Saskatchewan Labour Relations Board

LESTER JOHN VILLAHERMOSA and SHAHEENA KOUSAR, Applicants v UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent and 610539 SASKATCHEWAN LTD., O/A HERITAGE INN, Respondent

and

610539 SASKATCHEWAN LTD., O/A HERITAGE INN, Applicant v UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent and LESTER JOHN VILLAHERMOSA and SHAHEENA KOUSAR, Respondents

LRB File Nos. 160-23, 161-23 and 169-23, February 21, 2025
Chairperson Kyle McCreary, Members Linda Dennis and Don Ewart
Citation: *Kousar v UFCW, Local 1400*, 2025 SKLRB 6

The Applicants, Lester John Villahermosa and Shaheena Kousar: Self-Represented
(Respondent in LRB File No. 169-23)

Counsel for the Respondent. United Food and Commercial Workers, Local 1400: Dawn McBride
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(Respondent in LRB File No. 169-23)

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(Applicant in LRB File No. 169-23)

Decertification – Dismissed as application made in part as a result of Employer actions

REASONS FOR DECISION

Background:

[1] **Kyle McCreary, Chairperson:** Ms. Kousar and Mr. Villahermosa ("the Applicants") have applied to have United Food and Commercial Workers, Local 1400 ("the Union") decertified as their collective bargaining agent with 610539 Saskatchewan Ltd. o/a Heritage Inn ("the Employer"). For the reasons below, the Board dismisses the applications to decertify and by extension, the objection to the conduct of the vote.

[2] The Employer and the Union are subject to a certification Order in LRB File No. 161-02 dated October 3, 2002. The Employer operates a hotel in Saskatoon. The parties' collective bargaining agreement expired in 2019. Bargaining that began in 2019 was started from scratch after the pandemic in early 2023.

[3] The process of bargaining up until the summer of 2023 is discussed in detail in *United Food and Commercial Workers, Local 1400 v 610539 Saskatchewan Limited (operating as Heritage Inn Saskatoon)*, 2024 CanLII 14520 (SK LRB) ("*Heritage Inn #1*").

[4] The bargaining continued through the summer. On September 5, 2023, Ms. Figueiredo, the Union President, took over bargaining. Bargaining continued through the fall, although little progress was made as the Employer continued to maintain its proposals. The only members of the Union with knowledge of what was happening at bargaining were members of the bargaining committee. The Union did not provide detailed status updates on proposals to membership.

[5] On September 5, 2023, the Employer gave the Union notice of a lockout to commence on September 7, 2023.

[6] Also on September 5, 2023, the Employer made offers of employment to all existing employees to continue working after the commencement of the lockout. Employees did not have union representation when receiving the offers.

[7] In response to the notice and the offers, Ms. Figueiredo, the Union President, attempted to attend the workplace on September 5, 2023. The Employer asked Ms. Figueiredo to leave, and threatened to call the police if she did not leave.

[8] The Employer locked out the Union on September 7, 2023. The evidence at the hearing was that the lockout was ongoing as of the dates of the hearing.

[9] The Union commenced a picket line at the start of the lockout. There were issues on the picket line. The Employer was granted an interim injunction pending a hearing on September 21, 2023. On November 10, 2023, the application for an injunction was dismissed in *Sasco Developments Ltd v United Food and Commercial Workers*, Local 1400, 2023 SKKB 242 (CanLII), and the interim injunction was lifted.

[10] On November 15, 2023, slightly over two months into the lockout, the Applicants filed their applications for decertification pursuant to s. 6-17 of *The Saskatchewan Employment Act*, in LRB File Nos. 160-23 and 161-23.

[11] The Board directed a single vote for both applications on November 28, 2023. The vote was conducted by mail between November 28, 2023 and December 19, 2023.

[12] On February 28, 2024, the Board released its decision in *Heritage Inn #1* finding that the Employer had committed an unfair labour practice by bargaining in bad faith. The Board dismissed allegations under s. 6-62(1)(a) related to the Labour Watch poster and communications sent by the Employer in March and April of 2023. The evidence at the hearing of the within applications established that the decision in *Heritage Inn #1* had been posted in the workplace.

[13] The hearing of the applications LRB File Nos. 160-23, 161-23 and 169-23 began in July 2024 and concluded with final arguments in November 2024. The Applicants both testified. The Union called Lucy Figueiredo, Rod Gillies, Kevin Tsang, Adam Loehndorf, Donald Boyd, Carrie Bovill, and Sandy Partridge. The Employer and Applicants cross examined most of the witnesses and put in documents through the Union's witnesses. The Employer did not call any witnesses.

Relevant Statutory Provisions:

[14] Section 6-4 of the Act provides as follows:

> ***Right to form and join a union and to be a member of a union***
> ***6-4****(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> *(2) No employee shall unreasonably be denied membership in a union.*

[15] Section 6-13 of the Act provides that:

> ***Certification order***
> ***6-13****(1) If, after a vote is taken in accordance with section 6-12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:*
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> > *(a) certifying the union as the bargaining agent for that unit; and*
> >
> > *(b) if the application is made pursuant to subclause 6-10(1)(b)(ii), moving a portion of one bargaining unit into another bargaining unit.*
>
> *(2) If a union is certified as the bargaining agent for a bargaining unit:*
>
> > *(a) the union has exclusive authority to engage in collective bargaining for the employees in the bargaining unit and to bind it by a collective agreement until the order certifying the union is cancelled; and*
> >
> > *(b) if a collective agreement binding on the employees in the bargaining unit is in force at the date of certification, the agreement remains in force and shall be administered by the union that has been certified as the bargaining agent for the bargaining unit.*

[16] This application is pursuant to s. 6-17 of the Act, which reads:

> ***6-17****(1) An employee within a bargaining unit may apply to the board to cancel a certification order if the employee:*
>
> > *(a) establishes that 45% or more of the employees in the bargaining unit have within the 90 days preceding the date of the application indicated support for removing the union as bargaining agent; and*
> >
> > *(b) files with the board evidence of each employee's support that meets the prescribed requirements.*
>
> *(2) On receipt of an application pursuant to subsection (1), the board shall direct that a vote be taken of the employees in the bargaining unit.*
>
> *(3) If a majority of the votes cast in a vote directed in accordance with subsection (2) favour removing the union as bargaining agent, the board shall cancel the certification order.*
>
> *(4) An application must not be made pursuant to this section:*
>
> > *(a) during the two years following the issuance of the first certification order; or*
> >
> > *(b) during the 12 months following a refusal pursuant to this section to cancel the certification order.*

[17] Section 6-62(1)(a) provides as follows:

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

[18] The Board's potential discretion to dismiss this application is based in s. 6-106:

> ***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.*

[19] This decision raises a question of the interpretation of s. 6-114:

> ***Board orders or decisions binding and conclusive***
> ***6-114*** *In any matter or proceeding arising pursuant to this Part, a board order or decision is binding and conclusive of the matters stated in the board order or decision.*

Analysis and Decision:

The Objection to the Admission of the Labour Watch Website

[20] The Union sought to tender the entirety of the Saskatchewan section of the Labour Watch website into evidence. The Employer and the Applicants objected to this evidence being

exhibited. The Board heard arguments and reserved on the objection for determination once the totality of the case was before the Board. The Board now sustains the objection. The evidence established that the Applicants received support from Labour Watch and that the Employer posted a poster with the name of Labour Watch and a phone number. The website was not referenced on the poster. The evidence did not establish that any member of the Union accessed the website such that it constituted a communication to membership in the period before or during the decertification vote. Relevance to this proceeding has not been established and the Board will not analyze the contents of the website for the purpose of this hearing.

The Test for Decertification

[21] This is an application pursuant to s. 6-17 of the Act. The vote has not been counted, but the pre-conditions for the vote have been met. However, pursuant to s. 6-106, the Board retains discretion to dismiss any application, including a decertification application, where the Board 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."

[22] The approach to this discretion under the former act was outlined by the Board in *Williams v United Food and Commercial Workers, Local 1400*, 2014 CanLII 63996 (SK LRB) at para 31:

> *[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. 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.*

[23] In *Mitchell Wentworth v Teamsters Canada Rail Conference*, 2019 CanLII 83972 (SK LRB), the Board set out some of the factors to consider in determining whether to exercise its discretion:

> *[75] Section 6-106 provides the Board with discretionary power to dismiss a decertification application when the application has been made in whole or in part due to employer advice, influence, interference or intimidation. The Board must consider the whole of the circumstances. While each case must be assessed on its facts, the Board routinely examines the following factors in assessing a given case:*
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> > *a. The plausibility of the applicant's motives for bringing the application;*
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> > *b. The relationship between the applicant and management, or the provision of special treatment;*
> >
> > *c. The provision of information or resources to the applicant, on behalf of the employer;*
> >
> > *d. Words or conduct, on behalf of the employer, that suggest, whether indirectly or overtly, that decertifying will result in a benefit to the employees;*
> >
> > *e. Demonstrated conduct on behalf of the employer that has hindered bargaining and damaged the union's reputation.*

[24] In *Mary Anne Legary v United Food and Commercial Workers Union*, 2020 CanLII 95887 (SK LRB), the Board commented on the approach to evidence in decertification applications:

> *[81] By virtue of the nature of and circumstances in which decertification applications are made, it is a rare case in which there is overt or direct evidence of interference or other impugned conduct on the part of the employer. It is for this reason that the Board must be alert to the existence of unusual circumstances, inconsistencies, or other hallmarks of suspicious conduct, and the Board is permitted, and in some cases must, infer from the circumstances the nature and extent of the employer's conduct.[2]*
>
> *[82] This does not mean that every "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".[3] In deciding whether to exercise its discretion, the question that the Board will consider is whether the employer's conduct is of a nature and significance that the probable impact of that conduct would be to compromise the ability of employees, of reasonable fortitude and intelligence, to freely exercise their rights under the Act.[4] The Board gives 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.*

[25] When discussing improper conduct, it must be noted that s. 6-106 is broader in scope than the unfair labour practice provisions under s. 6-62. An Employer is prohibited from various activities in s. 6-62, but no clause of that section uses the term influence. As such, an Employer can commit improper influence under s. 6-106 while not committing an unfair labour practice under s. 6-62. This is of particular importance in this case as the Union has chosen to litigate in

slices and has segregated its unfair labour practice complaints into files distinct from this application. A determination by this panel of the Board under s. 6-106 is not determinative of the pending unfair labour practice complaints, both as a matter of interpretation and as a matter of procedural fairness as the Union did not plead the unfair labour practices in this case.

Should this application be barred for being brought during a lockout?

[26] The Union has argued that the discretion under s. 6-106 should be exercised in all cases where a recission is brought during a lockout or strike. Effectively, the Board should not permit a labour stoppage to be determined through a recission application.

[27] The Union position relies on two decisions of this Board in addition to decisions of the British Columbia Board. In *Dyck v. Bridge City Electric (1981) Ltd. and International Brotherhood of Electrical Workers,* [1983] Feb. Sask. Labour Rep. 46, LRB File No. 370-82 ("*Bridge City Electric*"), this Board stated:

> *Although it does not have a similar legislative time restriction, the British Columbia Labour Board has expressed a similar reluctance to decertify during a strike or lockout. The approach of that Board is based on one of the fundamental principles of the British Columbia Labour Code which, indeed, is a fundamental principle of the Saskatchewan Trade Union Act. That principle is that a collective bargaining impasse should be settled by a strike or lockout process. To decertify during such an impasse could, in some cases, involve the Board to an unacceptable extent in the collective bargaining process and could terminate a collective bargaining dispute in a manner not contemplated by the code.*
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> *Another basis for the reluctance of the British Columbia Labour Board is expressed in Adams Laboratories Limited, (1980) 2 Can. LRBR 101, where decertification is seen as a clash between two competing groups of employees, each of which is seeking to exercise a legal right. One group continues to strike and picket as they have a legal right to do. Another group have decided not to strike but to cross the picket line and to continue to work as they have a legal right to do. To grant decertification in these circumstances would effectively extinguish one of those competing legal rights, while withholding decertification would not extinguish the rights of anyone.*
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> *We agree with the thinking of the British Columbia Labour Relations Board on these matters.*

[28] In *Mayer v. L.L. Lawson Enterprises Ltd.*, 2001 CarswellSask 913, [2001] Sask. L.R.B.R. 485, [2001] S.L.R.B.D. No. 45, 73 C.L.R.B.R. (2d) 200 ("*Mayer*"), the Board considered the previous decision

> *43 However, even where the Board is satisfied of the bona fides of an application for rescission and of the surrounding circumstances, there is an over-riding discretion to dismiss the application, at least in certain circumstances, as demonstrated by the Board in Dyck v. Bridge City Electric, supra. As explained in the summary of arguments set out above, the Board in that case articulated a general policy, adopted from the experience of the British Columbia Labour Relations Board, to avoid interfering with the collective*

> *bargaining process by granting a decertification order during a strike or lockout. However, the Board also expressed caution in its approach by adding the following caveat, at 47:*
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> > *In dismissing this application the Board wishes to make it clear that it is in no way limiting its discretion to consider each application on the particular merits of the case.*
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> *44 The B.C. Board has quite recently confirmed its policy with respect to its discretion to disallow decertification during a strike as described in Adams Laboratories Ltd. v. R.W.D.S.U., Local 580 [(1980), 80 C.L.L.C. 16,036 (B.C. L.R.B.)], supra, in British Columbia Auto Assn., Re (July 16, 1999), Doc. B282/99 (B.C. L.R.B.) (reconsideration dismissed [1999] BCLRB No. 515/99 [Certain Employees of the British Columbia Automobile Assn. v. O.P.E.I.U., Local 378, 1999 CarswellBC 3224 (B.C. L.R.B.)]). At paras. 27 and 32, the B.C. Board expressed caution in stating that the exercise of its discretion must recognize and be consistent with "the balance of the [Labour Relations] Code," and that the board should be "most careful" in exercising its discretion if it would interfere with an on-going collective bargaining struggle, that is, if granting decertification would extinguish one of two competing rights.*
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> *45 One of the purposes of the Act is to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and unions and to promote collective bargaining. The ultimate sanction of strike or lockout is part of that process. To dismiss an application for rescission that is contemporaneous with a strike will not affect the right of any employee to continue working (should they decide to) but to allow such application would remove the right of employees who wish to be represented by the union to continue with job action or to engage the first contract assistance process and, if unsuccessful, to engage in strike and picketing activity.*

The Union argues that this supports the idea that there is a freestanding discretion to dismiss decertification applications without a finding of improper influence.

[29] However, the Board in *Mayer* limited the discretion to dismiss to situations where improper influence has occurred:

> *58 If there is a pending strike or lockout, or the union has a strike mandate, or the employer is guilty of a failure to bargain when the application for first contract assistance is made, the timing and context of a concurrent rescission application must be carefully examined. This list is by no means exhaustive: evidence of actions by an employer, particularly related to the process of collective bargaining, that tend to indicate that it has improperly and negatively influenced the perception of employees as to the effectiveness of their bargaining agent, even if they do not constitute influence within the meaning of s. 9 of the Act, may prompt a similar review by the Board and could result in the dismissal of the application for rescission. The reasons for this are clear. Section 9 is not exhaustive of the grounds upon which the Board may dismiss an application. The Act must be interpreted and applied with regard to the Act as a whole and the fundamental purposes and objects of the Act and the rights of employees as enunciated in s. 3 in particular. The first agreement assistance process set out in s. 26.5 of the Act is an integral part of the protection of the s. 3 rights of employees; it is designed to promote a successful conclusion to the certification process. The Canada Board succinctly described this relationship in Union of Bank Employees (Ontario), Local 2104 v. Canadian Imperial Bank of Commerce (1986), 86 C.L.L.C. 16,023 (Can. L.R.B.), at 14,196-97:*
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> > *It was not merely coincidence that Parliament took steps to bring in first contract settlement provisions in 1978 while it was shoring up the certification process. The two are intrinsically linked. It can be seen from the foregoing review that section 171.1 has more to do with the reinforcement of the certification process than it has*

> *to do with the settlement of provisions in a compulsory arbitration sense. The settlement of first collective agreements by the Board was primarily intended to give support and some meaning to the exercise of the fundamental freedom of association rights of employees. It was not just some aimless governmental intrusion into the free collective bargaining system, nor was it simply a prop for weak unions as some commentators have described the concept of first contract settlements. Parliament had no interest in balancing bargaining powers vis-a-vis the ability of newly organized employees to wrest substantial gains in benefits from their employer. Section 171.1 was aimed at bringing into line those employers who, having been finessed of the opportunity to influence the certification process, decide to turn first contract negotiations into a recognition struggle for the bargaining agent by refusing to participate in any meaningful collective bargaining. That notion is further supported by Parliament's adoption of the British Columbia approach which provides for selective intervention by the Board where the collective bargaining regime is challenged...*
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> *59 Once certified, the trade union selected by the majority of employees is the exclusive representative of all employees in the bargaining unit. Only the employer and the bargaining agent are given the right to collectively bargain or apply for first contract assistance under s. 26.5; by necessary implication these rights are denied to everyone else including the employees. This is consistent with the statutory status of the union as the exclusive bargaining agent after certification — employees in the bargaining unit are no longer able to bargain individually with the employer. Concluding a collective agreement is the responsibility of the employer and the bargaining agent. The only avenue for employee input is through the certified union. There is not even a statutory requirement for ratification of a collective agreement by the employees; employees in the unit are bound by the collective agreement, but do not negotiate it. To determine that the Board has no discretion in any circumstances to disallow an application for rescission when an application for first contract assistance is concurrently pending, particularly where the bargaining agent has a strike mandate or the employer has failed to bargain collectively, would, notionally, allow dissident employees to affect or render null the method of concluding a collective agreement chosen by their exclusive bargaining agent.*

[30] The Board agrees with this analysis, the discretion to dismiss must be rooted in the Act. Section 6-17 requires the vote to grant an order if certain preconditions are met. There is no discretionary authority to refuse an application in that section. The Board does have discretion in s. 6-106 in the case of employer influence or interference. The Board also has broad remedial authority under s. 6-103. If there has been finding of a failure to bargain preceding a rescission or decertification application, that failure can grant the Board discretion to dismiss an application pursuant to s. 6-106. However, the Board would also agree with the analysis in *Bridge City Electric* that its authority under s. 6-103 is broad enough to permit dismissal if the factual situation surrounding a recission supports a dismissal being necessary or appropriate to attain the purposes of the Act.

[31] In this case, the Board in *Heritage Inn #1* has made a finding of a failure to bargain in good faith that immediately preceded the lockout and recission application. This finding would be determinative of this application except for the fact that the decision is not final due to the pending

judicial review. As this finding is under challenge, and therefore not final, the Board declines to rely upon it as a basis for dismissing under s. 6-106.

[32] In this case, while accepting that the Board could dismiss the recission application under s. 6-103 when there is an ongoing work stoppage, the Board declines to exercise its discretion to do so. This is a mature bargaining relationship, and the Board prefers to consider the evidence and arguments of this application pursuant to its authority more broadly under s. 6-106.

a. The plausibility of the applicant's motives for bringing the application;

[33] Both Applicants testified as to their work history and their reasons for seeking decertification. Mr. Villahermosa was just hired in the summer of 2023 and Ms. Kousar has been employed since 20019. Both parties were dissatisfied with the Union and did not believe they received value from it.

[34] Ms. Kousar had previously had a grievance filed on her behalf and withdrawn related to vision benefits. She did not recall the grievance in her testimony, but did recall talking to the Union about vision benefits. As the grievance did not achieve a result or proceed past the first step, the Board does not consider this as evidence that she is insincere in lacking support in the Union.

[35] Mr. Villahermosa had no contact with the Union in the time prior to the lockout. On the evidence, the Employer did not appear to have provided Mr. Villahermosa with a copy of the CBA when hired. The Union was not provided with his contact information until after the lockout.

[36] The Board accepts the sincerity of the motives of the Applicants in bringing the application. However, the Board has concerns about what caused Mr. Villahermosa's dissatisfaction and whether it was influenced by the Employer's actions. Those concerns will be addressed under the conduct of the employer.

b. The relationship between the applicant and management, or the provision of special treatment;

[37] The Union asserts that both of the Applicants are managers. For Mr. Villahermosa it is based around the circumstances of his hiring and for Ms. Kousar it is because she is now in a supervisor position.

[38] The Board does not find that the circumstances of Mr. Villahermosa's hiring to establish that he is a manager or acting on behalf of management. Whether the posting of the position was in compliance with the CBA is a matter for an arbitrator, there is no evidence of special treatment or other evidence of collusion to establish the Union's contention.

[39] As it relates to Ms. Kousar, the Union put heavy emphasis on the Employer's desire to move the housekeeper supervisor position out of scope in negotiations. The Board does not find Ms. Kousar to be in a management position.

[40] The position is currently in scope and was previously occupied by a previous member of the bargaining committee. While the Employer did seek in bargaining to move the position out of scope, the evidence made it clear that other than those on the bargaining committee, no union members were aware that was a position the Employer wanted to be out of scope. The evidence also established that the position did not yet have the human resources duties of discipline, hiring and firing that would be expected of management.

[41] The potential for a position to be moved out of scope which was not widely known without further indicia of being a part of management is insufficient to establish the Union's contention that Ms. Kousar is management.

[42] The Board does not find that either of the Applicants were acting as management or on behalf of management in making this application.

c. The provision of information or resources to the applicant, on behalf of the employer;

[43] The only evidence of the Employer providing resources to the Applicant are the posting of the Labour Watch phone number. The Applicants did receive assistance from Labour Watch, however, the Board does not find the posting of the phone number to be of such assistance to override the employees reasonable fortitude. As noted in *Williams v United Food and Commercial Workers, Local 1400*, 2014 CanLII 63996 (SK LRB):

> *[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 probably 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.*
> *[Emphasis added]*

d. Words or conduct, on behalf of the employer, that suggest, whether indirectly or overtly, that decertifying will result in a benefit to the employees;

[44] There were no communications of the Employer put into evidence during the period after the filing of the recission application and prior to the closing of the vote. The Board finds that the communications that occurred related to bargaining and are better addressed under the next factor.

e. Demonstrated conduct on behalf of the employer that has hindered bargaining and damaged the union's reputation.

[45] It is the consideration of this factor that is determinative of the application. The Board finds that the cumulative effects of the Employer's conduct leading up to and after the lockout influenced, in part, the application. Even without the previous finding of the Board on *Heritage Inn #1*, the Board would have found the events of September 5th, the failure to provide the CBA to new employees prior to the lockout, and the issues with the provision of Union cards or up to date contact information for new union members to the Union, influenced the recission application in part.

The ULP

[46] The Board has previously found that the bargaining that preceded the lockout constituted an unfair labour practice. The Union takes the position that this decision is binding upon the Board. The Employer takes the position that it is not binding and should not be followed.

[47] The Board accepts that the doctrine of r*es judicata* does not apply as the decision is currently under judicial review as the decision is not yet final. While it could be argued that abuse of process applies, the Employer is not the initiating party in either dispute. The Employer is

arguably seeking to re-litigate the determination of the Board in *Heritage Inn #1*, that decision is currently under judicial review and is therefore not a final decision that it is an abuse of process to challenge. The Employer is challenging the decision in the correct forum and it is not an abuse to raise arguments that have not been finally determined.

[48] Similarly, s. 6-114 is a codification of the principles of *res judicata*, that is that the Board's decisions are final and bind the parties in future proceedings. On a plain reading, the provision binds the Board to the past decision. However, it must be read in context. Section 6-115 is a privative clause, and despite its clear wording on finality, has been interpreted by the Courts as permitting judicial review. Section 6-114 must be read in harmony with this, that is while the Board's decisions are final, they are subject to review and while under review they are not yet final. As such the Board finds that while parties are bound to comply with Board orders unless stayed, the Board should not use s. 6-114 as a form of *res judicata* until any legal challenge is resolved. *Heritage Inn #1* is under judicial review; the Board cannot find the previous decision to be determinative as directed by s. 6-114 until that judicial review is complete.

[49] The question of how to treat *Heritage Inn #1* comes down to consistency of the Board with previous decisions apart from *res judicata*. Administrative tribunals should make consistent decisions and must justify departures from previous decisions. The principle of consistency was discussed by the majority of the Supreme Court of Canda in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653 at paras 129-31:

> *[129] Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by stare decisis. As this Court noted in Domtar, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.*
>
> *[130] Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid . . . conflicting results": IWA v. Consolidated-Bathurst Packaging Ltd., 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to*

> *address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.*
>
> *[131] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker does depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: Baker, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.*

[50] There is also the question of the evidentiary value of the previous decision. The evidentiary weight of previous decisions was discussed in *British Columbia (Attorney General) v. Malik,* 2011 SCC 18 (CanLII), [2011] 1 SCR 657

> *[42] Of course the weight of the prior judgment will depend on such factors as the similarity of the issues to be decided, the identity of the parties, and (because of the differing burdens of proof) whether the prior proceedings were criminal or civil. As the Sopinka text points out: "The fact that it is a civil judgment only would be significant in terms of weight. The party against whom the judgment was rendered would have a greater opportunity to explain it or suggest mitigating circumstances" (Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, Sopinka, Lederman & Bryant: The Law of Evidence in Canada (3rd ed. 2009), at §19.177).*
> *….*
>
> *[46] Whether or not a prior civil or criminal decision is admissible in trials on the merits — including administrative or disciplinary proceedings — will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions. On this point I agree with Del Core (which was not an interlocutory proceeding) that it "would be highly undesirable to replace this arbitrary rule [in Hollington v. F. Hewthorn & Co.] by prescribing equally rigid rules to replace it" (p. 22).*
> *…*
>
> *[48] Once admitted, the weight to be given to the earlier decision in subsequent interlocutory proceedings will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on all "the varying circumstances of particular cases" (Del Core, at p. 22).*

See also *Phillips v Law Society of Saskatchewan*, 2021 SKCA 16 (CanLII).

[51] The Board now must consider what was found in *Heritage Inn #1*. In relation to bargaining, the Board made the following findings:

[127] With respect to its proposals, especially those of greatest importance to the membership, the Employer was, overall, intransigent. The Employer refused to prioritize proposals. It wanted the Union to make substantive compromises but was not demonstrating a willingness to do so itself, especially in relation to the most important proposals.

[128] The Employer rushed through the bargaining process and declared impasse after only five days of substantive bargaining. It ended conciliation bargaining early and did not provide a response to the Union's pass.[18]

[129] By May 25, the Employer had maintained all of the foregoing proposals (any many others), including the most concerning among them, to the point of providing impasse notice pursuant to section 6-33 of the Act. A prerequisite to providing impasse notice is that the party is of the opinion that "collective bargaining to conclude a collective agreement has reached a point where agreement cannot be achieved".

[130] In other words, the Employer maintained the proposals to the point at which it decided that agreement could not be achieved. It would be required to submit to impasse bargaining, but both parties had already had the opportunity to bargain with or through a third-party mediator. The Employer had failed to make progress with respect to the impugned proposals at that time.
…

[153] It is well established that maintaining a position to impasse may breach the party's duty to bargain in good faith where the Board can make the inference that the party doesn't intend to enter into a collective agreement or that it seeks to undermine the union. The position does not need to be illegal per se.

[154] The Employer attempted to provide justifications for its proposals (not at the hearing, but at the bargaining table). While the Employer's financial concerns appeared genuine, the Employer's stated goals, being "flexibility, efficiency, collaboration, and cost management", pitched a wide tent.[21] It is understandable that the Union expressed some skepticism about whether the Employer was harnessing those goals to undermine collective bargaining.

[155] Given the nature of the Employer's proposal package, the Employer's intransigence with respect to the most concerning of those proposals, the Employer's minimal participation in reply stream documents[22], and the Employer's declaration of impasse after only five days of bargaining, in the middle of conciliation bargaining, the Board must find that the Employer wasn't making every reasonable effort to enter into a collective agreement. The Employer's paper record and its progress on some issues does not change this assessment. The Employer was demonstrating an outward willingness to observe the form of collective bargaining while masking an intention to avoid entering a collective agreement at all.[23]

[52] In relation to employer communications with members of the Union, the Board made the following findings:

[213] The Union has alleged that the Employer interfered with the Union's members by providing the LabourWatch poster. For the reasons as outlined, the evidence about the LabourWatch poster is too weak to establish that the Employer interfered with employees in this workplace of reasonable intelligence, resilience and fortitude, in the exercise of their Part VI rights.

> *[214] The Union also alleges that the effect of the letters was to coerce the employees. In Saskatoon Co-op, the Board stated that "'[c]oercion' is characterized by a degree of threat or intimidation that provokes fear of potential consequences".[33]*
>
> *[215] With respect to the March 24th letter, it is not probable that the aforementioned employees would have interpreted the references to sustainability as a threat to close. Rather, it is probable that such employees would have interpreted these references as inferring that the dispute could be lengthy, and that the Union's conduct was contributing to the continuation of the dispute.*
>
> *[216] While the March 24th letter would have raised questions (for employees of reasonable intelligence, resilience and fortitude in this workplace) about the Union's bargaining strategy, it contains a degree of nuance which, in the Board's view, does not rise to the level of "coercion" pursuant to clause 6-62(1)(a) of the Act.*
>
> *[217] To be sure, the April 5th letter comes close. Although the Board allows a certain degree of spin, especially during negotiations,[34] the more "misinformation or unnecessary amplification or spin" contained in a communication, the more likely it is to stray outside of what is considered permissible.[35]*
>
> *[218] The problem for the Union is that there was no reliable evidence about how this document was disseminated among the employees. In the absence of that evidence, the Board cannot find that the Employer, by distributing the document, improperly interfered with employees.*

[53] As noted above, if this matter had been litigated concurrently with *Heritage Inn #1*, the finding of bad faith bargaining would be determinative of this application. However, as that decision is still under challenge, and arguably the Union cannot seek the Board to make an order it has already made, the Board must consider the relevance of the bargaining evidence independent of the finding of the Employer bargaining in bad faith.

[54] The Board finds that there is limited relevance to the bargaining as the Union's evidence established that only the bargaining committee and the Union's negotiators were aware of the Employer's positions and tactics at bargaining. As such, the Employer's conduct at bargaining could not have overridden the will of the employees as they were unaware of it. The Board accepts that the factual findings of bargaining are consistent with the evidence called but finds that it cannot rely on the finding of bad faith due to the way this file has been litigated.

[55] The employees were aware that bargaining had been ongoing since 2019 and that they had not received a negotiated wage increase during that time as there was no new collective bargaining agreement. The length of bargaining likely had some influence on the application for recission.

[56] On communications, the Board agrees with the analysis from *Heritage Inn #1* and follows the previous determination of the Board as it relates to the communications. While the

communications may have some issues, they do not on their own have the effect of intimidation or interference. Further, as the communications are seven to eight months removed from the application date, the passage of time limits a finding of improper influence.

The Events of September 5th

[57] It was established in evidence that on September 5, 2023, the Employer made an offer to all of its employees to continue working under different terms and conditions during the course of the lockout. The agreement offered would expire upon the signing of a new collective bargaining agreement.

[58] In addition, the Board must consider the actions in relation to Union representation on that day. Ms. Figueiredo sought to attend the Employer's property on September 5th. The Employer denied the Union President the opportunity to meet with staff prior to discussing the offer with the Employer. The Employer relied on a provision of the CBA requiring notice of Union attendance. The Employer demanded that she leave or the Employer would call the police. The Union called evidence that various members of the Union witnessed portions of Ms. Figueiredo's discussions with management and being required to leave the premises.

[59] After Ms. Figueiredo left, Mr. Loehndorf then gave notice for the Union to attend the following day. The Employer refused to allow the Union to attend even with notice.

[60] The Board finds that this offer and the Employer's conduct in relation to denying Union representation when considering the individual employment offers, undermined the Union.

[61] Pursuant to various provisions of the Act, including ss 6-4 and 6-13, a certified union is the exclusive bargaining agent of its members while a collective bargaining agreement is in effect. The Employer's position is effectively that once lockout notice was given, the Employer was entitled to negotiate directly with employees about their employment during the lockout. Whether this is permitted by the Act and the CBA will be determined in other hearings, but for this hearing, the Board finds that the negotiation of individual employment contracts prior to the lockout undermined the Union and influenced the application in part.

[62] On the same day that the Employer gave notice of lockout and offers to the employees, the Union President sought to attend the premises. The Employer asked the Union President to leave and advised that it would call the cops if she did not leave voluntarily. This was witnessed in part by union members who testified. The Union sought to exercise its rights under the CBA to

schedule a time to meet with its members. The Employer denied this request. Within the context of a lockout notice, contract offers, and the interactions with the Union President, this denial undermined the Union at a particularly important juncture.

Picketing Related Events

[63] A lot of evidence was called in relation to the actions of both parties on the picket line. The Board finds that while the interactions were generally unpleasant, they were not expected in a labour dispute. For example, there was evidence in relation to insults, profanity and hand gestures. This activity made have contributed to some members wishing to decertify but is not relevant to the Employer influence analysis.

[64] One issue of concern with picketing is timing of the decertification application in relation to the injunction being removed. The Board has concerns that the within applications were brought less than a week after the injunction was removed. The timing was not sufficiently explained by the Applicants. However, given the animosity between the picketers and the workers who crossed the picket line, the Board declines to draw an inference of Employer influence from the timing.

Failure to Provide CBAs to the Applicant and other new employees

[65] While the Board does not think the connection between Mr. Villahermosa and the Employer was proven to be inappropriate, the Board does have concerns about how Mr. Villahermosa was hired. Mr. Villahermosa's hiring raised several concerns as to the failure to provide CBAs to new employees and the failure to forward Union cards in an expeditious manner.

[66] Mr. Villahermosa did not believe the Union provided him with any benefits or that union membership was worth his Union fees. The Board infers that this conclusion was in part influenced by the lack of contact with the Union or initial access to a CBA. The lack of contact is at least in part the result of the Union not having Mr. Villahermosa's contact information or knowledge of his employment.

[67] The Board does not find it was in full caused by the Employer's actions. The Union also contributed to the lack of contact as the Union did not have a shop steward in the workplace at the time of Mr. Villahermosa's hiring and the evidence supports that the Union's representatives who did attend the Employer's business never talked to Mr. Villahermosa.

[68] When the issues of the Employer contributing to lack of Union contact are taken together with the events of September 5th, the Board finds that the application was made in part as a result of Employer influence or interference. The Employer's actions undermined the Union and contributed in part to the application for recission.

[69] The Board again notes that this application would have also been dismissed based on the finding of *Heritage Inn #1* if that decision was final.

Conclusion:

[70] The Board exercises its discretion pursuant to s. 6-106 of the Act to dismiss the applications in LRB Files No. 160-23 and 161-23. The dismissal of the applications negates the votes in those applications, which renders LRB File No. 169-23 moot. The application in LRB File No. 169-23 is dismissed. As the applications giving rise to the vote are dismissed the vote will not be counted. The Board also orders:

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

b) That the Employer provide a copy of the Board's Order and Reasons for Decision on request to any employee; and

c) That the ballots in that matter be destroyed unopened sixty (60) days after the issuance of this decision.

[71] The Board thanks the parties for the submissions they provided, all of which were reviewed and considered in making a determination in this matter. This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this 21st day of **February, 2025.**

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson