



ALRB cite: *Certain Employees of Lansdowne Foods Ltd. v. United Food and Commercial Workers Union, Local 401 et al.*
[1992] Alta. L.R.B.R. 413

CERTAIN EMPLOYEES OF LANSDOWNE FOODS LTD., Applicants and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 401, Applicant and Respondent and LANSDOWNE FOODS LTD., Respondent. Board File: RV-00184, GE-00983. July 24, 1992.

Andrew C.L. Sims, Q.C., Chair, Deborah Howes, Vice-Chair, Zale Asbell, Donna Neumann, Kay Willekes, Board Members

For the Applicant: Sean Day, Maria Salzano, Stacy Smith

For the Respondent: Tom Hesse, John Leeyus, Bruce Dean

For the Intervenor: Phil Ponting, Mike Bateman

Revocation - s. 52(1) (L.R.C.) - Employer unfair labour practices constituting “other relevant matter” Board may consider in granting or dismissing revocation application

Revocation - Petition - s. 49(2) (L.R.C.) - Direct employer involvement in origination, preparation or circulation of petition being prohibited - Other employer unfair labour practices being addressed as “other relevant matter” under s. 52(1) - Worksite labour relations environment rarely affecting whether employee signatures voluntary at time of signing petition

Revocation - Petition - s. 49(2) (L.R.C.) - Board requiring that petition signatures reflect genuine and voluntary expression of employee wishes, free from influence of management or perception of such influence

Remedies - s. 15(7) (L.R.C.) - Board balancing employee’s right to revocation with Union right to effective remedy for Employer’s unfair labour practices - Board setting revocation vote aside and ordering new vote - Vote not to occur if before date of vote, employees ratifying an agreement, voting in favour of strike action, or if Employer applying for lockout poll

Certain employees applied to revoke the Union’s bargaining rights. Before counting the votes, the Board heard and determined complaints of Employer unfair labour practices. The Employer breached its duty to

bargain in good faith, contrary to sections 58 and 59 of the Labour Relations Code. The Employer also interfered with Union representation of employees, contrary to s. 146(1)(a)(ii). The Board directed that bargaining commence on specified conditions. The Union then urged the Board to dismiss the revocation application: 1) as a remedy for the unfair labour practices, or 2) on the basis that the findings were a relevant matter to consider in granting or dismissing the revocation application under s. 52(1). The Union maintained that the petition evidence supporting the revocation application could not be considered voluntary in light of the unfair labour practices. The Union was also concerned about an evening shift supervisor's involvement in circulating the petition.

The Board determined that the unfair labour practices did not undermine the voluntary nature of the petition. The worksite labour relations environment may affect employee opinions, but rarely affects whether signatures reflect true wishes at the time of signing. The petition must be a genuine and voluntary expression of employee wishes, free from management influence or perception of same. The involvement of a non-managerial supervisor did not taint that perception in the circumstances of this case.

The unfair labour practices could, however, be considered by the Board as part of "any other relevant matter" under s. 52(1). The Board balances the revocation rights of employees with the Union's right to an effective remedy for unfair labour practices. The Board set the vote aside and ordered a new one in five weeks time. The Board directed that the vote not take place if, prior to that time, the Union obtained ratification of an agreement, or the employees voted in favour of a strike, or the Employer applied for a lockout poll.

REASONS FOR DECISION

Andrew C.L. Sims, Q.C., Chair: This decision involves two applications before the Board at the same time. Both concern the bargaining relationship between Lansdowne Foods Ltd ("Lansdowne") and the United Food and Commercial Workers, Local 401 ("the Union"). The first is a complaint, brought by the Union, that Lansdowne has failed in its duty to bargain in good faith. The Board has already heard that complaint and found it justified. The second is an application for revocation of the Union's bargaining rights, brought by certain employees within the bargaining unit. Mr. Stacy Smith is spokesperson for those employees.

Mr. Smith sought revocation based on a petition signed by certain employees of Lansdowne. The Board panel hearing the revocation application ordered a representation vote. However, it ordered the ballot box sealed pending the hearing into the unfair labour practice complaints. A second panel heard and upheld the unfair labour practice complaints. That panel made a remedial order, but reserved jurisdiction to make a further order concerning the revocation matter.

The Union's position is that the employees only sought revocation because of the frustration caused by the Employer's refusal to engage in meaningful bargaining. The Union argues from this that the employee's petition in support of revocation was involuntary. It also argues that the Board should deny revocation because of the unfair labour practices committed by the employer.

To unravel and decide these questions, the Board scheduled a hearing involving the members of both Board panels. All parties consented to this procedure.

I. The Background to this Bargaining Relationship

Lansdowne Foods Ltd. operates a mid-sized grocery store in Edmonton. It has a compliment of about 45 bargaining unit employees. Canada Safeway Ltd. once ran the store, but in 1989 Safeway divested itself of several such stores following an agreement with the federal authorities. The chronology below summarizes events since that time. There are also three reported Board decisions dealing with this bargaining relationship:

United Food and Commercial Workers Union, Local 401 v. Lansdowne Foods Ltd., Donan Foods Ltd., and Ottewell Foods Ltd., [1990] Alta.L.R.B.R. 350

Lansdowne Foods Ltd. v. United Food and Commercial Workers Union, Local 401 and Certain Employees of Lansdowne Foods Ltd., [1991] Alta.L.R.B.R. 6

United Food and Commercial Workers Union, Local 401 v. Lansdowne Foods Ltd. [1991] Alta.L.R.B.R. 41

- January 1989. Lansdowne took over the store from Canada Safeway. It took over the location, some stock and some fixtures, but no former Safeway employees. A new workforce began work a couple of days after Safeway vacated the premises. A collective agreement bound Safeway at that location.
- May 5, 1989. The Union applied for a declaration that the purchaser of the Lansdowne store was the successor to the Safeway bargaining relationship and collective agreement. The parties agreed to adjourn the application and await the outcome of a similar application involving another employer.
- June 27, 1990. The Board ruled that Lansdowne was the successor to Safeway under Section 44 of the Labour Relations Code. This resulted in a declaration that, when Lansdowne took over the store, Local 401 was the bargaining agent for the employees. The Safeway collective agreement continued to apply to the new owners and to the new employees.

- November or December 1990. The Union gave Lansdowne a notice to bargain a new collective agreement and the parties began bargaining.
- November, 1990. The Union filed a series of grievances against Lansdowne, alleging a total failure to comply with the Safeway collective agreement. The Union also complained to the Board about a refusal to comply with the section 44 declarations.
- November 19, 1990. Mr. Smith, on behalf of a group of Lansdowne employees, applied to revoke the Union's bargaining rights. The applicants lost the representation vote on a tie vote.
- February 12, 1991. The Board found that Lansdowne had totally failed to apply the former collective agreement to the employees in the Lansdowne store. The Board found this to be non-compliance with the Board's earlier successorship declaration and therefore filed that declaration in the Court of Queen's Bench.
- March 17, 1991. The parties settled a new collective agreement and reached a compromise over the outstanding grievances. The new agreement ran until March 14, 1992.
- November 22, 1991. The Union served the employer with a notice to bargain for a new collective agreement.
- March 24, 1992. The Union filed its unfair labour practice complaints alleging a total failure or refusal to meet and bargain.
- April 1, 1992. Mr. Smith filed this application to revoke the Union's bargaining rights.
- April 9, 1992. The Board held its initial hearing into the revocation application.
- April 23, 1992. The Board heard the unfair labour practice complaints and, on April 24, 1992 issued findings and directives on those complaints.
- April 28, 1992. The Board conducted a representation vote on the revocation application and sealed the ballots.
- May 12, 1992. The Board's combined panel met to hear representations about the revocation application and about any additional remedies over the unfair labour practice complaints.

II. The Unfair Labour Practice Complaints

The Union's March 24, 1992 letter of complaint, after alluding to the certificate and the collective agreement, reads, in part:

By letter dated November 22, 1991, from Jack McMorran, Secretary-Treasurer of U.F.C.W. Local 401, served upon Mike Bateman of Lansdowne Foods Ltd., the Union gave notice in writing requiring Lansdowne Foods Ltd. to commence collective bargaining pursuant to Section 57(2) of the Code.

Lansdowne Foods Ltd. has not only refused to meet and bargain collectively in good faith but has refused utterly to meet to bargain in any manner whatsoever. This refusal continues to the present date notwithstanding numerous letters and telephone calls, both to the principals of Lansdowne Foods Ltd. as well as to counsel for Lansdowne Foods Ltd.

In addition to the foregoing, the Union has specifically requested that Lansdowne Foods Ltd. meet and commence bargaining in relation to the bakery employees in the store and provide to the Union the names and addresses of the members to enable them to properly bargain a new Collective Agreement. Lansdowne Foods Ltd. has not only refused to meet and bargain in relation to these employees and refused to provide names and addresses for bargaining, they totally refuse to accept U.F.C.W. Local 401 as the Certified Bargaining Agent for the bakery employees in the store. This is true notwithstanding that the employees are clearly included per certificate no. 1565-91.

The actions of Lansdowne Foods Ltd. in refusing the Union information regarding these employees as well as its refusal to allow the Union access to these employees represents an unfair labour practice contrary to Section 146(1)(a)(i) and (ii) of the Labour Relations Code.

Please accept this letter as a complaint pursuant to section 58(3) and Section 146(1)(a)(i) and (ii).

The Board panel (Vice-Chair Howes, and Members Neumann and Willekes) heard these complaints on April 23, 1992 and issued the following findings and directives the next day:

1. Lansdowne Foods Ltd. ("Lansdowne") has failed to bargain in good faith with the United Food and Commercial Workers Union, Local 401 ("U.F.C.W."). Lansdowne has exhibited a complete lack of cooperation in the bargaining process.

2. Lansdowne has not met with U.F.C.W. within the 30 days from the Notice to Commence Bargaining or at all. It has failed to provide to U.F.C.W. the names and addresses of its persons authorized to bargain, conclude a collective agreement, sign a collective agreement, and on its bargaining committee. As a result of its failure to meet, the parties have not exchanged bargaining proposals as contemplated by the Labour Relations Code. Lansdowne has refused to take any meaningful steps to conclude a collective agreement.
3. Lansdowne was aware of the petition for revocation circulating among employees when it agreed on March 24, 1992 to meet with the Union to commence bargaining on April 10, 1992. Further, it intended to avoid bargaining when, on April 3, 1992, it postponed the bargaining meeting to April 24, 1992. Lansdowne's position before the Board that the April 24, 1992 bargaining may be postponed is further evidence of the conduct intended to thwart the collective bargaining process.
4. With respect to bakery employees, Lansdowne has failed to recognize U.F.C.W. as the bargaining agent of those employees.
5. The bakery employees are included in the certified bargaining unit represented by U.F.C.W. and are bound by the collective agreement.
6. Lansdowne has interfered with the representation of employees by U.F.C.W. specifically by refusing reasonable access to the Union, and refusing to provide initiation fees, dues and employee information to the Union for bakery employees.
7. Lansdowne's actions are contrary to Sections 58, 59 and 146(1)(a)(ii) of the Labour Relations Code.

Therefore, the Board makes the following directives pursuant to Section 15 and Section 16 of the Labour Relations Code:

8. The Parties shall meet and commence collective bargaining on Friday, April 24, 1992 at 9:00 am as previously agreed.
9. Lansdowne shall commence or cause an authorized representative to commence collective bargaining in good faith and thereafter make every reasonable effort to conclude a collective agreement.
10. Lansdowne shall provide to the U.F.C.W. by 9:00 am April 24, 1992 the names and

addresses of its bargaining committee, and persons authorized to bargain collectively, conclude a collective agreement, and sign a collective agreement.

11. The parties shall exchange bargaining proposals on or before Monday, May 11, 1992.
12. Within 30 days of the exchange of proposals the parties shall meet to bargain on those proposals and thereafter shall meet as necessary in good faith and make reasonable efforts to conclude a collective agreement.
13. Lansdowne shall provide to U.F.C.W. a copy of the employees shift schedule showing lunch and coffee breaks for a period of one week from April 24, 1992.
14. Lansdowne shall provide the U.F.C.W. access to the employees for the week from April 24, 1992 during lunch and coffee breaks without the presence of management or excluded employees. The U.F.C.W. is not to interfere with the Employer's normal operations.
15. The Board shall post this Directive at the worksite where it will be seen by the employees.
6. The Board reserves the jurisdiction to make a further remedial Directive with respect to the outstanding application for revocation of U.F.C.W.'s bargaining rights.

III. The Revocation Application

Mr. Smith filed a petition to support his revocation application. That petition contained the signatures of 20 of the 44 employees in the bargaining unit. The Union has maintained throughout these proceedings that the petition was not a free and voluntary expression of employee wishes. The revocation panel considered the Union's objections at the time, decided to conduct some further inquiry, and then ruled as follows:

On Thursday April 9, 1992, the Board convened to hear an application for revocation. At that time, Mr. Hesse, on behalf of the incumbent trade union, raised a preliminary objection about the wording at the head of the petition. The petition read:

WE the undersigned employees of...have freely signed this petition in support of:(*specify purpose of the petition*) an application of revocation of the bargaining rights of United Food and Commercial Workers Union,

Local 401

Mr. Hesse argued that a petition in this form could not comply with section 48(2). He urged that the petition had to be in support of the revocation of the bargaining rights, not just for the application for revocation. Absent such initial evidence, he argued, the Board had no authority to hear the matter. The Board rejected this argument. It held that section 51(2) referred to the Board considering the same written material as that referred to in section 49(2). While the two sections use different words, the Board felt the legislation indicated an intention to view the two things as the same. That is, a person who supports the application for revocation is essentially the same as a person who supports the revocation.

The Board also heard argument about an outstanding unfair labour practice complaint alleging a total failure by the employer to meet and bargain with the Union over a new collective agreement. It also heard about an alleged denial of access to certain bakery employees. The Board ruled that if it was to conduct a representation vote, it would only do so on the basis that all ballots would be sealed and the matter deferred until after the Board heard these unfair labour practices. It scheduled those matters directly for hearing for April 22, 1992 commencing at 9:30 a.m. It declined to seal the ballots of the bakery employees separately from those of the other employees.

The Board heard evidence and argument on the supporting employee petition. At the conclusion of that evidence the Board advised the parties that it was not yet satisfied about the requisite 40% employee support. However, neither was the Board inclined to dismiss the petition outright as unproven. The Board expressed some concern over some inconsistencies between the evidence of the employee spokesperson and the Union's witness. The Board also noted the earlier history of this bargaining relationship which, the Board felt necessitated extra caution. In the result, the Board directed a further investigation pursuant to section 11(2)(b) as to the voluntariness of the employees expression of support for the application.

Initially, the Board indicated an officer might be commissioned to investigate further. However, the Board advised the parties on April 9, during a conference call, that this would be done by the two seized Board members meeting a sample group of employees to inquire whether they signed the petition and, if so, whether they did so freely, understanding the petition's import. Mr. Hesse recorded his opposition to the further investigation, but indicated a preference for the use of the members if the petition was not to be dismissed outright for want of proof of its validity. The Board indicated that it would issue a synopsis of any findings indicating a lack of voluntariness, but that the results of inquiries of individuals would be protected information under section 13(6).

Since that time, Members Kay Willekes and Zale Asbell have interviewed certain employees. Those employees interviewed who had signed the petition all indicated signing the petition freely. They also each confirmed that they understood the nature of the petition document when they signed it.

The Board is now satisfied that the application had the written support of the requisite 40% of employees and directs that a representation vote take place amongst the affected employees. The time and place will be set by the Board's chief returning officer after consultation with the parties. The vote will remain sealed as directed at the last hearing. The Board will consider the application further following the hearing of the unfair labour practice complaints by another panel of the Board.

Following this ruling the vote took place but the ballots remain sealed pending this decision.

IV. The Statutory Provisions

The important statutory provisions governing revocation applications are:

49(1) An application to revoke bargaining rights may be made by the trade union, the employees within the unit, or the employer or former employer to whom the bargaining rights relate.

(2) If an application for revocation of bargaining rights is made by the employees within the unit, the application shall be supported by evidence, in a form satisfactory to the Board, that at least 40% of the employees within the unit have indicated in writing their support for the revocation of the bargaining rights of the trade union.

...

50(4) Notwithstanding subsection (3), no application shall be made under clause (d)(i) of that subsection unless the application is made at least 10 months prior to the end of the term of the collective agreement.

...

51(1) Before granting an application for revocation the Board shall satisfy itself, after such investigation as it considers necessary, that

(a) the application is timely,

(b) in the case of an application by an employer or by the employees in the unit, the employees have voted, at a representation vote conducted by the Board, in favour of the revocation of bargaining rights of the trade union as their bargaining agent,

...

(2) Before conducting a representation vote on an application for revocation brought by employees the Board shall satisfy itself, on the basis of the evidence submitted in support of the application and the Board's investigation in respect of that evidence, that at the time of the application for revocation 40% of the employees within the unit indicated in writing their support for the application for revocation.

(3) The Board shall conduct any representation vote and shall complete its inquiries into and consideration of an application for revocation of bargaining rights as soon as possible.

52(1) When the Board is satisfied with respect to the matters referred to in section 51(1) and satisfied, after considering any other relevant matter, that the bargaining rights of the trade union should be revoked, the Board shall grant a declaration that the trade union's bargaining rights are revoked, and revoke any certification.

The Board's remedial powers following an unfair labour practice are set out in the following sections:

15(7) Subject to section 16(2), when the Board makes a decision with respect to a complaint, reference or application, it may by order or directive give any remedy that is appropriate to the matter or necessary to ensure compliance with and enforcement of this Act.

16(1) When the Board is satisfied after an inquiry that an employer, employers' organization, employee, trade union or other person has failed to comply with any provision of this Act that is specified in a complaint, the Board may issue a directive to rectify the act in respect of which the complaint was made and, without restricting the generality of the foregoing,

(a) may issue a directive or interim directive to the employer, employers' organization, employee, trade union or other person concerned to cease doing the act in respect of which the complaint was made;

...

(c) in respect of a failure to comply with section 58,

(i) may issue a directive directing the employer, employers' organization, bargaining agent or authorized representative concerned to bargain in good faith and to make every reasonable effort to enter into a collective agreement, and

(ii) may prescribe the conditions under which collective bargaining is to take place;

(d) may, subject to subsection (2) but notwithstanding any other provision of this Act,

(i) certify or refuse to certify a trade union as the bargaining agent for a unit of employees;

(ii) revoke or refuse to revoke the certification of a bargaining agent;

(iii) revoke or refuse to revoke the bargaining rights of a bargaining agent voluntarily recognized;

...

(2) Subsection (1)(d) and section 15(7) do not authorize the Board to certify a trade union or to revoke the certification of a trade union unless the majority of employees voting at a representation vote conducted by the Board vote in favour of the certification or revocation of certification, as the case may be.

The following powers also merit consideration:

11(2) The Board may for the purposes of this Act

(a) receive applications, references and complaints,

(b) conduct any inquiries or investigations that it considers necessary, either itself or through its officers,

(c) conduct any hearings that it considers necessary,

(d) require, conduct or supervise votes only by secret ballot,

(e) make or issue any interim orders, decisions, directives or declarations it considers necessary pending the final determination of any matter before the Board,

(f) make or issue any orders, decisions, notices, directives, declarations or certificates it considers necessary,

(g) make rules of procedure for the conduct of its business, for the giving of notice, for the service of documents, for hearing and conducting inquiries and for any other matters it considers necessary,

(h) through its members, officers and other representatives undertake efforts to assist the parties to a proceeding before the Board to settle the matter, and

(i) award any costs it considers appropriate in the circumstances if an application, reference or complaint, or a reply or defence thereto, is, in the opinion of the Board, trivial, frivolous, vexatious or abusive.

V. The Relationship Between Unfair Labour Practice Complaints and the Voluntariness of Petitions.

When an employer fails to bargain with a union, or engages in other prohibited conduct, it is predictable that employees in the bargaining unit will become frustrated. In some cases, employees will direct their frustration at the employer, in others at their trade union. From the employee's vantage point, often all they see is the union's failure to achieve results on their behalf. Employer conduct can undermine a trade union's ability to meet the legitimate expectations of the employees it represents. When that happens, a revocation application is the predictable result.

An employer's unfair labour practice does not, of itself, cut off the employees' opportunity to seek revocation. Such situations bring two interests into conflict. Frustrated employees have the right to apply to the Board for the revocation of a trade union's bargaining rights. Trade unions have the right to complain to

the Board when faced with unfair labour practices, and to expect an effective remedy when their complaints prove justified. What happens when, as here, the two coincide?

The Union has argued throughout this case that the Employer's conduct has so undermined the Union's position that the employee's revocation petition cannot be considered a free and voluntary expression of employee wishes. It also argues that the Board should dismiss the revocation application because of the unfair labour practices. The Union urges us to do so as a remedy arising from the unfair labour practices. Alternatively, it urges us to do so by considering those findings "a relevant matter" for consideration under section 52(1) of the *Labour Relations Code*.

We find it important to separate the tasks before the Board rather than letting them all blur into one. We will divide our considerations into three separate questions:

1. What evidence will invalidate petition evidence as a free and voluntary expression of employee wishes?
2. What evidence of "other relevant matters" will the Board consider in dealing with a revocation application and what will it do with that evidence once considered?
3. How will the Board approach its remedial powers in unfair labour practice cases where the employer's conduct has, or predictably will, undermine the union's support amongst the workforce? In particular, how will the Board approach such remedies in the face of a revocation application?

VI. Voluntariness and Petitions

Parties to Board proceedings use petitions as evidence to:

- support a certification application,
- counter a certification application, or
- support a revocation application.

There are some common features to petitions. However, their use in these three distinct ways raises different considerations because of the different labour relations realities involved. There is less likely to be, and employees are less likely to suspect, inappropriate employer involvement in a certification petition. Petitions filed in opposition to a certification application usually involve employees signing to contradict support they recently gave the union. The "change of mind" aspect of such petitions raises concerns rarely present in revocation petitions. Our comments in this case only address revocation petitions.

The Labour Relations Code requires that employee applicants for revocation file evidence of employee

support “in a form satisfactory to the Board”. They do this using a petition. What test does the Board use to determine if the petition is a valid indication of that support? A revocation petition must be a genuine and voluntary expression of the wishes of the employees, free from the influence of management. While the Board assesses each case on its own merits, the issues involved can be broken down as follows:

The petition must be *authentic*. The signatures on a petition must be genuine. Employees must sign on their own behalf. The Board will reject any petition, in its entirety, if it finds a forged signature. All signatures must also be accurately dated. For these reasons, all signatures on a petition must be witnessed. The witnesses’ signatures are an affirmation, by them, that the persons signing the petition did so on their own behalf on the indicated date.

The petition must be *understandable*. The heading on the petition must say clearly what it is for. It should be simple and straight forward. It should be free of confusing editorial comment. The heading must be on the petition before anyone signs it, and remain there, unaltered, from then on.

The petition must be *fairly presented* to employees. Persons circulating petitions must make it clear to the employees they solicit that their purpose is to ask the Board to revoke the Union’s bargaining rights. Substantial evidence that employees were told the petition, despite its heading, was for some other purpose, will destroy the petition’s credibility.

The petition must be *freely signed*. Evidence of intimidation, undue influence, threats or coercion by those involved in the origination or circulation of the petition will cause the Board to reject the petition. This is so whether such conduct is a result of the petition organizer’s own actions or as a result of management influence.

The petition must be *free of actual employer interference*. In addition, the petition must be *signed in circumstances perceived to be free of employer interference*. While these two criteria overlap they involve looking at the evidence from two distinct vantage points.

Adams, Canadian Labour Law, *Canada Law Book*, p. 440, describes these last two issues as follows:

Due to the use of the word “voluntarily” the Board must satisfy itself that the petition or statement filed in support of the application represents a reliable expression of employee wishes, reasonably free from a concern that their expression one way or another will come to the knowledge of their employer. On the other hand, employer knowledge that a petition is being taken up against the union, or the recognition by employees that an employer would prefer to be without a union, are not in themselves matters which disturb the Board. Where the petition is signed during working hours, the Board has noted that mere indulgence on the part of management may be sufficient to destroy the petition. Even a

hands-off approach by the employer in unusual circumstances might be enough to convey to employees that management is somehow connected to the petition. Employer interference can take many forms, ranging from an offer by the employer to pay the petitioners' legal expenses to blatant intimidation. All the types of interference are simply too numerous to list. Employee perception, however, is the key.

Direct employer interference can take many forms. Sack and Mitchell, *Ontario Labour Relations Board Practice* (2nd Edition) p. 208 gives many examples. Circumstances likely to give rise to a perception of employer interference in the minds of employees are equally diverse. See *Sack and Mitchell* at p. 212.

The following case contains an interesting illustration of the distinction between direct and perceived interference:

United Steelworkers of America v. Baltimore Aircoil Interamerican Corporation [1982]
OLRB Rep. 1387.

In that case, management, without impropriety, and in response to a request, provided an employee with a list of lawyers who might answer questions the employer did not want to discuss. The petitioning employee then told at least 10 employees that management had recommended a particular lawyer. The Board found no fault with the referral, but found the petitioners statements to those he solicited fatal to the petition's voluntariness. The Board said, at p. 1408.

Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by the petitioners.

...

Similarly, actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

and at p. 1410

The next issue is Mr. Leyte's admission that he may have told up to ten employees that his lawyer's name had been suggested by the employer. We are of the view that this

admission is fatal. To advise other employees that the lawyer representing the petitioners was suggested by the employer could reasonably create a direct link between the petitioners and the employer in the minds of employees approached by the petitioner. Understandably, they could fear that their refusal to sign the petition would be communicated to the employer particularly having regard to Mr. Hampton's letter to the work force dated September 24, 1980. This is one risk associated with very specific advice by the employers to objecting employees.

VII. Voluntariness in this Case

We now turn to the Union's objections to voluntariness in this case, which we classify as follows:

Understandable. The Union objected to the wording in the heading of the petition. Our earlier written decision, set out above, deals fully with this objection.

Fairly Presented. The Union argues that the employees may not have been shown the heading on the petition and may therefore have been misled about its purpose.

Employer Involvement. The Union maintains that the Employer's conduct in this matter, including the history of the bargaining relationship and the unfair labour practice findings now before us, undermine the petition's voluntariness.

Perception of Employer Involvement. The Union says Stacy Smith has supervisory duties which creates the perception of employer involvement.

We will deal with each of these points in turn.

Ms. Edith Fry testified that, while she understood the nature of the petition, she did not read it. Mr. Smith had covered the heading while trying to keep signatures of other employees confidential. Ms. Fry also gave evidence of how she perceived Mr. Smith, and how she was approached about the petition.

This evidence failed to convince the panel considering the petition that it lacked voluntariness. A similar allegation arose in the *Baltimore Air Coil* case cited above. In that case those organizing the petition shielded the names of those who had signed the petition from those whom they were approaching. In shielding the names, however, they also covered the preamble to the petition. Therefore very few employees, if any, actually read the preamble. However, the organizer told all the employees of the significance of the petition and the effect of signing. On these facts, stronger on this point than those at hand, the Ontario Board ruled, at p. 1411:

Considering all the evidence, we are of the view that the document ought to be accepted. There is no doubt that a preamble was contained on the face of the petition at the time it was signed by all employees and that each employee had the opportunity of asking to examine the preamble if he or she wished. No employee had the document misrepresented to him or her.

The Union relied on certain comments made by Mr. Smith to Ms. Fry to question the fairness of the presentation of the petition. None were sufficient to convince us the petition was involuntary as a result. We note the caution given by the Ontario Board in *Taylor v. U.F.C.W., Locals 175 and 633 and Thorhold I.G.A. Market* (referred to below) at p. 252:

Counsel for the respondents criticized several of these elements in the applicant's campaign as being dishonest and being designed to play on employees' fears about job security.

11. In our view, the reasons put forward by Ms. Taylor and her supporters did not go beyond the acceptable bounds of salesmanship, although some of them were contested on factual grounds by the respondents. It is not our role to sit in judgment on the truth or on the merits of what employees might say to each other during a decertification campaign. Our task is to see whether employees signed voluntarily, or whether their endorsement of the application was tainted by undue influences or other impropriety. We are unable to find anything approaching undue influence or impropriety in any of the campaigning in support of the applications. (*emphasis added*)

The Union's next argument suggests that the employer's involvement, as shown by the overall circumstances of the bargaining relationship, undermines the voluntariness of the petition.

This line of argument has been the subject of vigorous debate before the Ontario Labour Relations Board for many years. That Board has developed tests for admitting and assessing evidence in this area which we find persuasive. We review their leading decisions on the point. The first is the *Taylor* case referred to above.

Sandra Taylor v. United Food and Commercial Workers' International Union, Locals 175 and 633 and Thorhold I.G.A. Market (1989) 4 C.L.R.B.R. (2d) 246 (Ont. L.R.B.)

The case involved an IGA grocery store of equivalent size to the one at hand. This summary of the arguments presented shows the similarity of issues:

On the question of "voluntariness", counsel for the respondents has argued that the applications do not disclose that the employees who signed petitions in support of the

applications did so voluntarily. He has presented essentially three challenges to the applications:

- (a) that there was a very turbulent labour relations environment at the place of work and that we should, as a result, be skeptical about the voluntariness of the petitions;
- (b) that the quality of the evidence concerning the origination, preparation and circulation of the petitions was deficient, and that we could not rely on that evidence; and
- (c) that Sharon Murgich, a supporter of the applications, who played an important role in the circulation of the petitions, was perceived by employees as acting on behalf of, or with the support of, management.

That Board drew on several earlier decisions, particularly contrasting two decisions:

K Mart Canada Ltd. v. Stuart (1983), 4 C.L.R.B.R. (NS) 150 (Ont. L.R.B.)

Belleville Plaza v. Scurr [1986] O.L.R.B. Rep Sept. 1179 (Ont. L.R.B.)

In *K-Mart* the Board said at p. 156:

While it is clearly not appropriate for the Board to visit the sins of an employer on its employees, who may have legitimate reasons for wishing to terminate the bargaining rights of a union which has been detrimentally affected by the employer's contraventions of the *Labour Relations Act*, as a pattern of pervasive and notorious breaches of the Act such as that outlined above is a factor which cannot be overlooked by the Board if it is to realistically assess the voluntariness of a petition arising out of that context. To disregard that background would be to ignore the labour relations realities of the situation. However, that background is but one of several factors which have led the Board to conclude that this application should be dismissed.

In *Belleville Plaza* the Board ruled:

In our view as well, little weight can be placed on the events surrounding the lock-out. In refusing to entertain evidence relating to the environment created by a labour dispute, the Board in *Ottawa Journal*, [1978] OLRB Rep. March 291, had this to say:

“Counsel for the respondent asks the Board to draw the inference that

because of the climate generated by the protracted labour dispute the statement in support of the termination application is not a voluntary one. In so doing the respondent is asking the Board to draw the inference that free expression has been thwarted because of circumstances *not directly related to the origination, preparation and circulation of the statement*. Even if the Board assumes that the respondent can establish the material facts upon which it intends to rely - and indeed a number of these facts are a matter of record having been set out in the Board's decisions dealing with the section 79 (now 89) complaints brought by the parties - the Board would not be prepared to draw the inference which the respondent suggests." (emphasis added)

In a similar context, the Board in *Ontario Hospital Association (Blue Cross), Supra*, noted that "if the employers actions overstep the bounds of lawful conduct, or are considered to be something other than they appear, the trade union has its remedies."

15. The petition before us was circulated approximately eight months after the lock-out ended. The Board finds there is nothing in the evidence which suggests that the actions of the employer had as their objective the origination of a termination application, or prevented employees from making up their own minds on union representation.

The Board, in *Taylor*, concluded from this comparison that:

The primary focus of the Board in a termination application has to be whether employees who signed the petition did so voluntarily. If there have been violations of the Act by the employer, the union or employees have their remedies. A history of bitterness in relations between the employer and the union is often the backdrop against which employees seek to bring to an end representation by their bargaining agent. It would scarcely be logical or desirable for the Board to hold that employees desiring to escape from a bitterly adversarial relationship should be denied the opportunity of doing so. In our view, the labour relations background is only of relevance in an exceptional case, where the Board can be satisfied that the employer has publicly engaged in a pattern of illegal behaviour designed to undermine the bargaining agent, and that, as a result, employees' freedom of expression has been thwarted. In the present case, the evidence falls far short of establishing a pattern of notorious illegal anti-union conduct by the employer. We cannot draw from this background information any inferences at all about the voluntariness of the petitions filed in support of these applications. We have therefore concluded that the evidence we heard on the labour relations background is irrelevant to the issue of the voluntariness of the petitions.

The *Ontario Hospital* case, alluded to above contained the following passage:

Homida Ali v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America (U.A.W.) v. Ontario Hospital Association (Blue Cross) [1980] OLRB Rep. 1759:

In the course of the evidence, counsel for the respondent insisted upon his right to place before the Board the full history of the bitter relationship that had evolved between the employer and the respondent, including the various items of propaganda which characterized that relationship. Counsel's purpose was to demonstrate to the Board that the real "mover" behind the petition was the employer itself, who by its conduct and statements had deliberately created an atmosphere which was calculated to, and did, lead directly to a termination application. The Board at the outset indicated its reservations over the relevance of that line of inquiry, but ruled that it could not say with certainty that the respondent's evidence would not disclose employer conduct or statements linked to the termination application. The respondent accordingly was permitted to proceed in the fashion counsel sought. This, of course, prompted the employer to counter with evidence showing the statements and events of that history in a different light, aimed at demonstrating to the Board that it was more likely the actions of the UAW and its supporters which prompted the termination application. The net effect of all of this was to transport into the hearing-room, and make a part of these proceedings, the very dispute which characterized this relationship on the outside, to the obvious detriment of those petitioning employees seeking a timely response from the Board to their application. As Ms. Cowan, one of the employees who acted as spokesperson for the petitioners, stated in her eloquent summation, she and her co-petitioners had no interest in getting involved in the dispute between the company and the union, and submitted that the employees throughout the history (sic) of the bitter conflict had become the "forgotten people".

7. The Board's experience with the present proceeding has confirmed the wisdom of the more narrow evidentiary approach which it adopted in the *Ottawa Journal* case, [1978] OLRB Rep. Mar. 291, where the matters sought to be relied upon by the respondent trade union were not a great deal different from the present case. In refusing to entertain such evidence, the Board had this to say: [*The Board then repeated the quotation from Ontario Hospital Association, quoted above, and continued*]

While the history of the underlying labour dispute may be of some relevance to the issue before the Board on a termination application, it is essentially a collateral matter and may be of so little weight as to justify a different balancing of interests than that adopted by the

Board in the present case. The Board finds nothing in the evidence, notwithstanding the olympian efforts of counsel for the UAW, to demonstrate to it that the actions of Blue Cross had as their real purpose the origination of a termination application, or prevented employees from making up their own minds on union representation.

More recently, in *T. Eaton Company Ltd. and McKean et al. v. Retail, Wholesale and Department Store Union*, 15 CLRBR (NS) 194 at 203, the Ontario Board said:

We do not understand the Board's decision in *Radio Shack*, [1978] OLRB Rep. Nov. 1043, as suggesting that every matter or occurrence capable of being described as part of an "overall environment created by the employer" can be said to affect the voluntariness of a petition signature.

... it seems apparent that the environmental characteristics which the Board then had in mind were employer acts or omissions which, however innocent, would give rise to an objectively reasonable belief that management was involved in the circulation of a petition or would be likely to learn who signed it.

These cases support our view in this matter. On the question of a petition's voluntariness, the labour relations environment, or "back drop" rarely constitutes relevant or admissible evidence about the voluntariness of the signatures on the petition. The background may explain why employees formed the opinion that led them to sign. But that is not the issue in question. The voluntariness issue is whether we can trust that the employees' signatures reflected their true wishes at the time at signing. This is a question generally divorced from the environmental factors that moulded those wishes.

Thus, the relevant and admissible evidence is that which shows employer involvement directly related to the origination, preparation or circulation of the petition, or circumstances that would objectively lead the reasonable employee to believe that management was involved in the circulation of the petition or would be likely to learn who signed it.

The evidence, in this case, on this objection, falls well outside these parameters. This is not to say it is irrelevant to the unfair labour practice remedies. It clearly is. Nor is it to say it is irrelevant to the revocation, given the Board's jurisdiction under s. 52(1) to consider any relevant matter. We simply confirm our finding, made before the vote, that these matters do not undermine the petition's voluntariness.

Next, the Union alleges perceived employer involvement because of Stacy Smith's role in circulating the petition. Mr. Smith is a full-time store clerk who works as a non-managerial supervisor in the evenings. The case reports contain many examples of this "near-manager" type of objection. The following case gives a useful review of the Ontario cases:

T. Eaton Company Ltd. v. McKean et al (1987) 15 C.L.R.B.R. (NS) 194 at 205.

The union's argument is that since section heads frequently act as conduits to and from management, employees may perceive them to be acting as agents of management in soliciting petition signatures and in making statements about the advantages of terminating the union's bargaining rights. Counsel further submits that section heads fall within a class described in this Board's jurisprudence as having "a greater proximity to managerial authority than other employees" (see *Dad's Cookies Ltd.*, [1976] OLRB Rep. Sept. 545 at para. 25), and argues that the Board has been suspicious of the voluntary nature of petitions circulated by such people and has often been unwilling to accept them as voluntary. [*The Board then referred to several examples and continued*] ...

13. Each of the cases cited turns on its particular facts. None stands for the proposition that petitions originated or circulated by bargaining unit employees who have a "lead hand" type of role in the work-place cannot be voluntary, and counsel for the union does not contend that there is any rule to that effect. What is required is an analysis of the sort reflected in the following paragraphs from Board's decision in *A.N. Shaw & Sons (Eastern) Ltd.*:

10. In assessing the voluntariness of the statement of desire, we are unable to accept the proposition that Mr. Foley stands in the same position as any other employee in the bargaining unit. Because of his supervisory functions, Mr. Foley's active involvement with the statement of desire raises concerns which would not exist if he were other than a working foreman. However, we also do not believe that his involvement with the statement of desire must invariably result in a finding that it cannot be given any weight. Rather, what is required is an examination of all of the surrounding circumstances and an assessment of whether other employees would likely have viewed Mr. Foley as acting on behalf of, or with the support of management, or whether they would likely have perceived him as a bargaining unit employee seeking only to further his own self-interests.

11. Employees would have been well aware of Mr. Foley's supervisory role, particularly in assigning work. They would also likely have been aware of the fact that he was responsible for making reports to management concerning their work performance. It is also reasonable to assume that the other employees would have known that notwithstanding his status as a working foreman, Mr. Foley, like themselves, was a union

member within the bargaining unit. The evidence does not suggest that Mr. Foley did anything to indicate to the employees that he was acting on behalf of management. To the contrary, his case in favour of terminating the respondent's bargaining rights was based upon his view that union representation had acted to restrict the work available to himself and others. Along with the other employees he had been laid off for five or six weeks under circumstances where he felt he need not have been, and he blamed the existence of the collective agreement for this fact. When all of these considerations are taken into account, we feel that the other employees would more likely have regarded Mr. Foley as acting in what he perceived to be in his own interests rather than acting on behalf of management.

12. Before leaving this matter, we would note that this case differs in certain key respects from certification cases involving anti-union petitions. Here there has been no sudden and apparently inexplicable change of heart relating to union support on the part of the employees who only a short time before had become union members. Further, the employees here have been represented by the union for some period of time and presumably they would have been aware of the union's ability to protect employees from being discriminated against for continuing to support the union.

In the circumstances of the cases before us, we have concluded that mere knowledge that an originator or circulator of a petition was a section head would not be likely to lead a bargaining unit employee to conclude that the petition was being circulated for or with the support of Eaton's and, thus, to fear that a refusal to sign would come to the attention of management. The mere fact that section heads were involved in initiating and circulating petitions filed in support of these applications is not a sufficient basis on which to reject any of the applications.

See also, the decision in *Taylor v. U.F.C.W.* (referred to above) particularly at pages 253 to 261. The Ontario Board said in that case:

In any event, every case must be approached on its own particular set of facts, and the Board must ask itself whether employees would likely have thought that management was supporting a termination application, or tracking the support it was enjoying among employees, through the employee in question. That determination has to be made on the basis of the evidence presented and inferences that can properly be drawn from that evidence, rather than from a comparison with the facts of other decided cases.

Mr. Smith is a full-time stock clerk. He has worked for Lansdowne for two years. The store remains open over extended hours. During such times he is the supervisor for the other employees on the shift. This occurs regularly from 8:00 to 10:00 at night, and also when the owner or manager are away, usually after 5:00 pm.

He has responsibility for locking up the store at night. He has access to the office and the safe. He has responsibility for ordering stock, making Visa calls, packing groceries, selling lottery tickets and attending at the customer service desk. Several of these duties only arise when the owner or manager are away. He has no responsibility for hiring or firing. He is conceded to be a bargaining unit employee.

In the case at hand we are not convinced that Mr. Smith's limited influence over the working lives of the employees meets the tests referred to above.

VIII. Other Relevant Matters on a Revocation Application

The Board's authority to consider "other relevant matters" on a revocation application under s. 52(1) raises substantive and procedural questions. The section bears repeating, with emphasis added.

52(1) When the Board is satisfied with respect to the matters referred to in section 51(1) and satisfied, after considering any other relevant matter, that the bargaining rights of the trade union should be revoked, the Board shall grant a declaration that the trade union's bargaining rights are revoked, and revoke any certification.

The Board cannot revoke bargaining rights until it is satisfied of the matters in s. 51(1). This includes an employee vote in favour of revocation. However, even if satisfied on the s. 51(1) matters, the Board still has another responsibility. It must be satisfied after considering any other relevant matter, that the bargaining rights should be revoked. What are those other relevant matters?

The Union urges us to follow a line of cases from British Columbia which suggests that the Board had a broad discretion to refuse revocation notwithstanding employee wishes at the time. These cases included:

Distillery, Rectifying, Wine and Allied Workers, Local 202 v. Hiram Walker & Sons Ltd.
[1974] C.L.R.B.R. 517 (B.C.L.R.B.)

Federation of Telephone Workers of British Columbia v. Dominion Directory Company Ltd. [1975] C.L.R.B.R. 345 (B.C.L.R.B.)

Century Plaza Hotel Ltd. v. Hotel and Restaurant Employees and Bartenders Union, Local

16 (unreported decision B.C.L.R.B. Oct. 7, 1975)

Kidd Brother Production Ltd. v. Miscellaneous Workers Union Local 351 [1976] C.L.R.B.R. 304 (B.C.L.R.B.)

Employees of Imperial Optical Company Limited v. Association of Commercial and Technical Employees, Local No. 1717 (Unreported decision B.C.L.R.B. Oct. 12, 1976)

Kootenay Savings Credit Union v. International Woodworkers of America, Local 1-405 [1977] C.L.R.B.R. 40 (B.C.L.R.B.)

Perhaps the most vigorous and comprehensive review of the B.C. Board's approach during the 1970's is given in the following extract from page 4 of the *Imperial Optical* case:

Having stated at the outset that we are satisfied that a majority of the employees in the bargaining unit were probably prepared to state, under oath, that they no longer wished the Union to represent them as a bargaining agent, we are still left with the responsibility of determining whether that alone is sufficient indication that the Union has ceased to represent a majority of the employees in the bargaining unit. To hold that Section 52(2) would amount to a simple head count would be oversimplifying that portion of the Labour Code. To hold that only a head count is necessary under Section 52(2) would lead to the obvious conclusion that in all cases, a vote would satisfy all requirements of that Section. A hearing or further enquiry would be superfluous. Such is not the case.

In determining whether a trade-union has ceased to represent a majority of the employees in a bargaining unit, it is necessary to consider such things as the history of the certification, the history of collective bargaining between the parties, the attitude and involvement of the employer, the size and location of the bargaining unit, the relationship of management to the working force, the proximity in which they work, the opportunities for discussion and influence, the adherence to the collective agreement signed by the parties, if such exists, the age and work sophistication of the employees, whether the employees are in full possession of all the facts necessary for them to make an informed decision, the activities and involvement of the union, the number of part-time or full-time personnel available for union activities, and the general dealing in good faith of one party with another. Such a list is not a comprehensive one, and all factors may not apply in each case, but it is quite obvious a mere counting of heads or ballots is not the sole determination of whether a trade-union has ceased to represent a majority of employees and should therefore be decertified.

We are not persuaded that 52(1) of the Alberta's *Labour Relations Code* contemplates such a broad ranging

review of the bargaining relationship. Indeed, a more recent case from B.C., also referred to by the Union, appears to take an approach more focused on the wishes of the employees. See:

Downie Street Sawmills Ltd. v. International Woodworkers of America, Local No. 1-407
(quoted above)

We note that the B.C. Code provision under consideration said the Board “may” decertify. This clear grant of discretion strongly influenced the original *Hiram Walker* decision (see above, at p. 522). Section 52(1) of the Alberta legislation, while allowing consideration of relevant matters, still ends with “shall.” The Board’s discretion is therefore, in our view, exceptional, rather than the primary focus of the Board’s function. The B.C. legislation in force at the time of these cases also differed in several respects from the current Alberta legislation in that it assigned a particularly activist role to the Labour Relations Board.

The Alberta Labour Relations Code has mandatory secret ballot representation votes. There is no doubt that inappropriate influences can distort a secret ballot, as well as a petition or a card count. However, the secrecy of the ballot provides a measure of protection to the employees which the Board can rely upon in assessing the appropriate course of action in a given situation.

The Board finds, however, that s. 52(1) at least allows it to consider the fact that the employer has committed unfair labour practices in deciding whether to grant an employee initiated revocation application. As we emphasized above, neither raising the allegation nor proving such an unfair labour practice removes the employees’ rights to apply. However, these are factors the Board can weigh before coming to its decision. What matters may be relevant beyond proven unfair labour practice complaints is something we do not need to decide in this case.

In our view, the jurisdiction to consider other relevant matters before revoking bargaining rights provides the Board with a link to other pending matters before the Board. It allows a panel considering a revocation to consider and weigh the impact of other proceedings upon what might otherwise appear to be a straight forward application.

Procedurally, s. 51(3) revocation applications are handled on an expedited basis. The Board attempts to conduct any representation vote as soon as the necessary 40% support has been tested. Where allegations of unfair labour practices remain outstanding, or arise concurrently with the revocation application, the Board frequently orders the ballot box sealed pending the resolution of those complaints. For this reason it is important to separate out what is relevant to voluntariness, usually determined before the vote, and what may be an unfair labour practice and thus, arguably, a relevant factor to consider before finally acting on the vote and granting or dismissing the revocation application.

Usually, the Board will allow the unfair labour practice complaints to proceed, on an expedited basis whenever possible, deferring final consideration of the revocation application itself until the resolution of those complaints. The Board might not do so, however, in cases where the unfair labour practice allegations, even if proven, would be insufficient to justify doing anything other than going ahead with the revocation vote.

IX. Remedies for Unfair Labour Practices

The Board's task, once an unfair labour practice is established, is to "rectify the act in respect of which the complaint was made." This is a remedial power not a punitive power. The objective must be, as far as possible, to restore the labour relations environment to the state it would have been in but for the violation of the statute. This is not an easy task when the damage done is to the support a union may have had amongst the employees within a bargaining unit. It is a task made more difficult when circumstances within the workplace change over time. Often, the passage of time precludes restoration of the previous state of affairs.

Section 16(1)(d) recognizes that certain unfair labour practices may have so altered the workplace environment that applications, otherwise appropriate to grant, should be denied. The section provides that:

[The Board] may, subject to subsection (2) but notwithstanding any other provision of this Act,

(i) certify or refuse to certify a trade union as the bargaining agent for a unit of employees;

(ii) revoke or refuse to revoke the certification of a bargaining agent;

(iii) revoke or refuse to revoke the bargaining agent voluntarily recognized;...

Section 15(7) provides an additional power:

15(7) Subject to section 16(2), when the Board makes a decision with respect to a complaint, reference or application, it may by order or directive give any remedy that is appropriate to the matter or necessary to ensure compliance with and enforcement of this Act.

The restriction on these powers, in section 16(2), provides:

16(2) Subsection (1)(d) and section 15(7) do not authorize the Board to certify a trade union or to revoke the certification of a trade union unless the majority of employees voting

at a representation vote conducted by the Board vote in favour of the certification or revocation of certification, as the case may be.

This provides a limitation on the Board's power to rectify, but does not eliminate the powers the Board otherwise has. However, in two specific situations, it makes the exercise of that power subject to a Board conducted representation vote amongst the affected employees. The Board cannot order that uncertified employees become certified, as a remedy, unless the employees confirm that remedy through a representation vote. Similarly, the Board cannot revoke an existing certification, presumably because of unfair labour practices committed by a trade union (or those acting on its behalf) without those certified employees confirming that revocation by vote. The remainder of the Board's powers in sections 15(7) and 16(1)(d) remain unimpaired.

However, ultimately all bargaining rights flow from the employees on whose behalf that bargaining takes place. This is the clear theme of the Labour Relations Code. The Code's emphasis on votes in matters of representation, in authorizing strike or lockout action, and in some respects in bargaining itself, shows that the freely expressed wishes of the employees affected are entitled to high priority in the administration of the Code. It is also a practical reality that collective bargaining, divorced from employee support, becomes an exercise in frustration.

As the B.C. Board observed in:

Downie Street Sawmills Ltd. v. International Woodworkers of America, Local No. 1-417 (1983) 2 C.L.R.B.R. (NS) 181, at 192.

Productive and harmonious industrial relations cannot be fostered in an atmosphere of hostility and resentment which must inevitably result where continued trade union representation is imposed on a group of unwilling employees. Absent at least minimal backing from bargaining unit members, a trade union could easily find itself in a situation where it is unable to obtain a strike vote or ratification of a collective agreement. Effective and constructive trade union representation requires a spirit of co-operation from employees in a unit. We fail to see how the refusal of the application will foster better industrial relations. As stated by the Board in *Imperial Oil, supra*, at p. 247:

A union does not have a property right in its certification which ensures perpetuation of that certification even after the employees it seeks to represent no longer desire that representation. ... Good industrial relations in a community would surely not be fostered by the Board's precluding employees from either changing their union representation or from ending any kind of formal representation whatsoever.

The Board has already granted a partial remedy to rectify the unfair labour practice complaints in this case. The panel specifically reserved the jurisdiction over the use of the powers in section 16(1)(d)(ii). The Board has no hesitation in inferring that the employer's conduct in this case had the predictable effect of frustrating employees vis-a-vis their union and its ability to act on their behalf.

We find that, when the Board conducted its representation vote in this matter, employees would have been unduly influenced by the Union's inability to achieve results in bargaining on their behalf. This would have been the inevitable result of the Employer's complete failure to engage in the bargaining process required by the statute. As a result, we direct that the ballot, conducted on April 28 1992, be set aside and the ballots destroyed.

The unfair labour practice panel directed that bargaining commence. The Union has now had a period within which to pursue its bargaining objectives. We are going to allow an additional period of bargaining. During that period, the Union and the Employer should attempt to conclude a suitable collective agreement. If, despite good faith bargaining, they cannot achieve a settlement, they have their statutory rights under the *Labour Relations Code*.

However, we have an application for revocation outstanding. We direct the following procedures to bring that matter to a conclusion.

1. The Board will conduct a representation vote amongst the employees within the bargaining unit on the revocation application on Thursday, September 3rd, 1992, at a time and place to be posted by the Board. Voter eligibility will be determined as of the date of this decision.
2. The representation vote referred to in paragraph 1 will not take place if:
 - (a) The Union and the Employer achieve a memorandum of settlement which the employees in the bargaining unit vote to ratify.
 - (b) The Union applies for a Board supervised strike vote which results in a majority vote in favour of strike action.
 - (c) The Employer applies for a lockout poll.

The Board would view the ratification of a collective agreement, or a vote in favour of strike action as an affirmation of employee support for the Union's role as bargaining agent. If either of those circumstances arise, it will dismiss the revocation application. If the Union and Employer conclude a collective agreement without seeking ratification, the representation vote will proceed, although the collective agreement will

stand if the vote goes against revocation.

Any allegation of unfair labour practices arising before the final conclusion of these matters will be referred to the Board Chair, and if practical, dealt with by this panel, which remains seized with any further matters arising out of these cases. We believe these directives will best serve to balance the rights of the parties. These include the Union's rights to rectification of the unfair labour practices it has successfully proven. They also include the rights of any employees who may genuinely wish revocation, even aside from their frustration over the failure of bargaining.

The employees are entitled to know of this decision. The Board will be posting a suitable workplace notice advising of the Board's decision.