather than the wishes of the employees. Examples of such cases include Wilson v. RWDSU and Remai Investment Co., supra; Larry Rowe and Anthony Kowalski v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Canadian Linen and Uniform Services Co., [2001] Sask. L.R.B.R. 760, LRB File No. 104-01; Tyler Nadon v. United Steelworkers of America and X-Potential Products Inc., [2003] Sask. L.R.B.R. 383, 2003 CanLII 62864 (SK LRB), LRB File No. 076-03; and Paproski v. International Union of Painters and Jordan Asbestos Removal, supra.*
> >
> > *2. Circumstances where the Board lost confidence in the capacity of the employees to independently decide the representational question because the nature of an employer's improper conduct was such that it likely impaired them of their capacity to freely do so. Examples of such cases include, Schaeffer v. RWDSU and Loraas Disposal Services, supra; and Patricia Bateman v.*

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[23] *Paproski v International Union of Painters and Allied Trades, Local 739 and Jordan Asbestos Removal Ltd*., 2008 CanLII 47038 (SK LRB), at para 133.
[24] *Williams v United Food and Commercial Workers, Local 1400 and Affinity Credit Union (Hague Branch)*, 2014 CanLII 63996 (SK LRB), at para 28.

> *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Empire Investments Corporation (Northwood Inn & Suites), 2009 CanLII 18238 (SK LRB), LRB File No. 149-08.*
>
> *[32] It is also important to keep in mind that s. 9 is invoked by stripping employees of the very right it is intended to protect; the right to decide the representational question. Where the Board is satisfied that improper employer conduct has tainted a rescission application, the remedial response is to reject or dismiss that application. Thus, a compelling labour relations justification is necessary before this Board will withhold the right of employees to decide for themselves whether or not they wish to continue to be represented. As this Board has stated on many occasions in exercising the discretion granted pursuant to s. 9 of the Act, this Board must carefully balance the right of employees to revisit the representational question (now recognized as a protected associational activities) against the need to be alert to signs of improper employer influences. To do so, this Board examines the impugned conduct of the employer and measures the likely impact of that conduct on employees of reasonable fortitude giving due consideration to the circumstances occurring in the workplace at the relevant time, including the maturity and status of collective bargaining.*
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> *[33] This is an objective test and the Board starts from the presumption that employees are possessed of reasonable fortitude and are capable of receiving a variety of information; of evaluating that information, even being aided or influenced by that information; without necessarily losing the capacity for independent thought or action. Employees are not presumed to be timorous minions cowering in fear of their masters. Rather, the Board presumes that employees are capable of deciding what is best for them and that they will weigh any information they receive, including information from their employer, and will make rational decisions in response to that information. For this reason, not every impugned statement made or action taken by an employer will necessarily lead to the conclusion that a rescission application has been made as the result of improper influence, interference, assistance or intimidation by the employer. See: Ray Hudon v. Sheet Metal Workers International Association, Local 296 and Inter-City Mechanical Ltd., [1984] Aug. Sask. Labour Rep. 32, LRB File No. 105-84. In exercising the discretion granted pursuant to s. 9 of the Act¸ the democratic rights of employees should not be withheld merely because employees have received information from their employer and that information may have assisted them. See: Button v. United Food and Commercial Workers, Local 1400 and Wal-Mart Canada, supra. Rather, the impugned conduct of the employer must approach a higher threshold; it must be of a nature and significance that the [probable] impact of that information will be to compromise the ability of employees (of reasonable fortitude) to freely exercise their rights under the Act. See: Shane Reese v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Holiday Inn Ltd., [1989] Summer Sask. Labour Rep. 84, LRB File No. 207-88 & 003-89.*

[219] The Board went on to observe that the amendments, in 2008, to clause 11(1)(a) of *The Trade Union Act* (later carried into the Act) "signaled a greater tolerance by the legislature for the capacity of employees to receive information and views from employers."[25]

[220] It is also the case that communications during either a certification or rescission application have generally been subject to a more rigorous review by the Board.[26] These circumstances make

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[25] *Williams*, at para 34.

[26] *Service Employees International Union (West) v Saskatchewan Association of Health Organizations*, 2014 CanLII 17405 (SK LRB), at para 101.

the union's relationship with the employees more precarious than in circumstances involving a mature bargaining relationship, and therefore, more vulnerable to employer interference.

[221] Drawing from *Williams*, the following principles are applicable to the current case:

- A compelling labour relations justification is necessary before the Board will withhold the right of employees to decide the representation question.

- The Board must carefully balance the right of employees to revisit the representation question against the need to be alert to signs of improper employer influence.

- The Board examines the conduct of the employer and measures the likely impact of that conduct on employees of reasonable fortitude giving due consideration to the circumstances occurring in the workplace at the relevant time, including the maturity and status of collective bargaining.

- This is an objective test and the Board starts from the presumption that employees are possessed of reasonable fortitude and are capable of receiving a variety of information.

- The employer's conduct must be of a nature and significance that the probable impact will be to compromise the ability of employees (of reasonable fortitude) to freely exercise their rights under the Act.

[222] The allegations in the present case focus less on direct influence over the making of the application and more on indirect influence over the applicant's choice to, and the employees' choice whether to, remove the Union.

[223] The Union suggests that this case falls into the second of the two circumstances outlined in *Williams*, that is:

> *Circumstances where the Board lost confidence in the capacity of the employees to independently decide the representational question because the nature of an employer's improper conduct was such that it likely impaired them of their capacity to freely do so.*

[224] The Board agrees.

[225] Despite the frailties in Beardy's evidence, the most consistent reason she provided for bringing the application was that "nothing was happening". She repeated this phrase many times.

[226] Relatedly, a primary reason for why the employees certified the Union (favoritism) was the issue most greatly impacted by the withholding of information. The withholding of classification information had the effect of delaying the Union's rationalization of the proposals.

[227] Then, the delay in the setting of dates had the effect of impeding bargaining progress at a critical time when the Union was revisiting its approach to bargaining.

[228] While all of this was happening, the Union had incomplete information and limited access to contact information for bargaining unit members. McConnell described the Union as resorting to a circuitous and unusual method of contacting members (using Can411). By the time the decertification application was filed, representatives were attending at employees' homes and showing up at the workplace to speak with them. To be clear, there is more the Union could have done – invoked union security, made more frequent requests, brought an unfair labour practice application earlier – however, it was the Employer's duty to provide information. It is clear that the Employer believed that said obligation did not apply to it.

[229] In the Fall of 2022, the Union asked Beardy to post a notice on the bulletin board (to obtain contact information) and she refused, providing no explanation.

[230] Obviously, the Union wanted to engage with the members about bargaining. Even if the Union had chosen to send updates through Beardy, which would have been far from ideal, she was not in possession of the employees' emails. Providing updates to some but not all of the members would have been corrosive (particularly given the concerns about favoritism).

[231] The lack of direct contact with the updated group of employees put the Union at a disadvantage and increased its vulnerability. Despite their best efforts, the committee members did not have information about the working conditions of all of the employees. It impeded their ability to bargain. It impeded their ability to negotiate an agreement that the Union could be confident would be acceptable to the members.

[232] To be sure, the decertification application had been in progress for some time. Beardy was reviving an application that had already been started. However, there is almost no information about the earlier progress made in decertification attempts. And, it was not until a few weeks prior to the filing of the application that Beardy says she had started it.

[233] Around this time, the Employer had provided a general wage increase without negotiating with the Union. The Union had already spoken to the Employer with concerns about the statutory freeze.[27] The Employer ought to have known what it was doing and the impact that it would have had. The Employer provided no evidence that the increase was benign in timing or in motivation. The temporal proximity to the decertification application raises serious questions that have not been answered.

[234] Even if Beardy is to be believed that she was unaware of the increase, her coworkers were aware. Nor does an employer provide a wage increase in total silence – a wage increase, to be effective, has to be known. Wages are a central feature and, at times, the most important feature of collective bargaining. By unilaterally increasing wages, the Employer undermined the Union and communicated to the employees that they would be better off without it.

[235] In considering whether to withhold the right of employees to decide the representation question, the Board starts from the presumption that employees are possessed of reasonable fortitude. Here, there was a new bargaining unit with a high rate of employee turnover during difficult economic times, making the relationship with the Union especially tenuous.

[236] The Employer's conduct had the effect of frustrating bargaining. Given the state of bargaining and the limited contact, it is not surprising that the employees were concluding that "nothing was happening". In the midst of this, the Employer avoided setting dates and then provided a wage increase, communicating that having the Union in the workplace was unnecessary. And despite there being no monetary downside to having a union[28], Beardy made the application.

[237] The probable impact of the Employer's conduct was to compromise the ability of employees (of reasonable fortitude) to make an informed decision about whether to be represented by the Union to the extent that their true wishes cannot be ascertained by a secret ballot vote. There is a compelling labour relations reason to exercise the Board's discretion under section 6-106 of the Act.

[238] The Board draws this conclusion independent of the circumstances under which Beardy came to retain a lawyer to assist her in the decertification hearing.

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[27] The Union had concerns about the closure of the daycare. There were discussions in bargaining about this, including in relation to the business-as-before principles. See also, para 46.
[28] No union dues were being collected.

[239] By concluding as much, the Board is not removing the employees' right to determine the representation question indefinitely but suspending it. By doing this, the Board is providing the parties with an opportunity to reach a CBA under different circumstances – circumstances in which the Employer is complying with its statutory obligations and in which the parties are negotiating if not on an equal basis on a more equal basis. This will provide the opportunity to the Union to prove its worth to the employees under the conditions that are guaranteed by the Act and that are intended to facilitate the Union's representation of the employees.

Conclusion:

[240] For the foregoing Reasons, the Board declares that the Employer committed unfair labour practices pursuant to sections 6-62(1)(b), (d), (n), (r), and 6-7 of the Act and makes the following Orders:

a) That the Employer cease and refrain from contravening sections 6-62(1)(b), (d), (n), (r) and 6-7 of the Act;

b) That the Employer post a copy of the Board's Order and Reasons for Decision at the Employer's facility in Saskatoon, in a location or locations accessible to the employees, for at least 60 days, commencing within one week of the date of the Order;

c) That the application to cancel the certification order be dismissed; and

d) That the ballots in that matter be destroyed unopened.

[241] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **14th** day of **December, 2023.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson