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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

AJAY LALA

Applicant

and

UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 401

Respondent

and

STAFF OF THE NON-PUBLIC FUNDS, CANADIAN FORCES

Employer and Intervenor

Indexed as
Lala v. United Food and Commercial Workers Canada, Local 401

In the matter of an application for revocation of certification under section 94 of the *Federal Public Sector Labour Relations Act*

Before: David Olsen, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: No one

For the Respondent: Kelly Nychka, counsel

For the Employer and Intervenor: François Paltrinieri, representative

Heard at Edmonton, Alberta,
October 25 to 28, 2016, and March 21 to 24 and May 2, 4, and 5, 2017.
(Written submissions filed May 5, 9, 12, and 15, 2017.)

I. Application before the Board

[1] On October 26, 2015, Ajay Lala ("the applicant") filed an application under s. 94 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) for a revocation of certification of a bargaining unit for which the respondent, United Food and Commercial Workers Canada, Local 401 ("UFCWC") (also referred to as "the bargaining agent" or "the union"), was certified.

[2] The reason cited in support of the application was that the employee organization no longer represented a majority of the employees in the bargaining unit.

[3] On December 2, 2015, the bargaining agent requested that the Public Service Labour Relations and Employment Board (PSLREB) dismiss the application due to employer dominance and inappropriate intervention in the application.

[4] On July 4, 2016, I issued an interim decision (*Lala v. United Food and Commercial Workers Canada, Local 401, and Staff of the Non-Public Funds, Canadian Forces*, 2016 PSRELB 59) in which I ordered that a representation vote be taken. I further ordered that the ballots cast be sealed and not counted until such time as I had disposed of the allegations by the bargaining agent that the revocation application be dismissed due to employer dominance and inappropriate intervention in the process.

[5] Immediately before the hearing that commenced on October 25, 2016, the bargaining agent advised the other parties of additional grounds it wished to add to its request to have the revocation application dismissed.

[6] On October 24, 2016, the applicant notified the PSLREB that he had come to the conclusion that his further participation in the hearing was not warranted or necessary and that he was resigning from any further participation.

[7] The bargaining agent brought a motion to add grounds of alleged employer dominance and inappropriate intervention in the process that had occurred subsequent to January 16, 2016. The motion was granted; so was an employer request to strike certain words from the amendment.

[8] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and*

to provide for certain other measures (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*"), and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

II. Background, the bargaining agent's allegations, and the employer's reply

[9] The UFCWC was certified by the former Public Service Staff Relations Board as the bargaining agent for all employees in the operational category employed at Canadian Forces Base (CFB) Edmonton in Alberta, except "Managers/Category II" employees, on September 26, 1985. Supervisors are also included in the bargaining unit.

[10] The employer is her Majesty in Right of Canada as represented by the Staff of the Non-Public Funds (NPF), Canadian Armed Forces, CFB Edmonton.

[11] The bargaining unit includes employees who work at the CFB Edmonton mess halls, fitness centre, hockey arena, CANEX Expressmart, liquor and retail stores, and golf and curling clubs.

[12] The bargaining agent and the employer were parties to a collective agreement, which commenced on July 1, 2012, and expired on June 30, 2015 ("the collective agreement"). The bargaining agent provided the employer with notice to bargain on March 4, 2015.

[13] In or about June 2015, the bargaining agent called a meeting of its members at CFB Edmonton to discuss its proposals for collective bargaining.

[14] In late summer to early fall of 2015, Mr. Lala, the chef at the golf club on the base, who was a supervisor and an employee in the bargaining unit although not a member of the bargaining agent, together with Geraldine Arey, another supervisor employed in the CANEX and a member of the bargaining unit, started a campaign among employees to decertify the bargaining agent.

[15] The bargaining agent alleges that the employer inappropriately supported Mr. Lala's revocation drive by failing to prevent him from campaigning at work during work hours and by providing him crucial information about bargaining unit members that enabled his decertification efforts.

[16] The employer says that there is no objective evidence on which to base the assertion that the employees perceived that Mr. Lala was acting on behalf of management and that it met with him and asked him to stop campaigning during working hours. The employer denies supporting or assisting the revocation application by providing confidential workplace information to Mr. Lala.

[17] The bargaining agent and the employer met in Edmonton from September 16 to 18, 2015, for the purpose of negotiating a new collective agreement. The parties scheduled dates to continue negotiations on November 24 and 25, 2015.

[18] On October 26, 2015, Mr. Lala filed his application with the Board.

[19] On November 13, 2015, the employer wrote to the bargaining agent, stating that it would be inappropriate to continue negotiations while the application for revocation was outstanding and that following its resolution, the employer would reschedule dates for negotiations.

[20] On November 18, 2015, the bargaining agent filed an unfair labour practice complaint under s. 190(1)(b) of the *Act* alleging that the employer failed to comply with s. 106, the duty to bargain in good faith.

[21] The complaint was heard from May 25 to 27, 2016. By decision dated June 28, 2016 (*United Food and Commercial Workers Canada, Local 401 v. Staff of the Non-Public Funds, Canadian Forces*, 2016 PSLREB 57), the Board found that the complaint was founded and declared the employer in breach of the duty to bargain in good faith. The Board directed the employer to arrange dates with the bargaining agent for the continuation of collective bargaining, to post copies of the decision in all workplace locations, and to distribute copies to all bargaining unit members.

[22] In the allegations before me, the bargaining agent alleges that the employer's unlawful failure to bargain in good faith undermined the bargaining agent and left employees with the impression that it was ineffective. It argues that bad faith bargaining can constitute employer interference when it creates a climate in the

workplace that would be propitious to an application for revocation.

[23] The employer says that it did not refuse to negotiate a new collective agreement with the bargaining agent to support Mr. Lala in his decertification activities. The employer states that the parties resumed bargaining in August 2016 and that the deal reached in bargaining was accepted by the membership at a ratification vote on August 30, 2016. It argues that the facts that transpired after the conclusion of bargaining and the ratification vote do not support a conclusion of employer interference.

[24] As noted, by interim decision dated July 4, 2016, I informed the parties that having reviewed the evidence filed with the revocation application, I was satisfied that at least 40% of the employees in the bargaining unit as of the date of filing no longer wished to have the employee organization represent them. I directed that a secret-ballot representation vote be taken, pursuant to s. 65(2) of the *Act*, by electronic means.

[25] I also directed that the ballots cast be sealed and not counted until it had disposed of the bargaining agent's allegations that the application be dismissed due to employer dominance and its inappropriate intervention in the process.

[26] Mr. Lala was suspended from his duties on July 22, 2016, pending an investigation into alleged misconduct involving another employee. He was directed by the employer not to communicate with anyone from or connected with the workplace, with the exception of his bargaining agent representative or any family members who might be connected to the workplace. The employer commenced the investigation.

[27] The bargaining agent alleges that the employer failed to reasonably investigate Mr. Lala for serious workplace misconduct, which undermined the bargaining agent and facilitated his ongoing decertification drive.

[28] The employer submits that its actions and conduct related to the investigation were not influenced or motivated by the decertification process and that it did not deviate from its common practice with respect to disciplinary investigations.

[29] On July 28, 2016, in response to concerns expressed by the bargaining agent, the Board wrote to the parties to advise them that the representation vote was to be

conducted by secret ballot and not by proxy and that "… no proxy voting will be tolerated. Each elector must cast their own individual ballot and that any allegations of inappropriate conduct or actions which would compromise the integrity of the vote will be taken seriously."

[30] The parties returned to the bargaining table on August 3 and 4, 2016, at which time they concluded a renewal of the collective agreement.

[31] The collective agreement was ratified on August 30, 2016.

[32] The collective agreement provided for salary increases and retroactive pay.

[33] The bargaining agent alleges that the employer delayed paying bargaining unit members agreed-upon wage increases and retroactive pay, which undermined the bargaining agent and communicated to employees that it was weak and unable to hold the employer accountable for its agreements. That strengthened Mr. Lala's revocation campaign message, which was that the employees would be better off without the bargaining agent.

[34] The employer states that well before it had any knowledge of the representation vote date, it explained the reasons for the delay to the bargaining agent. It was attributed to a staff shortage in the CBF Edmonton Human Resources (HR) office.

[35] On September 29, 2016, the Board notified the parties that the list of voters had been submitted to the service provider conducting the electronic vote and that polls would open beginning October 17 and would close on October 21, 2016.

[36] The bargaining agent alleges that the employer issued promises and threats directly to employees on the eve of the revocation vote.

[37] The employer argues that it only communicated its neutrality and that it urged employees to remain respectful and to keep union discussions to breaks or off-work hours. No threats were made to employees concerning working hours, wages, or layoffs.

[38] The vote was conducted between October 17 and 21, 2016.

[39] Following the vote, the ballots were sealed pending the resolution of the bargaining agent's allegations of employer interference.

[40] Mr. Lala resigned from his employment on November 3, 2016.

[41] For the reasons that follow, I find that the employer committed an unfair labour practice and that it interfered in the revocation process when it cancelled bargaining in November 2015 at the request of the applicant, who had initiated the revocation application and had made a declaration to that effect.

[42] Notwithstanding the above, and for reasons detailed later in my decision, I have concluded that there is no reasonable basis on which the secret-ballot representation vote held from October 17 to 25, 2016, would not reflect the true wishes of employees, given the events that transpired after the Board rendered its decision on June 28, 2016, which I have referenced above, with respect to bad-faith bargaining, namely, the return to the bargaining table and the conclusion of the new collective agreement that was ratified by 100% of the members of the bargaining unit who voted on August 30, 2016.

[43] I direct that the ballot box be unsealed and that the votes be counted.

III. The witnesses

[44] The bargaining agent called the following eight witnesses:

- Richelle Stewart, the northern director of UFCWC Local 401; she oversees the day-to-day operations for the Local in northern Alberta;
- Steven Nanson, cashier clerk, CANEX Expressmart, and a member of the bargaining unit;
- Danielle Gracie, former cashier clerk, CANEX Expressmart, and a former member of the bargaining unit;
- Rebecca Fanjoy, clerk in the post office portion of the CANEX Expressmart and a member of the bargaining unit;
- Serena Van Hees, part-time bartender at the golf and curling club, a member of the bargaining unit, and a shop steward;
- Larry Zima, senior labour relations officer/business agent for the bargaining agent and a service representative for 15 years at CFB

Edmonton, until September 2014;

- Melissa Lachance, bartender, Junior Ranks' Mess, and a member of the bargaining unit; and
- Vinko Zigart, senior labour relations officer with the bargaining agent and the current service representative at CFB Edmonton.

[45] The employer called the following five witnesses:

- Erin Stevens, senior labour relations officer with the NPF;
- Elaine Stanners, CANEX base manager responsible for the retail and liquor stores;
- Matt Gawley, general manager, golf club operations;
- William (Bill) Pigden, senior manager of the Personal Support Programs at CFB Edmonton; and
- Herb Martin, regional manager, HR, Western Region, NPF.

[46] The applicant did not attend the hearing and did not call any evidence.

IV. <u>List of statutes considered</u>

- *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*; "the *Charter*"), s. 2(d);
- *Public Service Labour Relations Act,* S.C. 2003, c. 22, s. 2 ("the *PSLRA*");
- *Federal Public Sector Labour Relations Act* ("the *Act*");
- *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*");
- *The Trade Union Act* (R.S.S. 1978, c. T-17);
- *The Trade Union Amendment Act* (S.S. 2008, c. 26);
- *The Saskatchewan Employment Act*, SS2013, C5-15.1;
- *Labour Relations Act* (S.O. 1995, c. 1, Sched. A; *OLRA*);

- *Labour Act* (R.S.P.E.I. 1988, c. L-1);
- *Industrial Relations Act* (R.S.N.B. 1973, c. I-4);
- *Labour Relations Code* (R.S.B.C. 1996, c. 244; "the *BC Code*"); and
- *Labour Relations Code* (R.S.A. 2000, c. L-1; "the *AB Code*").

V. List of authorities considered

- *Rex v. Pressley*, [1948] B.C.J. No. 63 (QL) ("*Rex*");
- *Fallico v. International Ladies' Garment Workers' Union*, 1982 CarswellOnt 1217 ("*Fallico*");
- *C.J.A., Local 1338 v. MacLean Construction Ltd. (Employees of)*, 1984 CarswellPEI 68 ("*C.J.A., Local 1338*");
- *Air Canada v. Air Canada Pilots Association*, [2012] C.I.R.B. No. 644 ("*Re Air Canada*");
- *International Woodworkers of America v. G.W. Martin Lumber Ltd.*, 1980 CarswellOnt 968 ("*G.W. Martin*");
- *Mitchell v. Universal Workers Union (LIUNA, Local 183)*, 2013 CarswellOnt 16424 ("*Mitchell*");
- *Professional Association of Foreign Service Officers v. Treasury Board (Department of Foreign Affairs, Trade and Development)*, 2013 PSLRB 111 ("*PAFSO*");
- *Robinson v. D.M. Stewart's Cartage Ltd.*, [2003] C.I.R.B. No. 209 ("*Re Robinson*");
- *United Steelworkers of America, Local 6551 v. Laidlaw Transit Ltd. (carrying on business as Laidlaw Education Services)*, [2005] C.I.R.B. No. 327 ("*Laidlaw*");
- *Feldsted v. Treasury Board*, PSSRB File Nos. 161-02-944, 947, and 954 (19990429), 1999 C.P.S.S.R.B. No. 57 (QL) ("*Feldsted*");

- *Northern Nishnawbe Education Council v. McNear*, [2013] C.L.A.D. No. 141 (QL) ("*Nishnawbe*");

- *Canadian Imperial Bank of Commerce v. Torre*, 2010 FC 105 ("*Torre*");

- *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 488 v. Tundra Boiler & Instrumentation Ltd.*, [2010] A.L.R.B.D. No. 81(QL) ("*Tundra Boiler*");

- *C-Tron Systems Corp. v. International Brotherhood of Electrical Workers, Locals Nos. 213, 230, 344, 993, 1003, and 2203*, [1995] B.C.L.R.B.D. No. 35 (QL) ("*C-Tron*");

- *Certain Employees of Kolbina Care for Seniors Incorporated v. Hospital Employees' Union*, 2016 CanLII 10575 (BCLRB) ("*Kolbina Care*");

- *FedEx Ground Package Systems Ltd. v. Canada Council of Teamsters*, [2011] C.I.R.B.D. No. 51 ("*FedEx*");

- *Williams v. United Food and Commercial Workers, Local 1400*, [2014] S.L.R.B.D. No. 8 (QL) ("*Re Williams*");

- *Simplex International Time Equipment Co. v. International Brotherhood of Electrical Workers, Local 213*, [1994] B.C.L.R.B.D. No. 359 (QL) ("*Simplex*");

- *Certain Employees of 24/7 Traffic Control Ltd. v. Telecommunications Workers' Union*, 2011 Can LII 49032 (BCLRB) ("*24/7 Traffic*");

- *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 ("*PIPSC*");

- *Certain Employees of Thompson Interior Savings Credit Union v. Industrial, Wood and Allied Workers of Canada, Local 1-423*, 2003 CarswellBC 2858 ("*Thompson Credit Union*");

- *Doherty v. United Brotherhood of Carpenters and Joiners of America, Local 1386*, 2004 CarswellNB 511 ("*Doherty*");

- *Canadian Chemical Workers Union v. Somerville Belkin Industries Ltd., Brockville Packaging Division*, 1980 CarswellOnt 978 ("*Somerville Belkin Industries Ltd.*");

- *Bateman Foods Ltd. (Employees of) v. Amalgamated Meat Cutters & Butcher Workmen, Local 312*, 1971 CarswellAlta 153 ("*Bateman Foods*");

- *Vandermeer v. United Food and Commercial Workers International Union, Locals 175 and 633*, [1998] O.L.R.B. Rep. July/August 543 ("*Vandermeer*");

- *Landry v. New Brunswick Government Employees Union, Local 27*, 2000 CarswellNB 552 ("Landry");

- *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*MPAO*");

- *Saskatchewan v. Saskatchewan Federation of Labour*, 2012 SKQB 62 ("*Saskatchewan Federation of Labour*");

- *Ross v. PEI Union of Public Sector Employees*, 2015 CarswellPEI 20 ("*Re Ross*");

- *Vector Energy Inc. v. Pacific Gas & Electric Co.*, 2000 ABQB 178 ("*Vector Energy*");

- *Pombinho v. C.A.W., Local 444*, 1990 CarswellOnt 1161 ("*Pombinho*");

- *Chapman v. International Association of Machinists and Aerospace Workers*, 2001 CarswellNS 519 ("Chapman");

- *United Food and Commercial Workers Union, Local 401 v. Staff of the Non-Public Funds, Canadian Forces*, 2016 PSLREB 57 ("the bad-faith bargaining decision");

- *Certain Employees of Lansdowne Foods Ltd. v. United Food and Commercial Workers Union, Local 401*, [1992] Alta.L.R.B.R. 413 ("*Lansdowne*");

- *Jean-Claude Harrison v. Seafarers' International Union of Canada,* (1983) 53 di 85 ("*Harrison*");
- *Bytown Electrical Services Ltd.*, [1996] O.L.R.D. No. 3449 ("*Bytown Electrical*");
- *Triac Industries Inc.*, [2000] O.L.R.D. No. 2048 ("*Triac*");
- Adams, George W. *Canadian Labour Law*, 2nd ed. Aurora: Canada Law Book, 1993;
- Clarke, Graham J. *Clarke's Industrial Relations Board*. Toronto: Canada Law Book, 1999;
- Sack, Jeffrey. *Ontario Labour Relations Board law and practice*, 3rd ed. Markham: Butterworths, 1997; and
- Sopinka, John. *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999.

VI. The Board's approach

[47] For ease of reference, this decision will review the evidence, make findings of fact, analyze, and render decisions with respect to all of the allegations raised by the bargaining agent. Many of the facts are in dispute. More significantly, the inferences that should be drawn from these facts as a whole are contested.

[48] In making reliability assessments, the following statement of Mr. Justice O'Halloran in *Rex*, at para. 12, is helpful:

> *… The judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box [sic]. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.*

VII. The parties' overview of the general legal principles to be applied in determining the issues arising from the allegations that the employer interfered in the revocation application

[49] Both parties have referred to court and arbitral jurisprudence decided in the

federal jurisdiction and in a number of provincial jurisdictions. In determining the applicability of the principles arising from this jurisprudence to this case, regard must be had to the statutory regimes in place when the decisions were rendered.

A. <u>For the bargaining agent</u>

[50] The union asserts that the employer committed an unfair labour practice. Specifically, it interfered with Mr. Lala's revocation application pending before the Board and the subsequent revocation vote. The union asks that the Board remedy this interference by declaring that the employer violated the collective agreement and by dismissing the revocation application. In the alternative, the union asks that the Board order that a new in-person vote be conducted at CFB Edmonton. In addition, it requests both a cooling-off period and damages.

[51] The bargaining agent alleges that ss. 185 and 186(1)(a) of the *Act* were breached. Those provisions at the material time stated as follows:

> *Unfair Labour Practices*
>
> ***185*** *In this Division,* ***unfair labour practice*** *means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*
>
> *Unfair labour practices — Employer*
>
> ***186 (1)*** *Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall*
>
> > ***(a)*** *participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization ….*
>
> [Emphasis in the original]

[52] Each province in Canada has enacted labour relations legislation with provisions comparable to s. 186 of the *Act*. The bargaining agent draws on case law from those jurisdictions, where appropriate.

[53] Additionally, the allegations raised occur in the context of an application to revoke the bargaining agent's certification. Subsection 94(1) of the *Act* sets out as follows the conditions governing revocation applications:

> ***Revocation of Certification***
>
> ***When employee organization no longer represents employees***
>
> ***94 (1)*** *Any person claiming to represent at least 40% of the employees in the bargaining unit bound by a collective agreement or an arbitral award may apply to the Board for a declaration that the employee organization that is certified as the bargaining agent for the bargaining unit no longer represents a majority of the employees in the bargaining unit.*
>
> [Emphasis in the original]

[54] It is an essential and constitutionally enshrined rule of labour relations in Canada that employees must be empowered to choose their own bargaining agent representatives, free from management's influence (see, generally, *MPAO*). Employee choice includes the right to decide whether to revoke a bargaining agent's certification, without interference by employers or those acting on their behalf. The *Act* explicitly protects these rights.

[55] Employer interference is prohibited in the revocation context to ensure that the serious decision to decertify a bargaining agent is made freely by the employees who bear the consequences of the decision. Revocation requires not only majority support in a bargaining unit, as set out in s. 96 of the *Act*, but also majority support that is voluntary. An application that on its face fulfills the criteria for revocation can be invalid if it is tainted by employer interference.

[56] Employer interference can take many forms. The general wording of paragraph 186(1)(a) of the *Act* captures all employer behaviour that "… interfere[s] with the … administration of an employee organization or the representation of employees by an employee organization …"

[57] To protect against employer interference, the Board should ensure that each statement of support for decertification "… represents a reliable expression of employee wishes, reasonably free [fr]om a concern that their expression one way or the other will come to the knowledge of their employer" (see *Fallico*, at para. 6).

[58] The Prince Edward Island Supreme Court has confirmed that in the revocation context, labour relations boards "… must be governed by the overall environment in the work place [*sic*] in deciding whether or not the statement of desire [to support

revocation] represents a voluntary expression of those who signed it" (emphasis added by the bargaining agent; see *C.J.A., Local 1338*, at para. 32).

[59] Therefore, in this case, the Board should consider the highly structured military context in which this workplace dispute occurred. The Board should reflect on the effect that respect for rank and hierarchy, inherent in the military and adhered to by many civilian employees due to their work exposure to and family relations with uniformed staff, has on employee perception of employer interference.

[60] The bargaining agent need not prove anti-bargaining-agent intent to establish employer interference. In *Re Air Canada*, at para. 33, the Canada Industrial Relations Board (CIRB) stated as follows in the context of the anti-interference provisions in the *Code*:

> *…The purpose of this* [anti-interference] *provision is to protect the union against employer pressure that seeks to undermine the union's authority in the eyes of its members. To establish a violation of this section of the* Code*, the complainant bears the onus of proving that the employer's action interfered in the union's internal affairs. It is not necessary to demonstrate anti-union animus, but it is necessary for the complainant to prove that the employer's actions interfered with its ability to represent the employees in the bargaining unit.*
>
> [Emphasis added by the bargaining agent]

[61] Subsequent case law has confirmed that actual employer intent is not determinative; "employee perception is … key" (see *Fallico*, at para. 8). This is largely because, as noted by the Ontario Labour Relations Board (OLRB) in *G.W. Martin* at para. 16, the relationship between employees and employers is of a "responsive nature", and employees typically have a "natural desire" to want to appear to be aligned with the interests of their employer.

[62] In addition, the Board should consider how a reasonable employee would perceive purported employer infringement; the test is objective (see *Re Ross*, at para. 65). The difficulties involved in proving employer interference, particularly in the decertification context, mean that the bargaining agent can satisfy its evidentiary onus through circumstantial evidence (see *Mitchell*, at para. 21).

[63] Direct evidence of the impact of improper employer conduct on employee minds is not necessary. Instead, the Board should look for evidence of circumstances from which it can reasonably infer that the employees' true wishes were unlikely to have been disclosed in a decertification vote (see *Thompson Credit Union*, at para. 42).

[64] Finally, "… so vulnerable are employees to employer influence that the influence [in a revocation campaign] need not even by created by employer design" (see *Doherty*, at para. 26). Statements of opposition to a trade union have frequently been found involuntary when they were signed in circumstances in which the employee could reasonably have believed that failing to sign would come to management's attention (still in *Doherty*, at para. 26). Therefore, interference can be carried out by third parties whose relationship to management is such that a reasonable employee fears that his or her decision on revocation might become known to the employer (see *Doherty*, at para. 34).

[65] Case law reveals a plethora of employer or employer-sanctioned activities that can constitute employer interference.

[66] These include taking a "hands-off" approach while an anti-bargaining-agent employee organizes a revocation drive (see *Fallico*, at para. 8); allowing a revocation petition to circulate in a workplace during work hours, in circumstances in which employees would feel management was aware of the petition (see *Fallico*, at paras. 9 and 10); providing paid time off to attend an at-work meeting organized by an anti-bargaining-agent employee (see *Somerville Belkin Industries Ltd.*, particularly paragraph 46); indirectly contributing to an employee social club fund, which is then used to pay the legal fees of a decertification drive (see *Bateman Foods*); and failing to ensure that anti-bargaining-agent employees solicit signatures for a decertification petition outside work hours (see *Vandermeer*, particularly paragraph 109).

[67] Innumerable other examples of interference exist and all undermine the voluntariness of employees' choices. When they are present during a revocation drive, the resulting petition "… is more likely indicative of the vulnerability of the employees and their inherent inequality in their relationship with the Employer rather than a true and voluntary expression of the employees' wishes" (see *Landry*, at para. 27).

[68] Therefore, the Board must consider the impact of any action that occurred during a revocation campaign on reasonable employees, rather than searching

formalistically for particular employer or employer-supporting activities.

[69] The employer's actions, both directly and by facilitating Mr. Lala's decertification drive, allow the Board to draw the inference that a reasonable employee would have perceived the employer's desire that the bargaining agent's certification be revoked. This casts doubt on the voluntariness of the revocation petition and vote, a situation that can be remedied only if the Board rejects the application for revocation or in the alternative orders that a new vote be held.

B. <u>For the employer</u>

[70] The employer unequivocally states that it remained neutral throughout the revocation process and that it did not interfere in the manner alleged by the union, or otherwise.

[71] The union alleges that the employer improperly interfered not only with the application but also with the representation vote. These allegations concern two distinct periods, and the employer submits that accordingly, the Board should consider only evidence of circumstances from before the application was filed (i.e., before October 19, 2015) when determining whether the employer improperly interfered with the application.

[72] It follows that the Board should consider only post-application evidence (i.e., from after October 19, 2015) when it considers whether to discard the representation vote.

[73] The employer proposes an evidentiary standard for the analysis of the facts relative to each period and allegation that notes the unusual circumstances of this matter, in which several months lapsed between the application and the representation vote.

[74] Given that the *Act* mandates that a vote be conducted, dismissing the application would actually prevent votes already cast from being counted rather than prevent a vote from being ordered. Once a vote is ordered, the threshold of interference required to dismiss the authenticity of ballots already cast is arguably higher than that of assessing petition evidence.

[75] For the Board to find that the employer interfered with the revocation application or with the subsequent vote, the union must establish the following:

- that Mr. Lala and Ms. Arey are managers or persons acting on behalf of the employer as identified in s. 186 of the *Act* or that they could reasonably be perceived as such, based on the relevant evidence; and/or

- that circumstances attributable to the employer are such that it can be said it interfered with the application and the vote to the extent that the vote is not likely to disclose the true wishes of the employees in the bargaining unit.

[76] Before examining these questions, the employer proposes the following legal framework in which this case ought to be decided.

1. <u>The federal labour relations regime</u>

[77] The *Act* (including all corresponding regulations) makes no reference to "employer interference" in the context of a decertification scenario. It refers to employer interference, in that no "employer" shall "interfere", in its unfair labour practices provisions at s. 186.

[78] There is no unfair labour practice complaint before the Board in this matter.

[79] As there is no s. 190 complaint, the employer submits that the Board must view the bargaining agent's allegations through the lens of s. 186 of the *Act* and the matching provisions from other jurisdictions, including the *Code* and provincial labour regimes.

[80] Subsections 186(1) and (2) outline what the *Act* considers unfair labour practices on the part of an employer.

[81] In light of this statutory provision, the employer submits that the bargaining agent must prove that either the employer, one of its managers, or someone acting on its behalf must have been involved with the application.

2. The evidentiary approach - employee perception

[82] The bargaining agent argues that the key to determining the employer's involvement or interference with the application or the representation vote is the employees' perception that it happened. It further states that the Board should consider how a reasonable employee would perceive the employer's actions and from there, draw a reasonable inference as to interference. The bargaining agent notes that the test is objective.

[83] The employer submits that the test is indeed objective. The Board should consider only evidence of the circumstances surrounding the application or the subsequent vote and not hear evidence as to the subjective states of mind of the employees who signed in support of the application or who cast a ballot in the sealed vote (see *Tundra Boiler*).

[84] While subjective evidence (such as about the perceptions of individual employees) may be considered in an objective test, the Board should take a guarded approach when relying on such evidence or on affording it much, if any, weight.

[85] Subjective evidence is not conclusive or determinative, and the Board is justified in adopting a guarded approach. As the British Columbia Labour Relations Board ("the BC board") stated as follows in *C-Tron*, at para. 27:

> *27 … Firstly, the integrity of the secret ballot process can be brought into question through this process because of the threat to confidentiality. Secondly, we recognize that employees called to testify in front of their employer and the union about their thoughts or feelings with regard to voting on a representation issue is subject to pressure to please one or more of the various sides. This causes the Board to have significant reason to be concerned about the weight to be given to such after the fact statements at a hearing. Thirdly, there is a concern that this approach can lead to the evidentiary process deteriorating into a contest of numbers of witnesses. This would not only lengthen the process would [sic] also substantially increase the threat to confidentiality. For all these reasons we find significant support for an objective standard with a very limited reliance on the subjective views of the witnesses.*

3. The *Code*

[86] Sections 38 and 39 of the *Code* govern the revocation of bargaining rights in the context of matters before the CIRB. They are in large part nearly identical to the

provisions of the *Act*.

[87] Section 94 of the *Code* addresses unfair labour practices as they relate to an employer's interference with a bargaining agent. The provisions of interest are ss. 94(1)(a), (3)(a)(i), and (3)(e), which are nearly identical to their counterpart sections of the *Act* (ss. 186(1)(a), (2)(a), and (c)).

[88] The employer submits that the case of *Re Robinson* is useful to interpreting the *Code* revocation regime, which may be applied to the present matter.

[89] The CIRB considers that an employer has interfered with a revocation application if the circumstances surrounding the application are such that the signature evidence in support is the product of employer influence. The CIRB will consider whether the employees were "stampeded into (their) decision", in which the employer's actions resulted in "restricting" the employees' choice, and whether their choices were made of "… their own free will without fear, or promise of favour" (all quotations are from *Re Robinson*, at para. 35).

[90] In light of *Re Robinson* and *a priori*, the employer believes that the Board should give effect to the representation vote already completed, since it gave the employees of the NPF at CFB Edmonton the opportunity to exercise their democratic right to determine the question of their representation (see *Re Robinson*, at paras. 34 and 35).

[91] Further to *Re Robinson*, *Laidlaw* sheds more light on the CIRB's approach at paragraph 50 as follows:

> *[50] Except for the general violation under section 96 of the* Code*, sections 94(1)(a), 94(3)(a)(i) or (vi) and 94(3)(e)* ***require that the employer or a person acting on behalf of the employer*** *have been involved in the alleged violation. Consequently,* ***it is necessary to consider whether Laidlaw or a person acting on its behalf*** *was engaged in activities considered unlawful under the* Code*.*
>
> [Emphasis added by employer]

[92] The threshold set in *Laidlaw* first requires a finding of employer interference and further that that interference has jeopardized the likelihood that a vote would accurately reflect the wishes of the bargaining unit members (see *Laidlaw*, at para. 80).

4. Provincial regimes

[93] The Supreme Court of Canada has noted the similarity of provincial and federal regimes (see *PIPSC).*

[94] With this in mind, the employer presented two provincial labour regimes that it believes provide for legislative provisions and jurisprudence that are most helpful to determine this case, the *AB Code* and the *BC Code*, both of which are referred to in the *PIPSC* case. They will be referred to in argument on the individual issues when appropriate.

[95] The bargaining agent alleges that the employer not only improperly interfered with the application but also with the representation vote. These allegations concern two distinct periods, and the employer submits that accordingly, the Board should consider only evidence of circumstances from before the application was filed (i.e., before October 19, 2015) when determining whether the employer improperly interfered with the application.

[96] It follows that the Board should consider only post-application evidence (i.e., from after October 19, 2015) when it considers whether to discard the representation vote.

VIII. The Board's analysis in determining the principles to be applied in addressing the union's allegations of employer interference

[97] At the time the application for revocation was made, the relevant provisions of ss. 94 to 96 of the *Act* read as follows:

> ***94 (1)*** *Any person claiming to represent at least 40% of the employees in the bargaining unit bound by a collective agreement or an arbitral award may apply to the Board for a declaration that the employee organization that is certified as the bargaining agent for the bargaining unit no longer represents a majority of the employees in the bargaining unit.*
>
> …
>
> ***95*** *If the Board is satisfied on the basis of written evidence that, as of the date of the filing of an application for a declaration made under subsection 94(1), at least 40% of the employees in the bargaining unit no longer wish to have the employee organization represent them, the Board shall order that a representation vote be taken. The provisions of*

> *subsection 65(2) apply in relation to the taking of the vote.*
>
> ***96*** *If, after conducting the representation vote referred to in section 95, the Board is satisfied that a majority of the employees in the bargaining unit who have cast a ballot no longer wish to be represented by the employee organization, it must revoke the certification of the employee organization as the bargaining agent.*

[98] The bargaining agent takes the position that it has complained under s. 190 of the *Act* in that it alleged a breach of ss. 185 and 186(1)(a), which are the unfair labour practice provisions.

[99] The employer states that there is no unfair labour practice complaint before the Board. The Board must view the bargaining agent's allegations through the lens of ss. 186(1) and (2) of the *Act* and the matching provisions from other jurisdictions, including the *Code* and applicable provincial labour regimes.

[100] The bargaining agent did not file a complaint under s. 190 of the *Act*. It raised allegations that the employer committed an unfair labour practice in the context of its replies to the original application for revocation.

[101] In *Harrison*, the Canada Labour Relations Board (CLRB) determined that it could look into the employer's potential involvement in a revocation application even though the union had made no unfair labour practice complaint.

[102] Given that the statutes are virtually identical, I am persuaded that the jurisprudence from the CIRB fairly sets out the applicable law on this issue and that the Board may look into the employer's conduct to ensure that it has not interfered with a revocation application, by having regard to the unfair labour practice provisions of the *Act*.

[103] The relevant provisions of the *Act* that apply to this application are set out in ss. 185, 186(1)(a) (cited earlier), and 186(5).

[104] It is an unfair labour practice for an employer or a person who occupies a managerial or confidential position to interfere in the formation or administration of an employee organization or in the representation of employees by the employee organization.

[105] Subsection 186(5) is an employer "free speech" provision that provides that an employer does not commit an unfair labour practice by expressing a point of view so long as it does not use coercion, intimidation, threats, promises, or undue influence.

A. <u>General applicable principles, based on the *Charter*</u>

[106] In *MPAO*, the Supreme Court of Canada determined that s. 2(d) of the *Charter*, the guarantee of freedom of association, protects a meaningful process of collective bargaining that provides employees with the degree of choice and independence sufficient to enable them to determine and pursue their collective interests.

[107] The Court stated as follows at paragraph 86:

> *[86] Hallmarks of employee choice in this context include the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations. Employee choice may lead to a diversity of associational structures and to competition between associations, but it is a form of exercise of freedom of association that is essential to the existence of employee organizations and to the maintenance of the confidence of members in them ….*

[108] The Court confirmed at paragraph 88 that "… a meaningful process of collective bargaining protects the right of employees to form and join associations that are independent of management …".

[109] One of the hallmarks of employee choice includes the ability to dissolve existing associations.

[110] In *Saskatchewan Federation of Labour*, Mr. Justice Ball of the Saskatchewan Court of Queen's Bench determined that when a bargaining agent's interests and employees' interests diverge, as in a revocation application, the *Charter* protects the employees' interests.

[111] His decision was made in the context of a union challenge under the *Charter* to the Saskatchewan *Trade Union Amendment Act 2008* (S.S. 2008, c. 26 and 27) (the "*TUAA*"), which amended the process by which trade unions could obtain or lose bargaining representative status.

[112] The *TUAA* changed the level of support required in certification and decertification applications. Before the change, a bargaining agent in a certification

application required the support of 25% to 50% of the employees in the proposed bargaining unit. If the bargaining agent met that threshold, the application would then proceed to a vote. If it had the support of 50% plus one, it was automatically certified.

[113] The *TUAA* changed the level of support required in certification applications to 45% of the employees in the proposed bargaining unit, following which a mandatory secret-ballot vote is held.

[114] With respect to decertification, before the amendment, an employee seeking a revocation of certification required the support of 50% plus one of the employees in the bargaining unit, following which the secret-ballot vote would be held. The *TUAA* lowered the threshold to 45%.

[115] The unions argued that the 45% level of support in the proposed legislation for certification applications was an extremely difficult threshold for them to achieve. However, they did not express any similar concern about the ability of employees to achieve the same threshold level of support for decertification applications.

[116] Mr. Justice Ball reasoned as follows at paragraph 257:

> *[257] On occasion, employees may find themselves in the divide between their union and their employer, unable as individuals to confront the power of either organization. A simple example is when a union loses the confidence and support of the majority of employees in a bargaining unit. Those employees will choose to exercise their right <u>not</u> to associate — a right recognized in* Lavigne v. Ontario Public Service Employees Union *and* R. v. Advance Cutting & Coring Ltd. *They exercise that negative right by applying for an order decertifying the union.*
>
> [Emphasis in the original]

[117] The unions argued that the proposed legislation contravened the *Charter*. Mr. Justice Ball summarized the argument as follows at paragraph 259:

> *[259] From the Union's perspective, there is a principled reason for that. Their view is that unionization is a social good to be promoted by labour legislation that facilitates certification, ensures the security of the union and discourages decertification as much as possible. They argue that Canada is bound by international law to promote (not just protect) unionization and that s. 2(d) of the* Charter *should be interpreted accordingly. Because their perspective*

> *is that unionization is beneficial for employees and, by extension, for society, freedom of association under s. 2(d) of the* Charter *must be interpreted in a manner that will promote the institutional interests of the unions themselves.*

[118] He then articulated the other perspective as follows at paragraph 260:

> *[260] The other perspective, equally principled, is that employees should be free to organize and to join, form or assist trade unions without coercion or interference by any person. That view, a more neutral one, focuses on protection of the freedom of every individual to choose to associate, or not to associate, for the purpose of pursuing work place [sic] goals. That protection extends to the independent, democratic, operation of the union. It does not extend to the promotion of the Unions' own institutional interests.*

[119] He concluded as follows that s. 2(d) of the *Charter* protects the interests of the employees seeking to decertify a bargaining agent (at paragraph 261):

> *[261] In my view, s. 2(d) of the* Charter *embraces the latter concept as a minimum level of protection, leaving it open to Legislatures to fortify that protection as they see fit. Thus, where the interests of the union and the interests of the employees diverge, s. 2(d) of the* Charter *serves to protect the interests of the employees.*

[120] In the result, Mr. Justice Ball determined that the *TUAA* did not offend the *Charter*.

[121] Both the Saskatchewan Court of Appeal (in *R. v. Saskatchewan Federation of Labour*, 2013 SKCA 43) and the Supreme Court of Canada (in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4) agreed with the trial judge's conclusions on this issue.

[122] In *Re Williams*, the Saskatchewan Labour Relations Board ("the Saskatchewan board") applied Mr. Justice Ball's decision in the context of a revocation of certification application.

[123] After quoting Mr. Justice Ball's conclusion that s. 2(d) of the *Charter* protects the interests of employees and not the interests of trade unions, the Saskatchewan board stated as follows:

…

> *Section 9 of* The Trade Union Act [which authorizes the Board to dismiss an application for revocation if it is satisfied that it was made on the advice of or as a result of the influence of or interference or intimidation by the employer] *represents an important adjunct to the fundamental right of employees to decide the representational question. When invoked, s. 9 provides a shield for employees to ensure that an employer has not used its authoritative position to improperly influence the actions of its employees in the exercise of their rights. In numerous cases, including those cited by the Union, this Board has acknowledged its obligation to be alert to signs that an application for decertification has been initiated, encouraged, assisted or influenced by the actions of the employer. This Board has repeatedly stated its intention to be vigilant in guarding against applications to decertify a trade union that appear to reflect the will of the employer instead of the wishes of the employees. However, in doing so, it is important to keep in mind that the purpose of s. 9 is to protect employees from the improper influences of management; not to protect trade unions from a desire for change in their membership.*
>
> …
>
> *It is also important to keep in mind that s. 9 is invoked by stripping employees of the very right it is intended to protect; the right to decide the representational question. Where the Board is satisfied that improper employer conduct has tainted a rescission application, the remedial response is to reject or dismiss that application.* ***Thus, a compelling labour relations justification is necessary before this Board will withhold the right of employees to decide for themselves whether or not they wish to continue to be represented.*** *As this Board has stated on many occasions in exercising the discretion granted pursuant to s. 9 of the* Act, *this Board must* <u>*carefully*</u> [emphasis in the original] *balance the right of employees to revisit the representational question (now recognized as a protected associational activities) against the need to be alert to signs of improper employer influences.* ***To do so, this Board examines the impugned conduct of the employer and measures the likely impact of that conduct on employees of reasonable fortitude giving due consideration to the circumstances occurring in the workplace at the relevant time, including the maturity and status of collective bargaining****.*
>
> ***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] S.L.R.B.D. No. 33, [1989] Summer Sask. Labour Rep. 84, LRB File No. 207-88 & 003-89.*
>
> …
>
> [Emphasis added throughout]
>
> [*Sic* throughout]

B. <u>Conclusions with respect to the *Charter*'s impact</u>

[124] Section 2(d) of the *Charter* protects the interests of the employees seeking to decertify a bargaining agent and not the interests of the bargaining agent.

[125] Unfair labour practice provisions prohibiting an employer from interfering in a representation question provide a shield to employees to ensure that the employer has not used its authoritative position to improperly influence the action of its employees in the exercise of their rights by initiating, encouraging, or assisting in an application for decertification.

[126] These provisions protect employees from the improper influence of management and do not protect trade unions from the employees' desire for a representation change. When a labour board dismisses an application for revocation by reason of employer interference, it denies employees the right to determine the representation question, which is protected by the *Charter*. A compelling labour relations justification is necessary to deny the right of employees to decide for themselves whether they wish to continue to be represented.

[127] The employer's impugned conduct must be of such a nature and significance that its probable impact would be to compromise the ability of employees of reasonable fortitude to freely exercise their rights.

C. The *Act*

[128] As noted by the employer, no relevant Board decisions deal with allegations of employer interference in the context of a revocation application.

D. The *Code*

[129] The provisions of the *Code* in effect as of the date of the application both with respect to a revocation of certification and unfair labour practices are very similar to those corresponding provisions in the *Act*. Decisions under the *Code* have guided this Board in rendering earlier decisions involving this application.

[130] Sections 38 and 39 of the *Code*, as they read at the time of the application, deal with revocation. The threshold of employee support is the same under both statutes.

[131] Paragraph 94(1)(a) of the *Code*, the unfair practices provision, uses similar language to s. 186(1)(a) of the *Act*. The section provides that no employer or person acting on behalf of one shall participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union. Unlike the corresponding section of the *Act*, paragraph 94(1)(a) of the *Code* does not confine such a person to someone "who occupies a managerial or confidential position."

[132] Paragraph 94(2)(c) of the *Code*, the provision on employer free speech, is virtually identical to s. 186(5) of the *Act*.

E. Relevant decisions of the CLRB and CIRB on employer interference, in the context of a revocation application

[133] In *Harrison*, the CLRB described employer influence at page 98 as follows:

> *The Board has to know if the employees were "stampeded into (their) decision". (J. Phillips …), and whether the actions of the employer resulted in "restricting the employees' choice or freedom to decertify the bargaining agent" (J. Phillips …) or whether the action of the employees was done of their own free will without fear or promise of favour.*
>
> …

[134] In *Laidlaw*, the CIRB, dealing with an unfair labour practice complaint in the context of an application for revocation, summarized the jurisprudence previously considered on the issue of what constituted illegal interference by an employer as follows at paragraph 71:

> *[71] These decisions indicate that each case stands on its own merits. While in* Mike Schembri et al., supra *and* Marcel Roussel et al., supra *the Board concluded that circulating a petition during work hours was an indication of employer interference, in* Steve Baidwan, supra*, the Board made the opposite finding. Accordingly, the circulation of a petition in the workplace is not the single decisive factor and requires other circumstances, for example, the employer's communications with employees (*Car-Ar Transit Services, Division of Tokmakjian Limited, supra*), unusual rewards (*Mike Schembri et al., supra*, and* Ken Robinson, supra*), practices found to be unfair labour practices (*Jean-Claude Harrison et al., supra*), the Employer's overall conduct (*Can-Ar [*sic*] Transit Services, Division of Tokmakjian Limited, supra*;* Jean Claude Harrison et al., supra*; and* Rogers Cable T.V. Ltd. (Hamilton), supra*), and circumstantial evidence (*Greg W. Prichard, supra *and* Mike Schembri et al., supra*).*

[135] In *FedEx*, the CIRB considered a number of unfair labour practice complaints that arose out of a national organizing drive at the Federal Express group of companies by the Canadian Council of Teamsters. The bargaining agent alleged that the employer had interfered with its organizing efforts, contravening s. 94(1) of the *Code*. In that case, in correspondence to its employees, the employer expressed the opinion that it did not need a union.

[136] Having reviewed the *Code* and in particular s. 94(2) (the employer free-speech provision), as well as the relevant case law under both the *Code* and provincial boards,

the CIRB derived the following non-exhaustive principles at paragraph 81:

> *- An employer is entitled to express its views and is not confined to mere platitudes. There is a middle ground, between mere platitudes and interference and undue influence, in which an employer is free to express its views.*
>
> *- In evaluating employer conduct, the Board should seek to establish whether the employer's conduct has detrimentally affected the employees' ability to express their true wishes. In other words, has the employer's conduct deprived the employees of the ability to express their true wishes in exercising their decision to associate or not?*
>
> *- The definition of intimidation, coercion and undue influence in a labour relations context contains this basic element: the invocation of some form of force, threat, undue pressure or compulsion, for the purpose of controlling or influencing an employee's freedom of association.*
>
> *- The fact that an employer does not want a union and expresses its opinion to that effect is not necessarily a violation of the* Code*; a factual analysis must be conducted to determine whether the manner in which this opinion is expressed contains an element of coercion, intimidation, threats, promises or undue influence.*
>
> *- The Board should consider the context in which the statements are made and the probable effect on a reasonable employee of the means used. Circulation of written material is the preferable mode, as the choice of written text is less intrusive than captive audience meetings or private discussions with employees.*

[137] Similarly, s. 186(5) of the *Act* permits an employer to express its point of view, so long as it does not use coercion, intimidation, threats, promises, or undue influence, without committing an unfair labour practice.

[138] From these CIRB decisions, I conclude that each case stands on its own merits; the circulation of a petition in the workplace without employer intervention is not a single decisive factor. Other circumstances are required, such as the employer's communications with employees or it using coercion, intimidation, threats, promises, undue influence, unusual rewards, or practices found to be unfair labour practices, and its overall conduct.

F. Provincial labour relations regimes and case law

1. Ontario

[139] The bargaining agent argues that revocation requires not only majority support in a bargaining unit as set out in s. 96 of the *Act* but also majority support that is voluntary. It asserts that to protect against employer interference, the Board should ensure that each statement of support for decertification represents a reliable expression of employee wishes reasonably free from concern that the employees' expressions one way or another will come to the knowledge of their employer. The bargaining agent relies upon the *Fallico* decision in support of its position.

[140] Section 57(2) of the *OLRA* then in force provided as follows:

> ***57*** *(2) Any of the employees in the bargaining unit defined in a collective agreement may … apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit ….*

[141] Section 57(3) provided that the following would occur upon an application under s. 57(2):

> ***57*** *(3) … the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than* 45 *per cent of the employees in the bargaining unit have* **voluntarily** *signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than* 45 *per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.*
>
> [Emphasis added]

[142] After reciting s. 57(3), the OLRB, in *Fallico*, stated as follows:

> …
>
> *The use of the word "voluntarily" in the section makes it necessary for the Board in every case to satisfy itself that the petition or statement filed in support of the application represents a reliable expression of employee wishes, reasonably free* [fr]*om a concern that their expression one way or the other 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….*
>
> …

[143] The current statutory provision in the *OLRA* dealing with revocation is s. 63, which was introduced in 1995, and it reads in part as follows:

> *63(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 67, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.*
>
> …
>
> *(4) The application filed with the Board shall be accompanied by a list of the names of the employees in the bargaining unit who have expressed a wish not to be represented by the trade union and evidence of the wishes of those employees, but the applicant shall not give this information to the Employer or trade union.*
>
> *(5) If the Board determines that 40 per cent or more of the employees in the bargaining unit appear to have expressed a wish not to be represented by the trade union at the time the application was filed, the Board shall direct that a representation vote be taken among the employees in the bargaining unit.*
>
> …
>
> *(10) The representation vote shall be by ballots cast in such a manner that individuals expressing their choice cannot be identified with the choice made.*
>
> *(11) The Board may direct that one or more ballots be segregated and that the ballot box containing the ballots be sealed until such time as the Board directs.*
>
> *(12) After the representation vote has been taken, the Board may hold a hearing if the Board considers it necessary in order to dispose of the application.*
>
> *(13) When disposing of an application, the Board shall not consider any challenge to the information provided under subsection (4).*
>
> *(14) If on the taking of the representation vote more than 50 per cent of the ballots cast are cast in opposition to the trade union, the Board shall declare that the trade union that was certified or that was or is a party to the collective agreement,*

> *as the case may be, no longer represents the employees in the bargaining unit.*
>
> *(15) The Board shall dismiss the application unless more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in opposition to the trade union.*
>
> *(16)* ***Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.***
>
> [Emphasis added]

[144] Sack, Mitchell, and Price, in *Ontario Labour Relations Board Law and Practice*, Third Edition, Volume 1, comment on the legislative history of s. 57(3), at paragraph 4.21 on pages 4-30 and 4-31, as follows:

> *Prior to the 1995 Act, the Board was required to determine whether employees had "voluntarily signified in writing" that they no longer wish to be represented by the union and this often involved determining the voluntariness of petitions and counter petitions.*
>
> *The Act no longer refers to "voluntariness," but rather provides that the Board may dismiss a termination application if satisfied that the "employer or a person acting on behalf of the Employer initiated the application or engaged in threats, coercion or intimidation in connection with the application" :s. 63(16).*
>
> *In Elirpa Construction and Materials Ltd., the Board rejected the union's argument that s. 63(16) confirm the Board's historical practice of requiring an applicant to establish the voluntariness of the written documentation filed with the Board in support of the application, holding that the Act no longer anticipated such an inquiry. The Board added that its conclusion was qualified by the discretion given to the Board under s. 63(16) to dismiss a termination application in the event of certain Employer conduct, but stated that the Board should only hold a hearing to deal with such issues where the allegations of misconduct were pleaded in such a manner as to establish a* prima facie *violation of s. 63(16).*

[145] In *Bytown Electrical*, the OLRB commented as follows at paragraph 107-109 (QL) on the changes to the legislation:

> *The current provision is contained in subsection 63(16) of the*

> *Act: The voluntariness of the petition is no longer the crucial consideration for determining the validity of a petition. Bearing in mind that the union only weakly advanced the contention that Bytown or Mr. Boyd "engaged in threats, coercion or intimidation in connection with the application", the issue to determine* is *whether the decertification application was in fact initiated by the employer or a person acting on behalf of the employer. That is not the same determination as had to be made previously. There has been a shift of ONUS. The union must now establish that the application has been initiated by the employer, rather than the petitioners having the overall burden of proving the voluntariness of their petition. That is not the only difference. The notions of 'voluntariness' and the absence of 'employer initiation' are not necessarily coterminous or coincidental. Furthermore, the point of consideration by the Board is different as between its former determination of 'voluntariness' and its current consideration of the application of section 63(16) of the Act. The inquiry into voluntariness focused upon the circumstances of the signing of a petition, the current inquiry focuses upon the launching of the application. The focus is not restricted to the signing of the petition and includes the bringing of the application. In most cases this will be a distinction without a difference, but in some it may be significant.*

[146] The bargaining agent also argues that case law has confirmed that actual employer intent is not determinative as "employee perception is key", relying upon *Fallico*. In that case, the OLRB stated as follows at paragraph 8:

> *Where the petition activity in fact takes place during working hours, the Board has noted the mere indulgence on the part of management may be sufficient to destroy the petition as a reliable expression of the employees' own wishes. This is because, once again, employee perception is the key ….*

[147] This comment was also made in the context of the pre-1995 *OLRA*, in which as noted the OLRB was mandated to ascertain the number of employees in the bargaining unit who had voluntarily signed in writing that they no longer wished to be represented by the trade union.

[148] Therefore, I conclude that the jurisprudence decided in the context of the pre-1995 *OLRA* that mandated the OLRB to determine the voluntariness of the signatures on the petition is not of assistance to me in the context of the *Act*, which contains no direct or analogous provision.

[149] Nevertheless, the current *OLRA* provision, s. 63(16), which sets out the grounds upon which the OLRB may dismiss an application, namely, an employer or a person acting on its behalf initiated the application or engaged in threats, coercion, or intimidation in connection with it, as well as the jurisprudence decided under that provision, may be of assistance in resolving the allegations before me. I have no difficulty concluding that such conduct, if proved, would constitute an unfair labour practice under the provisions of s. 186 of the *Act*.

[150] George W. Adams, in *Canadian Labour Law*, Second Edition, Volume 2, comments on the practice under the current Ontario provisions at paragraph 9.80 as follows:

> *…the onus is on the party alleging misconduct to call evidence to support its allegations, with either direct or circumstantial evidence supporting the inference of Employer initiation or misconduct. Where it is alleged that the Employer initiated the application, it must be shown that the Employer's conduct amounted to significant and influential involvement giving rise to the termination application. For example, the board has dismissed a termination application under this section where the Employer asked the applicant to file the application, assisted the applicant in preparing legal submissions and promised to provide financial support. The board remains prepared to make a finding of improper Employer initiation on the basis of reasonable inferences from evidence called and not called by the parties.*

[151] In determining whether an unfair labour practice has been committed in this context, I am guided by the Ontario jurisprudence that no longer focuses on the voluntariness of the petition and perceived employer involvement in revocation applications but rather on evidence of actual employer involvement.

2. <u>Saskatchewan</u>

[152] Section 5 of *The Trade Union Act* empowered the Saskatchewan board to make orders rescinding its orders or decisions that certified bargaining agents for units of employees.

[153] As noted in the discussion under the *Charter*, s. 9 of *The Trade Union Act* provided that the Saskatchewan board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of or influence of or interference

or intimidation by, the employer or employer's agent.

[154] The *Trade Union Act* was repealed in 2013 and replaced by the *Saskatchewan Employment Act*. The express provision found in s. 9 is no longer found in the provision dealing with the revocation of certification. Reference may be made to the unfair labour practice provisions in s. 6-62(1).

[155] The cases in which the Saskatchewan board invoked s. 9 of *The Trade Union Act* generally fell into one of two categories, outlined as follows in *Re Williams* at page 11:

…

> *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] S.L.R.B.D. No. 74 [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.*

3. <u>Prince Edward Island</u>

[156] The bargaining agent also relies upon decisions from Prince Edward Island in support of its argument, which focuses on the voluntariness of majority support.

[157] In *Re Ross*, the P.E.I. Labour Relations Board had to consider whether the requirements for the revocation of a certification order had been satisfied. The board determined that a majority of employees had in fact signed the petition. It then turned

to what it called the "second part of the legislative test", which was whether the majority of employees no longer wished the trade union to act as the bargaining agent.

[158] That board relied upon OLRB decisions rendered before the 1995 amendments and in particular the requirement to make a determination of the voluntariness of the employees' wishes, as outlined in the pre-1995 s. 57(3) of the *OLRA*, relying upon *Fallico*, at para. 69, and *Pombinho*.

[159] For the reasons already articulated in light of the provisions in the *Act*, I do not find this decision of assistance.

4. <u>New Brunswick</u>

[160] The bargaining agent argues that employees are so vulnerable to employer influence that the influence need not even be created by employer design and that statements of opposition to a trade union have frequently been found involuntary when they were signed in circumstances in which the employee could reasonably have believed that failing to sign would come to management's attention. In support of these principles, the bargaining agent cited the decision of the New Brunswick Labour and Employment Board ("the New Brunswick board") in *Doherty*, at para. 26.

[161] One of the issues in that case was whether the signatures on the statement of desire were freely and voluntarily obtained. Subsection 23(3) of the New Brunswick *Industrial Relations Act*, which was considered, provides the following:

> ***23****(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the date the application was made and, if satisfied that the application is supported by or has the* ***voluntary*** *support of not less than forty per cent of the employees in the bargaining unit at such time as is determined under paragraph 126(2)*(e) *the Board shall, by a representation vote, satisfy itself whether a majority of the employees desire that the right of the trade union or council of trade unions to bargain on their behalf be terminated.*
>
> [Emphasis added]

[162] The New Brunswick board stated as follows at page 13, quoting an earlier case:

> …
>
> *The Board has before it, in the present case, a cogently-*

> *worded statement of desire signed by almost the full complement of the bargaining unit. The board must still be satisfied, however, that the motivation behind such a statement was of a truly voluntary nature; that is, as the above cases indicate, that the employees are not simply identifying themselves with the choice of their employer, out of fear of antagonizing their employer, or fear of reprisal, or for whatever reason. This is a fundamental duty, which the Board owes to the employees themselves, and is made a pre-condition under section 49(3) of the* Labour Relations Act *to its power to direct the holding of a representation vote.*
>
> …

[163] It is in this context of determining the voluntary nature of the statement of desire in paragraph 18 that the New Brunswick board stated, "… so vulnerable are employees to employer influence that the influence need not even be created by employer design."

[164] As in the case of Ontario, this jurisprudence, in the context of the New Brunswick *Industrial Relations Act* that mandates the New Brunswick board to determine the voluntariness of the signatures on a petition, is not of particular assistance in interpreting the *Act*, which contains no direct or analogous provision.

5. <u>British Columbia</u>

[165] Subsection 33(6)(b) of the *BC Code* authorizes the BC board, when an application for decertification has been made, to cancel or refuse to cancel the certification of a trade union as bargaining agent for a unit without a representation vote being held, or without regard to the result of a representation vote, in any case where "… the board considers that because <u>of improper interference</u> by any person a representation vote is unlikely to disclose <u>the true wishes</u> of the employees" [emphasis added].

[166] In *Kolbina Care*, the BC board applied a two-stage analysis in determining allegations of employer interference in a decertification situation.

[167] It stated as follows (at p. 15):

> …
>
> *To engage the Board's discretion under Section 33(6)(b), a two-stage analysis applies. First, the Board must find that improper interference occurred. If such a finding is made, the second stage of the analysis requires the Board to determine*

> *whether the improper interference makes it unlikely that the decertification vote would reflect the true wishes of the employees ….*
>
> …

[168] In *C-Tron*, the BC board interpreted as follows the term "improper interference" in the *BC Code* as being a wider concept than an unfair labour practice. The BC board articulated a test to determine the true wishes of employees in the context of a representation vote and a finding of improper interference as follows at para. 26:

> *… How are "true wishes" to be determined? Is the standard objective or subjective? We find that the proper standard is objective, not subjective. The use of an objective test was confirmed in* South Surrey Hotel Ltd., *BCLRB No. B25/94 which dealt with evidence in an unfair labour practice complaint. The logic for an objective test here is equally if not more convincing. In addition,* Simplex International Time Equipment Co., *BCLRB No. B355/94, which states that it is:*
>
> > *… not necessarily direct evidence of the impact of improper interference on employee minds; but rather evidence of circumstances from which [the panel] can reasonably draw an inference that the true wishes of the employees are unlikely to be disclosed in a decertification vote. (p. 19)*
>
> *Finally, the entire course of events prior to the application may be examined to determine if a vote is unlikely to disclose the true wishes of employees:* Michael C Wright Sales Ltd., *BCLRB No. B221/93.*
>
> …

[169] This provision in the *BC Code* has not been amended.

[170] The *Act* makes no reference to employer interference in the context of an application for revocation of certification. Unlike the *BC Code*, the *Act* does not empower the Board to determine whether there has been "improper interference" that captures not only activities that would have been captured under unfair labour practice language but also broader activities that would not necessarily have been captured by that language.

[171] The two-stage analysis approach has considerable merit and in fact is used by a number of labour boards by firstly determining whether there was employer interference constituting an unfair labour practice and secondly whether that

interference makes it unlikely that the decertification vote would reflect the true wishes of the employees.

[172] In determining whether the employees' wishes have been affected, the BC Board applies an objective standard in which there must be some evidence of circumstances from which an inference can reasonably be drawn that the true wishes of the employees were unlikely to be disclosed in the vote.

6. Alberta

[173] Subsection 51(1) of the *AB Code* provides for applications for revocation of certification. It directs that before granting one, the Alberta Labour Relations Board ("the Alberta board") must satisfy itself that after any investigation that it considers necessary, certain conditions relating to the application have been met, as follows:

…

> ***53(5)*** *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 boards 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.*
>
> [Emphasis added]

…

> *54(1) When the Board is satisfied with respect to the matters referred to in section 53(2) 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.*

…

[174] In *Tundra Boiler*, the Alberta board considered an application to revoke bargaining rights.

[175] An officer of the Alberta board investigated the application and found it timely but had concerns about the authenticity of the petition and left it to the board to determine the voluntariness of the petition.

[176] The Alberta board outlined as follows its practice with respect to petition evidence as set out in *Information Bulletin #13, Revocation of Bargaining Rights, V. Form of the Application*, at paragraphs 25 and 26 of the decision:

> ***25*** *It is well settled law the Board only accepts petition evidence if satisfied the petition represents a free and voluntary expression of employees' wishes. In other words, can we trust that the employees' signatures reflected their true wishes at the time at signing? In ascertaining this, the Board examines whether:*
>
> > **the statement of intent at the top of each page is completed before any person signs;*
> >
> > **each person is given the opportunity to read the statement of intent at the top of the petition in order to understand what the individual is supporting by signing;*
> >
> > **the signatures are witnessed as they are collected;*
> >
> > **the signatures are not gathered during working hours; and*
> >
> > **the organizer(s) of the petition is always in physical possession of the petition(s). (See:* Information Bulletin #13, Revocation of Bargaining Rights, V. Form of the Application*).*
>
> ***26*** *The Board also looks at whether there was any managerial involvement in starting the petition or its dissemination. In this regard, the Board examines whether there are any unwarranted pressures from an employer. Some of the considerations the Board looks at include:*
>
> > **the application was not management's idea;*
> >
> > **the application or the purpose of the application was not discussed with anyone from management;*
> >
> > **no one from management offered any of the employees any reward or benefit for starting or proceeding with the revocation application;*
> >
> > **no one from management threatened termination of employment, wage reduction, or anything relating to employment with the employer if an individual did not support the application; and*
> >
> > **the spokesperson has not been led to believe that the revocation application will be funded in whole or in part by the employer ….*

[*Sic* throughout]

[177] The Alberta board, presumably based on its broad discretion in s. 54 of the relevant legislation and the legislature's direction to investigate the evidence in support of the petition, has incorporated into its law, as manifested in its information bulletin, a test that it only accepts petition evidence that represents a free and voluntary expression of employees' wishes.

[178] As in the case of the pre-1995 Ontario jurisprudence, for the same reasons, I do not find the practice of the Alberta board with respect to the inquiry on voluntariness helpful on the issue as there is no analogous provision in the *Act*. Nevertheless, I do find of assistance the articulation of the considerations that the Alberta board has regard to in determining whether there has been unwarranted pressure from the employer, such as the following:

- the initiation of the petition, as in Ontario;
- no offer of reward or benefit to any of the employees for starting or proceeding with the application;
- no threat of termination of employment, wage reduction, or anything relating to employment with the employer if an individual did not support the application; and
- the applicant has not been led to believe that the revocation application would be funded in whole or in part by the employer.

IX. Conclusion on federal and provincial labour relations regimes and jurisprudence

[179] There are no analogous provisions in the *Act* empowering the Board to go beyond its powers as outlined in s. 186, the unfair labour practice provisions, in determining whether an employer has interfered in a revocation application.

[180] As stated earlier, I conclude that the jurisprudence decided under the *Code* is of assistance in resolving the allegations before me as the statutory provisions are very similar to the provisions in the *Act*.

[181] In addition, as stated, I have no difficulty concluding that the grounds upon which the OLRB may dismiss an application for revocation of certification under the

current Ontario provision, s. 63(16), if proved, would constitute an unfair labour practice under the provisions of s. 186 of the *Act*. Those grounds are that the employer or a person acting on its behalf initiated the application or engaged in threats, coercion, or intimidation in connection with it.

[182] I also find the jurisprudence decided under that section helpful in that it articulates a reasonable test for determining whether there has been employer interference in terms of the initiation of the bargaining agent's allegations, namely, that the employer's conduct was both significant to and influential in the initiation of the revocation application.

[183] That jurisprudence also addresses how concerns about the impropriety of employer involvement in revocation applications, i.e., voluntariness, should be addressed when there is no express language in the *Act* empowering the Board to engage in that inquiry. Such conduct, i.e., the circulation of petitions during working hours, may amount to improper employer involvement if when taken together with other factors, it leads to a conclusion that the employer's conduct was both significant and influential in the initiation of the revocation application.

[184] In addition, this jurisprudence stands for the principle that under the current *OLRA*, the OLRB is more concerned about actual and not perceived involvement in revocation applications.

[185] I also find of assistance the articulation of the considerations that the Alberta board took into account in determining whether unwarranted employer pressure had been present.

[186] It appears that there is a significant overlap of the factors considered by the CIRB, the OLRB, and the Alberta board.

[187] In terms of the onus, the jurisprudence recognizes that it is upon the bargaining agent to establish improper employer interference. Circumstantial evidence may be sufficient to lead to that conclusion, especially in circumstances in which the employer calls no evidence in reply.

[188] The two-stage analysis adopted by the BC board has considerable merit. As a matter of process, I propose to use it in the circumstances of this case. Firstly, I will determine whether the employer committed an unfair labour practice; if so, I will

determine whether the circumstances surrounding that practice make it unlikely that the decertification vote in this case would reflect the true wishes of the employees.

[189] Moreover, I am guided by both the Saskatchewan courts and labour relations board decisions, which state that a compelling labour relations justification is necessary to deny the *Charter* rights of employees to decide for themselves whether they wish to continue to be represented by a trade union and that the employer's impugned conduct must be of such a nature and significance that its probable impact would compromise the ability of employees of reasonable fortitude to freely exercise their rights.

X. The issues to be determined

[190] Two distinct issues must be determined in this case. The first is the following question. Did the employer or persons acting on its behalf interfere with the revocation application that was filed on October 26, 2015, by committing an unfair labour practice?

[191] The other is whether the employer or persons acting on its behalf interfered in the revocation application subsequent to October 26, 2015, by committing an unfair labour practice, and if so, whether the circumstances surrounding that misconduct make it unlikely that the decertification vote reflects the true wishes of the employees in the bargaining unit.

[192] The evidence relevant to the first issue relates to the period after the revocation campaign started up to October 26, 2015, the date on which the application for revocation was filed with the Board.

[193] The evidence relevant to the second issue would relate to the period subsequent to October 26, 2015, up to and including the conclusion of the revocation vote held from October 17 to 25, 2016.

XI. Did Mr. Lala or Ms. Arey occupy managerial or confidential positions or did they act on behalf of the employer during the revocation campaign?

[194] Subsection 186(1) of the *Act* provides that neither the employer nor a person who occupies a managerial or confidential position, whether or not a person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by

an employee organization.

[195] Did either Mr. Lala or Ms. Arey occupy a managerial or confidential position with the employer? Alternatively, did either of them act on the employer's behalf during the revocation campaign?

[196] Mr. Gawley, the general manager of the golf club operations at CFB Edmonton, who was responsible for all golf operations, curling operations, food and beverages, and the bar and kitchen, testified that Mr. Lala was the food and beverage supervisor who reported to him.

[197] The food and beverage supervisor position was created as the employer's operations needed a single conduit so that direction could be given to the bar in the kitchen. Mr. Lala occupied the position for approximately two years. He was in a working supervisory position preparing food and worked varied hours. The position was unionized, as were the positions of all employees engaged in the operations, except for the manager and assistant manager positions. Mr. Lala did not occupy a managerial position.

[198] Shortly after Mr. Lala was hired as a chef and supervisor, he asked for a business card with the title of "Manager" on it so he could obtain better deals from suppliers. Mr. Gawley agreed. Mr. Lala was still a supervisor and not a manager, and there was no change to his authority in the workplace. Mr. Gawley stated that giving Mr. Lala the title was not unique to this organization and was not unusual in the golf industry, in which the title "Food and Beverage Manager" is typical.

[199] Mr. Pigden, the senior manager of the PSP at Edmonton, corroborated Mr. Gawley's evidence with respect to the creation of the food and beverage supervisor position and confirmed that it was in the bargaining unit.

[200] Ms. Stanners, who was employed as the CFB Edmonton manager responsible for the retail and liquor stores, testified that Ms. Arey was the supervisor in the Expressmart. All persons working there reported to Ms. Arey; she was their first point of contact. She was responsible for the staff in terms of scheduling, time off, vacations, etc. As a supervisor, she could issue verbal warnings; however, Ms. Stanners was required if a written warning had to be issued. Ms. Arey's position was in the bargaining unit.

[201] The bargaining agent's witnesses did not dispute the fact that supervisors are included in the bargaining unit and that that both Mr. Lala's and Ms. Arey's positions were too. Mr. Lala was not a member of the bargaining agent; however, as a Rand formula employee, he paid it dues.

[202] The *Act* in s. 2 defines "managerial or confidential position" as a position declared managerial or confidential by an order of the Board. There was no evidence that either Mr. Lala's or Ms. Arey's position had been declared managerial or confidential by the Board.

[203] There was no evidence adduced to support the conclusion that Mr. Lala or Ms. Arey acted on behalf of the employer.

[204] Therefore, I conclude that neither Mr. Lala nor Ms. Arey occupied managerial or confidential positions or acted on behalf of the employer.

[205] However, the bargaining agent contends that the employer inappropriately supported Mr. Lala's revocation campaign by allowing him to use the title "Manager". Consequently, employees perceived him as a manager, and thus, the employer interfered in the revocation application.

XII. Did the employer inappropriately support Mr. Lala's revocation campaign?

[206] I will deal with the allegations that the employer inappropriately supported Mr. Lala's revocation campaign in the following order:

- by failing to prevent him from campaigning at work during work hours before October 26, 2015;
- by providing him with crucial information about bargaining unit members that enabled his decertification efforts; and
- by allowing him to use the title "Manager".

A. Did the employer fail to prevent Mr. Lala from campaigning at work during work hours before October 26, 2015?

1. Summary of the bargaining agent's evidence

a. Ms. Stewart

[207] Ms. Stewart oversees the day-to-day operations of the UFCWC Local 401 in northern Alberta. As of the date of the hearing, she had held her position for approximately three years.

[208] She first became aware in or about June 2015 that some employees wished to decertify the bargaining agent.

[209] She recalled a telephone discussion with Mr. Lala in early September 2015. He called to complain about his bargaining agent representative. During the call, they discussed the revocation application that was circulating at the base. At the end of the call, a suggestion was made that they get together with some employees on the base to discuss their concerns.

[210] Mr. Lala advised her that some employees had asked him to start a revocation application.

[211] He advised her that employees were signing a petition and at that point had been signing it for some two weeks.

[212] Mr. Lala informed her that he had the support of employees working at the gas bar, the liquor store, the mess hall, and in his area of the golf course.

[213] He discussed a June 2015 meeting with Mr. Zigart, the bargaining agent representative for the base, and bargaining unit members concerning the bargaining agent's proposals for collective bargaining. He advised her that he did not want collective bargaining to proceed as he did not believe that the proposals were fair.

[214] He further advised her that HR had asked him if he was circulating the petition on work time. He told her that he advised it that he was not. It advised him that he could proceed.

[215] He told her that eight women working at the gas bar wanted to leave the bargaining agent and that other employees were upset that the union dues were increasing.

b. <u>Mr. Nanson</u>

[216] During the summer of 2015, Mr. Nanson's supervisor was Ms. Arey. She reported to Ms. Stanners. Ms. Arey's responsibilities included handling paperwork

and ensuring that the tills balanced.

[217] Mr. Nanson stated that he filled out a Board Form 5 ("Application for Revocation of Certification") supporting the revocation in or about September 2015. Ms. Arey showed him the form and explained it to him. He signed the form in the back office of the CANEX.

[218] Ms. Arey advised him that the collective agreement provided no additional benefits over the HR personnel policy and that paying dues to the bargaining agent was a waste of money.

[219] Mr. Nanson stated that at that time, he believed he was receiving factual information. Subsequently, he read the HR policy, compared it to the collective agreement's provisions, and concluded that that policy contained substantially less benefits than provided in the collective agreement, which is why he then signed a statement of opposition to the revocation application.

[220] He was not on shift at the time he signed the Form 5. He was not certain whether Ms. Arey was on shift or not as she had a flexible work schedule. There are no formal regulations in place that would preclude an employee from staying in the back room while not on shift. Mr. Nanson also spends time in the back area speaking to supervisors and managers.

[221] He recalled having one conversation with Ms. Arey about removing the bargaining agent before signing the form. The conversation took place in the loading bay at the Expressmart before his and Ms. Arey's shift.

[222] He filled out a statement of opposition on November 23, 2015. He wrote on it that after having collected all the relevant information, his opinion was that he wished to keep the bargaining agent.

[223] He observed Mr. Lala speak to a co-worker about how he felt about the bargaining agent. The conversation took place outside in front of the store in an area designated for smoke breaks.

[224] After he signed the statement of opposition, Ms. Arey did not discuss the matter with him. Mr. Lala approached him while he was on shift, working at the cash register. He told Mr. Nanson that he had heard that Mr. Nanson had signed a statement

of opposition and asked him why he had reversed his decision. Mr. Nanson told him that he had read the HR policy.

[225] Mr. Lala's conduct became offensive, but he left after a few minutes. Mr. Nanson could not recall if customers were in the store at that time. It happened between noon and 1:30 p.m. Mr. Lala was in his uniform, which consisted of black pants and a black shirt with the curling club insignia on it.

[226] When Mr. Lala had discussions with others, Mr. Nanson did not overhear what was said. His co-workers advised him that they were speaking about the bargaining agent.

[227] As far as Mr. Nanson was aware, only Expressmart employees were to be permitted in the back office unless others had authorization.

[228] Mr. Lala would go to the back office to speak with Ms. Arey two or three times per week, around the lunch hour.

[229] He confirmed that when he observed Mr. Lala speaking with employees in the smoking area, which was some 30 to 40 feet from the CANEX, he was not able to overhear the discussions.

[230] He was not aware of Mr. Lala's schedule or of when he took his breaks.

c. Ms. Gracie

[231] In the summer of 2015, Ms. Gracie's supervisor was Ms. Arey.

[232] She was contacted by Ms. Arey while she was on sick leave. Ms. Arey told her that the HR policy was superior to the collective agreement and that the employees would be better off without the bargaining agent.

[233] When Ms. Gracie returned to work, Ms. Arey handed her a form with respect to the application for revocation while she was on the till and on company time. Ms. Arey requested that it be returned to her by the end of the day. Ms. Gracie felt pressured to sign the form because Ms. Arey continually asked for it. To the best of her recollection, this took place in September 2015. She could not recall whether it was early or late in the month.

[234] Ms. Gracie had other discussions with Ms. Arey in the back office about the removal of the bargaining agent. Some discussions took place on company time; others did not.

[235] She also stated that the manager, Ms. Stanners, was present during some of these discussions.

[236] She acknowledged that she did not discuss this matter with Ms. Stanners.

[237] Ms. Gracie and several other employees who had signed the application for revocation wanted to change their positions. They asked to meet with the bargaining agent off-site. A co-worker arranged a meeting with Mr. Zigart.

[238] Within a couple weeks after Ms. Gracie signed a statement of opposition, Mr. Lala confronted her. He told her that she should not have signed it and advised her that he was working to get pay raises, benefits, and full-time jobs. Ms. Gracie stated that this upset her.

[239] She asked him how he had received the information that she had signed the statement of opposition. She had believed it was private. The conversation occurred at the back of the till as she was working at the time. Mr. Lala did not tell her how he had learned that she had signed it.

[240] She witnessed Mr. Lala and Ms. Arey discussing removing the bargaining agent. Their discussions took place 2 to 3 times per week and lasted approximately 15 to 20 minutes. They occurred during Ms. Arey's working hours.

[241] Ms. Gracie believed that Ms. Stanners was aware that these discussions were taking place as Mr. Lala would go to the back office to meet with Ms. Arey. Ms. Stanners's office was also located in the back of the CANEX.

[242] During cross-examination, Ms. Gracie acknowledged that she was not present while these discussions were taking place in the back office and that she did not know if they were about the revocation application.

[243] Ms. Gracie observed that Mr. Lala would come to the Expressmart to purchase items and that he would converse with the cashiers.

d. Ms. Fanjoy

[244] Ms. Fanjoy is currently employed at the post office portion of the Expressmart and has been since December 2016. Before this, she was employed as a part-time clerk and cashier at the Expressmart for five-and-a-half years.

[245] When the application for revocation was filed, her supervisor was Ms. Arey.

[246] Ms. Fanjoy completed a statement of opposition to the application for revocation. She had originally supported it. She stated as follows: "I was misled and feel forced into signing the petition to remove the union".

[247] She stated that she had been approached by Ms. Arey during her lunch break. She had been seated in the back area of the Expressmart. Ms. Arey asked her if she could sign the paperwork and stated that she needed it before the end of the day. Ms. Arey stood behind her and then sat down and asked her if she could quickly sign the paperwork.

[248] Ms. Fanjoy signed the application. She said she felt pressured as she had only a short time for lunch.

[249] The reason she stated she was misled in the statement of opposition was that the supervisor had told her that the employees would receive different benefits and that Mr. Lala had said that he would try to renegotiate on the employees' behalf, especially for benefits for part-time employees, which would include scheduling more full-time positions.

[250] In her view, the likelihood of Mr. Lala being able to achieve these things was high. Given his manners, his ability to deal with those higher up, and his ability to come and go, he appeared to have the employer's backing.

[251] In the late spring or early summer of 2015, she discussed with Ms. Arey removing the bargaining agent. Ms. Arey brought up the fact that a great sum of dues was being paid to the bargaining agent. If it were removed, Mr. Lala would fight to improve benefits for the employees. They had three to five discussions of this nature. Some occurred during working hours.

[252] Ms. Fanjoy signed the original application during a lunch break.

[253] She was of the view at the time that as her supervisor, Ms. Arey was looking out for her best interests. She also considered that she had better go along with Ms. Arey as her supervisor as she scheduled shifts and vacations, etc., and she did not want to get on Ms. Arey's bad side.

[254] She observed Mr. Lala talking with employees in the smoking areas outside the facilities during working hours. Initially, this occurred approximately once a week, and it increased to two to three times per week. Mr. Lala was dressed in chef's whites or khakis.

[255] It was her opinion that Ms. Stanners would have been aware of Mr. Lala's presence as there are surveillance cameras that run 24 hours per day, 7 days per week.

[256] She acknowledged during cross-examination that she did not know Mr. Lala's work schedule or his days off.

[257] It was her opinion that only employees of the CANEX, representatives of suppliers, HR personnel, or headquarters personnel are supposed to have access to the offices in the back of the CANEX, unless a person is invited.

[258] In her view, as an employee of the golf and country club, Mr. Lala would have had no purpose in going to the back office.

[259] Ms. Fanjoy's impression was that the employer was backing Mr. Lala. It appeared to her that it gave him time off from work to discuss matters with the employees.

[260] She also acknowledged that she discussed the revocation issue with Mr. Nanson and Ms. Gracie during breaks.

e. <u>Ms. Van Hees</u>

[261] Ms. Van Hees is a part-time employee of the NPF as a bartender at the golf and curling club. She started bartending in April 2015. Her duties include opening and closing the bar, key control, serving guests, preparing beverages, serving meals, and depositing bank drops.

[262] As a part-time employee, she works between 13 and 32 hours per week.

[263] She was appointed as a shop steward in June 2016.

[264] Ms. Van Hees was asked about Mr. Lala's work hours. Employees' schedules were posted on a board. Mr. Lala was a full-time employee who supposedly worked a 40-hour week on the day shift. He was not scheduled to work night shifts or weekends. He would work on the line at busy times, for example, during lunch. If he was not doing administrative work, he worked in the back, preparing food.

[265] Ms. Van Hees had discussions with Mr. Lala about the bargaining agent. The discussions usually did not go well as he was spearheading the revocation application. Interaction occurred if she interjected when he was having discussions with other staff members about the bargaining agent. She believed that Mr. Lala was misinforming employees.

[266] She recalled observing him providing documents to an employee who was engaged in beverage counting. He requested that she read the document over and sign it. Ms. Van Hees had been looking for Mr. Lala. She opened the back door to the facility where the beverage count takes place and observed them speaking.

[267] Mr. Lala asked her what she wanted. She stated that she needed the employee to assist in closing the kitchen.

[268] Ms. Van Hees told Mr. Lala that he could not carry out bargaining agent business on company time. He became angry with her. She said the following: "Great. I am a bargaining agent member. I want the papers as well." Mr. Lala answered, "No", as she was not in favour of the revocation application. She again advised him that he was not allowed to sign papers during work time.

[269] She stated that she felt intimidated and threatened. Mr. Lala was aggressive and upset and was her supervisor. She prepared a written statement and sent it to Mr. Zigart.

[270] She observed that Mr. Lala would come to and go from the facility as he pleased. He needed to be there on the line only at peak times and at lunch.

[271] Complaints were made to the lounge supervisor about Mr. Lala's comings and goings. The lounge supervisor raised it with Mr. Gawley, Mr. Lala's manager. After that, Mr. Lala would advise employees that he was going on break. Sometimes he would be gone as long as 40 minutes. Full-time employees were entitled to two 10-minute breaks.

[272] Ms. Van Hees acknowledged that running the food and beverage service is a balancing act and that demand fluctuates. She was a part-time employee with fluctuating hours. She was not always at work when Mr. Lala, a full-time employee, was working.

f. Ms. Lachance

[273] Ms. Lachance is currently employed at CFB Edmonton as a bartender working in the Junior Ranks' Mess. She has been employed by the base since August 2014. Initially, she worked in the Officers' Mess as a bartender on a casual basis. Casuals are not covered by the collective agreement. She became a part-time employee in June 2015. She started to work in the Junior Ranks' Mess in July 2016.

[274] When she worked in the Officers' Mess, her supervisor was Dawn Decosse, who in turn reported to a manager.

[275] Ms. Lachance's husband and father are in the military.

[276] In September 2015, Ms. Lachance had a conversation with Mr. Lala during her shift in the lower bar. He gave her a paper and told her that if she agreed that the bargaining agent's certification should be revoked, she should sign it. He explained that there was no good reason to keep the bargaining agent and that the Army would protect them and their positions. He said that he did not want to tell her what to do and that it was her choice. She was working at the time.

[277] She stated that she felt pressure as Mr. Lala was insistent. The conversation lasted about 15 minutes.

[278] He gave her two papers, one for her and one for her colleague. She put them in the back of the bar.

[279] Ms. Lachance stated that only officers and working staff are allowed in the Officers' Mess. She told her supervisor that Mr. Lala had given her the papers. Her supervisor told her that Mr. Lala could not come into the Officers' Mess and that she did not have to sign the papers. Ms. Lachance said it was a friendly conversation with her supervisor and that she did not feel any pressure that she had to agree with her supervisor's opinion.

[280] That conversation occurred a couple of days after her discussion with Mr. Lala. Ms. Decosse told her that what Mr. Lala had advised her was wrong and that the military could contract out work. Her supervisor told her that the bargaining agent was providing protection. This discussion took place before her shift.

[281] On "Thank Goodness It's Friday (TGIF)" occasions, officers go to the mess for a beer and a free supper. On either the next Friday after her discussion with Mr. Lala or the one after that, he came into the mess. He was bringing the food. He asked Ms. Lachance if she had thought about what he had said about the revocation. She answered, "Yes"; however, she stated that she "did not have time that day". Only that one sentence was spoken. There were many customers in the mess.

[282] She told her supervisor of the incident, who told her that Mr. Lala could not come into the bar. During her first conversation with Mr. Lala, she did not know whether he was working at the time.

[283] She stated that she did not sign the revocation form.

g. <u>Mr. Zigart</u>

[284] Mr. Zigart is a senior labour relations officer with the bargaining agent. He has been a full-time bargaining agent representative for 15 years. He was a relief representative for five years and a shop steward for eight years. He comes out of the Safeway Warehousing System.

[285] He is responsible for administering 10 collective agreements, 1 of which is with CFB Edmonton. He has been responsible for this collective agreement since January 2015. The bargaining unit is composed of some 74 people. At the end of September or early October, most of the golf course staff is laid off. The rest of the units are stable operations year round. Supervisors are in the bargaining unit.

[286] There are other bargaining agents on the base, such as the Canadian Union of Public Employees, the Union of National Defence Employees, and the Public Service Alliance of Canada. The main purpose of the employees working in the bargaining unit at issue is to serve the military. The messes are like private clubs for the ranks. Many employees are spouses or children of military personnel. There are several ex-members of military personnel in the bargaining unit.

[287] He had met Mr. Lala. He described their first conversation as less than stellar. He came in to introduce himself to Mr. Lala, who was working at the time, shortly after he was appointed to represent the bargaining agent at the base. Mr. Lala made a rude comment about the bargaining agent.

[288] A few weeks later, Mr. Lala stopped him in the lounge. Mr. Lala told him that he represented all the employees in the unit and that he wanted to get rid of the bargaining agent. This conversation took place in April or May 2015.

[289] During September 2015, some bargaining agent officers visited the base to counter Mr. Lala's revocation campaign. Mr. Zigart stated that because of the issues he was raising for the union, management came after him about the base visits, claiming that he did not inform it or receive permission to visit the base.

[290] He agreed that he should let management know in advance of base visits. It had not been raised as a concern before.

[291] An email exchange between himself and HR was prompted when Sandra Dauphinee, the manager of HR, claimed that when UFCWC personnel came to the base, they were supposed to let managers know in advance by speaking to the most senior person available.

[292] It was his view that Ms. Dauphinee or Mr. Lala's manager did not investigate or speak to Mr. Lala about campaigning on company time. He acknowledged that perhaps they had spoken to him, but he did not believe that they had.

[293] He acknowledged that he did not observe Mr. Lala campaigning on company time. It was suggested to him that he did not know for certain Mr. Lala's hours of work. He stated that he was certain because Mr. Lala worked Monday to Friday but did acknowledge that he did not know Mr. Lala's schedule.

2. Summary of the employer's evidence

a. Ms. Stanners

[294] At the time of the hearing, Ms. Stanners was employed as the CANEX base manager responsible for both the retail and liquor stores.

[295] It is a busy site. It does $5 million of business per year. At the times material to the application, nine part-time employees worked in the Expressmart and three in the post office. There were two full-time employees, both supervisors, one working in the Expressmart and the other in the post office. These positions reported to Ms. Stanners.

[296] Ms. Arey was a supervisor in the Expressmart. She retired on October 16, 2016. All persons working in the Expressmart reported to her. She was the first line of contact for them. She was responsible for the staff, scheduling, time off, vacations, etc. As the manager, Ms. Stanners had the bottom-line authority.

[297] She and Ms. Arey discussed everything that went on in the store, including staffing, conflicts, and employee concerns. She encouraged the staff to bring their concerns to Ms. Arey, who had a good rapport with them. If issues could not be resolved, Ms. Arey would escalate them to her, and depending on their nature, she would go to HR.

[298] As a supervisor, Ms. Arey could issue verbal warnings to employees. Ms. Stanners was authorized to give written warnings. She would involve HR if more serious discipline had to be imposed. Discharge required the authority of the CANEX vice president in Ottawa, Ontario.

[299] She identified Mr. Pigden as the PSP manager responsible for the messes, the gym, and the golf course. He is the liaison to the base and is not involved in managing the CANEX.

[300] At the rear of the CANEX, there is a hallway and a back office. In this area, there is a bargaining agent bulletin board and information boards setting out such matters as the staff schedule. The office was shared by Ms. Stanners and Ms. Arey. Extra stock is stored in the office, and the store safe is located there.

[301] This area is also accessible by vendors, NPF staff, accounting firms, and HR. There is very little privacy. Because the CANEX sells merchandise to the messes, the gym, and the golf club, PSP employees constantly access this area.

[302] There are no rules about who may access the area. However, if neither Ms. Arey nor Ms. Stanners was there, the area was locked on account of a safe being located there.

[303] In the spring of 2015, she received an email from Ms. Dauphinee, advising that union dues had increased. She informed Ms. Arey, who had been unaware of it.

[304] Around that time, a bargaining agent meeting was held with employees on the base.

[305] After the meeting, Ms. Arey told Ms. Stanners that she was upset as things had become heated at the meeting. She had asked a few questions. Mr. Lala had gotten angry.

[306] Sometime after the meeting, Ms. Arey and Mr. Lala conversed about getting rid of the bargaining agent.

[307] Ms. Stanners heard Ms. Arey asking some of the staff about a list of concerns. Ms. Stanners did not see the list. Ms. Arey provided answers to the staff.

[308] Ms. Arey informed Ms. Stanners that they had to get a certain percentage of employee support to get rid of the bargaining agent.

[309] Ms. Arey came in early to talk to the staff.

[310] Ms. Stanners received word from HR that employees could not campaign during business hours. She advised Ms. Arey, who was given guidelines to discuss the issues with employees after hours and not on worktime. Ms. Stanners acknowledged that some discussions might have occurred during work time before the direction was issued.

[311] She observed a union steward talking with the staff in the post office and in particular talking to one of the staff while there was a lineup of customers waiting to be served.

[312] She stated that an incident occurred in the liquor store in which a Bargaining Agent Representative wanted to speak with the staff. The Representative would back off when a customer was being served and then move in to talk to the employee. She did not personally observe the incident.

[313] The bargaining agent would give notice that it was coming on-site. Stewards would go to each facility. Much of the time, this took place when she and Ms. Arey were away. She reviewed the security video camera footage.

[314] One Sunday, she observed Mr. Zigart in the Expressmart talking with two employees at the front counter during working hours. The conversation lasted approximately 20 minutes. She stated it was apparent that work was not being done.

[315] In his capacity as a supervisor, Mr. Lala came to the Expressmart as a customer. He was told not to talk about the revocation application with Ms. Arey on the premises. They would go outside during smoke breaks. After working hours, Ms. Arey would go up to the golf course to meet with Mr. Lala.

[316] On a few occasions, Mr. Lala and Ms. Arey would have a discussion in the back office, and Ms. Stanners would then leave.

b. Mr. Gawley

[317] Mr. Gawley is the general manager of the golf club operations. He is responsible for all golf operations, curling operations, food and beverages, and the bar and kitchen.

[318] He is responsible for providing services to military personnel and off-base civilians. He runs golf tournaments and provides meals for them, runs curling bonspiels in the winter, and hosts banquets and catered events for 50 to 300 people either off-site or at the messes. He is involved in hosting between 150 and 200 events per year.

[319] Overtime is paid under the collective agreement to frontline staff supervisors, who can bank it or have it paid.

[320] Mr. Lala worked a lot of overtime, and he worked a lot of free time. He banked the overtime in the computer system. He took his banked time in long blocks. Under the previous collective agreement, banked time had to be used within 30 days or be paid out. Sometimes, Mr. Lala showed up for work during his banked time. He wanted to see the operation succeed.

[321] In the spring of 2015, the employees received a new bargaining agent representative, who paid a visit to the golf club lounge. Mr. Gawley recalled that Mr. Lala and the bargaining agent representative became involved in a heated discussion outside the pro shop. Mr. Lala stated words to the effect of, “What are you doing for me?” The language was loud and colourful. Mr. Gawley had to close his door.

[322] Mr. Lala told Mr. Gawley that the representative could not answer his questions and that he might try to get rid of the bargaining agent. Mr. Gawley said the following: "I cannot help you; I am management."

[323] Subsequently, he saw more and more employees visit with Mr. Lala.

[324] Mr. Lala came to see him and advised him that he had signed up more people for a decertification application. Mr. Gawley would not give him any satisfaction. When Mr. Lala tried to talk to Mr. Gawley about the decertification, Mr. Gawley said he could not help him with it and told him that if he was going to work on the decertification, he had to do it on his own time.

[325] He said that there was a closed-door discussion with Mr. Lala. Also present was Mr. Martin, from regional HR. Mr. Lala assured them that he was working on the decertification on his own time. Mr. Martin reiterated the same thing. He stated that this discussion took place in the summer of 2015.

[326] During cross-examination, Mr. Gawley was asked whether he was certain that the meeting with Mr. Lala was held in the summer of 2015. He stated at first that he was not certain and then thought it was in the summer of 2016, after the application for decertification had been filed.

[327] He was asked about his evidence that Mr. Lala would show up to work on days for which he was not scheduled. He acknowledged that he was not paid for that time. He agreed that not paying Mr. Lala for work would contravene the collective agreement.

c. <u>Mr. Pigden</u>

[328] Mr. Pigden is the senior manager of the PSP at CFB Edmonton. There are some 5000 soldiers at CFB Edmonton.

[329] He knows the personnel at the golf course. He is there frequently and interacts with Mr. Gawley and his assistant.

[330] He also interacted with the kitchen and lounge supervisor, Mr. Lala, whom he described as an outgoing character. He stated that the lounge had been struggling and that Mr. Lala had been a big part of a significant increase in sales.

[331] Mr. Lala had to be sent home a number of times because he was working a lot of overtime and had to be careful of advances being voided. Initially, he received overtime pay. However, he preferred to take the overtime as time off. Mr. Gawley came to an agreement with him. If there was a big event, Mr. Lala would come in to work and check on it, even if he was not scheduled to work.

[332] Mr. Pigden recalled that in mid-July 2015, he had heard that Mr. Lala had gone to a bargaining agent meeting. Union dues had increased. He understood that there was not a large number of employees in attendance. There had been a confrontation at the meeting, and Mr. Lala felt that Ms. Arey had been improperly treated. He wanted to do something about it. He stated that at times, Mr. Lala was all talk and no action.

[333] He understood that Mr. Lala started talking with people. Employees would talk to Mr. Pigden. He advised them that he had no say in the matter.

[334] He talked with HR about the process, and he received direction from Labour Relations stating that he could listen but not comment. All managers were told what they could and could not say. Shortly after Mr. Lala began his campaign, the managers held a meeting. Second and third meetings were held when Labour Relations personnel came from Ottawa and explained to all the managers that they could not comment on the campaign.

[335] During the fall of 2015, a number of issues arose in the workplace involving employees that were both for and against the bargaining agent. Managers asked whether they could do anything about the situation and were advised that they could not.

[336] An incident occurred involving the seven fitness and sports instructors, who were unionized. A representative of the bargaining agent went to the office and started "slagging down" Mr. Lala's background to the staff. A manager came to Mr. Pigden and advised him that a bargaining agent representative was slagging another employee's reputation in the workplace. Mr. Pigden said that there was nothing he could do about it and that management could not do anything on either side.

[337] He was asked in cross-examination about his discussions with Mr. Lala about bargaining agent activities. Mr. Pigden stated that Mr. Lala came to talk to him. He did not initiate the conversation. Mr. Lala was upset about a bargaining agent meeting that

occurred in or about June 2015. Mr. Pigden told him to discuss his concerns with his bargaining agent. He said the conversation took place in the lounge or in the clubhouse and that Mr. Lala came out from behind the kitchen.

[338] He did not raise the matter with HR at that time because Mr. Lala at times was all talk and no action. When things got more serious that fall, the situation was addressed.

[339] He was asked whether the November 24, 2015, email asking managers to refrain from discussing the revocation process with employees was the first email on this issue. Mr. Pigden stated that he was pretty sure meetings had been held with the staff before then. Managers had already been briefed. HR would have been in the loop. That email was formal. At least three meetings with the staff had been held before then.

d. Mr. Martin

[340] Mr. Martin is a regional manager of HR for the NPF's Western Region, a position he has held since May 2009. His office is located in the Edmonton office. He supervises 13 HR managers located at different bases. The Western Region includes all bases west of Kingston, Ontario. He in turn reports to a director of HR in Ottawa. He provides both strategic and day-to-day direction.

[341] Located in Edmonton is an HR manager who provides assistance and serves some 300 NPF staff. Some employees are unionized, and some are not. The HR office provides advice on staffing, labour relations, and pay and benefits.

[342] Ms. Dauphinee had been the HR manager, with 12 years of experience. She left her employment in July 2016.

[343] The NPF's Edmonton office provides personnel support programs to Mr. Pigden.

[344] There are also personnel support programs for military family and financial services.

[345] He became aware of the campaign for the revocation of certification on the base in the early fall of 2015. Mr. Lala had made it known that he was going to try to decertify the bargaining agent. It came to Mr. Martin's attention that Mr. Lala was trying to seek support during business hours.

[346] He met with Mr. Gawley and Mr. Lala on September 10, 2015. Mr. Lala acknowledged that he was seeking support during business hours. Mr. Martin asked him to stop. Mr. Lala told Mr. Martin that he would stop campaigning during business hours.

[347] At the request of Ms. Stevens, Mr. Martin provided input to her about the meeting of September 10, 2015, for the purpose of responding to the bargaining agent's reply in these proceedings.

[348] On December 9, 2015, Mr. Martin emailed Ms. Stevens, stating as follows:

…

> *On or about 10 September, as the Regional Manager Human Resources (West), I met with Ajay Lala and Matt Gawley in response to allegations that Ajay was using work time to talk to staff about union decertification proceedings. I advised Ajay that he was not to talk to employees about the decertification process during periods of work. Ajay said that initially he was using work time to discuss the decertification process with his colleagues, but that he had now stopped discussions during work time and would only talk to people when both he and they were on their breaks. I concluded the discussion by reinforcing with Ajay not to talk to employees during periods of work as it gave the impression that the Employer was somehow involved in the process, and the Employer wanted no involvement in this attempt.*

[349] He was asked whether subsequent to the meeting of September 10, 2015, the bargaining agent made further allegations that Mr. Lala continued to speak with the employees during work time. He did not recall. He did not speak with Ms. Dauphinee or others about further complaints that Mr. Lala was using work time to discuss the decertification.

3. Summary of the bargaining agent's arguments

[350] The employer facilitated Mr. Lala's decertification efforts at work during work hours, and in doing so communicated its support for the termination of the members' bargaining rights. The case law demonstrates a low bar for employer interference in revocation campaigns. The fact that an employee conducts decertification activities openly can be enough for reasonable employees to conclude that he or she has management's tacit approval (see *Thompson Credit Union*, at para. 47). Employer knowledge of a decertification drive can also contribute to unlawful interference

in bargaining agent activities.

[351] As the OLRB stated as follows in *Vandermeer*, at para. 109:

> *109. The manner in which the applicants collected signatures on the petition in support of the termination application suggests covert support by management for the application. The signatures were collected during working hours and while the store was in operation. Ms. Thain in particular appears to have sat in the Bakery of the store and called employees in from the floor to sign the petition. While she claims she was on breaks or lunches, as Mr. Schramn indicated in his evidence, staff are not supposed to take their breaks and lunches on the store floor. Further, even if she was on a break or lunch, all of the employees she called in were not similarly on breaks or lunches – otherwise they too could not have been present on the store floor. From the evidence given by the applicants it appeared clear that there was no stealth involved and that management would have been in a position to know what was going on. Indeed, Ms. Than [sic] honestly admitted that everyone knew what was happening. It is apparent to the majority of the Board that the Employer took no steps to ensure that the termination applicants conducted their campaign in non-work time, thus giving its seal of approval to the campaign.*
>
> [Emphasis added by the bargaining agent]

[352] Similarly, the bargaining agent presented uncontradicted evidence that Mr. Lala campaigned to decertify it on work premises and during work hours. In fact, even the employer's managers testified that Mr. Lala campaigned on work time. In its evidence, the employer admitted that it took a hands-off approach at least until September 10, 2016, when Mr. Martin and Mr. Gawley met with Mr. Lala and told him that he should stop such behaviour. In addition, Ms. Stanners, a manager, testified that she permitted Mr. Lala's revocation ally, Ms. Arey, to campaign against the bargaining agent and on work time, until told to stop by HR at some point after the campaign began.

[353] The effect on the voluntariness of the revocation drive was dramatic. The employees saw that their managers permitted Mr. Lala and his allies to campaign at work during work hours. The fact that HR intervened months after the decertification drive was brought to its attention did not cure the initial interference. According to the bargaining agent, *Fallico* is clear: "Where the petition activity in fact takes place during working hours … mere indulgence on the part of management may

be sufficient to destroy the petition as a reliable expression of the employees' own wishes".

[354] Any attempt by the employer to prevent Mr. Lala from campaigning inappropriately was delayed and insufficient. The testimony of the employer's witnesses, particularly Mr. Martin, demonstrates this point. Mr. Martin was the most senior (and only) HR representative who testified, and even if the Board accepts his account as credible, it reveals a lacklustre attempt to prevent Mr. Lala's unlawful campaigning for revocation.

[355] For example, Mr. Martin stated that he had only one meeting with Mr. Lala, apparently on September 10, 2015, to ask him to cease campaigning on work time. Mr. Martin, by his own admission, failed to follow up or prevent further inappropriate campaigning, even after he was informed that it was occurring on June 15, 2016. This inaction undermines Mr. Martin's assertion that he took the employer's obligation of neutrality seriously. It supports the reasonableness of the employees' perception that the employer was not intervening to prevent Mr. Lala's inappropriate activities.

[356] There are also important aspects of Mr. Martin's testimony that weaken his credibility. Despite saying that he believed that Mr. Lala's actions were serious, Mr. Martin failed to take any notes in his purported meeting with Mr. Lala on September 10, 2015. The only documentary record of it is an email Mr. Martin sent to Ms. Stevens three months later. In addition, he initially denied having been informed that additional problems arose with Mr. Lala's revocation campaigning after his initial meeting. This is despite the fact that he admitted that his office is just down the hall from his local HR manager's office (Ms. Dauphinee's and Cheryl Petruk's) and that he admitted having a close working relationship with his local managers, particularly his Edmonton HR manager, due to the proximity of their working locations. Mr. Martin admitted that he had been informed of additional problems only when he was presented with an email on which he had been copied. As a result, the Board should not give significant weight to his claims that he and the employer acted with sufficient seriousness to prevent Mr. Lala's campaigning.

4. <u>Summary of the employer's arguments</u>

[357] Principal considerations arising out of the case law pertinent to this issue are the following (see *Laidlaw*, at paras. 62 to 71, *Tundra Boiler*, at para. 26, and *Kolbina*

Care).

- Was the application management's idea?
- Was its purpose meaningfully discussed with management?
- Did management offer any reward for signing the application, make any threat to wages or job security for not signing?
- Did management fund the application or provide any financial support to the applicants, as legal fees?
- Were application forms left around the workplace?
- Were applications signed in the presence of a manager or in a manager's office?
- Was there free solicitation of signatures in the workplace without any management interjection?
- Did the employer communicate to employees that they would be better off without the bargaining agent?
- Did the employer facilitate the circulation of the application or allow employees to hold decertification meetings in the workplace?
- Did the employer show a consistent lack of respect for the bargaining agent, not remit its dues, renege on agreements, or refuse to comply with arbitral awards or court orders?

[358] In the context of an allegation that the employer permitted the circulation of a petition in the workplace during company time, the employer referred to *Laidlaw* and stated that it is important to note that the CIRB concluded that had a union only been able to establish evidence of the circulation of the petition in the workplace, this on its own would not have led to a conclusion of interference. There needs to be something more; that is, a connection between the circulation of the petition and management. In that case, it was that the dispatcher circulating the petition could have been perceived as having the authority to act on behalf of the employer.

[359] There is no objective evidence on which to base the assertion that the employees perceived the applicant as acting on behalf of management. The evidence indicated that Mr. Lala worked irregular hours. Both Ms. Van Hees and Mr. Gawley spoke to the unpredictable nature of the golf course and the resulting work hours. Mr. Gawley and Mr. Pigden spoke of Mr. Lala's habit of coming into the workplace on his days off. Mr. Nanson, Ms. Gracie, and Ms. Fanjoy testified to seeing Mr. Lala visit the CANEX during the day. But they did not work with Mr. Lala and could not state for certain that he did so during his working hours.

[360] They also characterized Mr. Lala's presence in the back office as unusual and against policy, which Ms. Stanners dispelled. She stated that employees from all divisions of the employer would enter the back office as would military members, family members of the staff, vendors, and suppliers. The union's witnesses spoke of their impressions of Mr. Lala going about the workplace freely, but in each instance, there were explanations to the effect that his presence in these locations was authorized, whether he was working a function (mess) or organizing workplace events. As a result, there is no objective evidence from which to conclude that Mr. Lala enjoyed more power than his unionized position of lounge food and beverage supervisor would have afforded him, certainly neither managerial power nor explicit condonation from the employer of his decertification efforts.

5. Analysis and conclusion

a. Analysis

[361] The jurisprudence supports the conclusion that the circulation of petitions during working hours may amount to improper employer involvement if when taken together with other factors, it leads to a conclusion that the employer's conduct was both significant and influential in the initiation of the revocation application.

[362] Ms. Stewart testified that in or about mid-September 2015 (likely September 10, as she emailed him that evening) during a telephone conversation, Mr. Lala advised her that a number of employees were signing a petition and that at that point, employees had been signing it for some two weeks. He advised her that HR had asked him if he was circulating the petition on work time. He told her that he advised it that he was not. It advised him that he could proceed.

[363] Mr. Nanson testified that he was not on shift when he signed the application for revocation in September 2015. His supervisor, Ms. Arey, had shown him the form and had explained it to him. He signed the form in the back office of the CANEX. He had one discussion with Ms. Arey about removing the bargaining agent before signing the form. The discussion took place in the loading bay at the Expressmart before his and her shifts.

[364] He stated that he observed Mr. Lala speak to co-workers about how they felt about the bargaining agent in front of the store, in an area designated for smoke breaks. In cross-examination, he acknowledged that he did not know if they discussed revocation.

[365] Ms. Gracie testified that Ms. Arey handed her a form with respect to the application for revocation while she was on the till and on company time and that she had discussions with Ms. Arey in the back office about the removal of the bargaining agent. Some of the discussions took place on company time; others did not.

[366] Ms. Fanjoy stated that she was approached by Ms. Arey during her lunch break in the back area of the Expressmart and asked to sign the paperwork.

[367] She observed Mr. Lala talking with employees in the smoking areas outside of the facilities during working hours. Initially, this occurred approximately once per week, and it increased to two or three times per week.

[368] Ms. Van Hees testified that Mr. Lala provided documents to an employee who was engaged in beverage counting at the back of the facility.

[369] Ms. Lachance recalled sometime in September 2015 having a conversation with Mr. Lala during her shift in the lower bar. He gave her a paper and stated that if she agreed that the bargaining agent's certification should be revoked, she should sign it. Some two weeks later, on a TGIF occasion when Mr. Lala was bringing food to the mess, he asked her if she had thought about what he had said about the revocation.

[370] Ms. Stanners testified that she received word from HR, following which she told Ms. Arey that she could not talk to the staff during work time. Ms. Arey was given guidelines to discuss the issues with employees after hours and not on work time.

[371] Ms. Stanners stated that Ms. Arey abided by the instructions and that although some discussions might have occurred during company time, they would have taken place before the direction was issued.

[372] Mr. Gawley testified that together with Mr. Martin, he had a closed-door discussion with Mr. Lala, during which he told him that if he was going to work on the decertification, he had to do it on his own time and not on company time. Mr. Lala assured him that he was not working on the decertification on company time. Mr. Gawley thought the discussion took place in the summer of 2015. During cross-examination, he stated that he was not sure and thought it might have been in 2016.

[373] Mr. Martin testified that he became aware of the campaign for the revocation of certification on the base in the early fall of 2015. It came to his attention that Mr. Lala was trying to seek support during business hours. He testified that he met with Mr. Gawley and Mr. Lala on September 10, 2015, during which Mr. Lala acknowledged that he was seeking support during business hours. Mr. Martin asked him to stop. Mr. Lala told Mr. Martin that he would stop. At Ms. Stevens' request, Mr. Martin prepared a summary of the December 9, 2015, meeting.

[374] A review of the Form 5s filed with the application indicates that three employees signed one before September 10, 2015. All the other Form 5s were dated after September 12, 2015.

b. <u>Conclusion</u>

[375] It is not disputed that some campaigning by Mr. Lala occurred before September 10, 2015. Both Mr. Martin and Mr. Gawley testified that when they learned of Mr. Lala's campaigning, they met with him. Mr. Gawley was not certain if it was on September 10 2015 or 2016. Mr. Martin was certain that it was on September 10, 2015, as he confirmed in writing to Ms. Stevens the details of the meeting some months later. At the meeting, they asked Mr. Lala to stop campaigning during working hours. He said that he would stop campaigning during business hours.

[376] During Ms. Stewart's telephone discussion with Mr. Lala, which likely occurred on September 10, 2015, given her email to him on that date, she stated that he had told her that HR had asked him if he was circulating the petition on work time.

[377] I find as a fact that the meeting occurred on September 10, 2015, and not September 10, 2016, as there is corroborating evidence both in Mr. Martin's email to Ms. Stevens dated December 9, 2015, as well as in Ms. Stewart's testimony concerning her discussion with Mr. Lala that likely occurred on the same date.

[378] None of the employees who testified in the proceedings indicated that they signed the Form 5 during working hours. Mr. Nanson signed a Form 5 when he was off shift in the back of the CANEX in the presence of the supervisor Ms. Arey, who is a member of the bargaining unit.

[379] Ms. Gracie did not indicate where she signed the form, and Ms. Fanjoy testified that she signed it during her lunch break.

[380] Also of significance is that from the Board's records, only three Form 5s were signed before September 10, 2015. There is no evidence before the Board concerning the circumstances under which they were signed.

[381] There was no evidence that application forms were left around the workplace. There is no evidence that the employer facilitated circulating the application or that it allowed employees to hold decertification meetings in the workplace.

[382] I conclude that the employer did not turn a blind eye to the campaigning and that it sought to address it through both meetings with Mr. Lala and Ms. Arey.

[383] Mr. Nanson and Ms. Fanjoy observed Mr. Lala talking with employees in the smoking areas outside the facilities during working hours. Ms. Fanjoy testified that initially, it occurred approximately once per week and that it increased to two to three times per week. She acknowledged that she did not know Mr. Lala's work schedule or his days off; nor did Mr. Nanson.

[384] Ms. Van Hees stated that Mr. Lala was a full-time employee supposedly with a 40-hour per week schedule on the day shift, and he was not scheduled to work the night shift or weekends.

[385] She observed that Mr. Lala would come and go to and from the facility as he pleased. He needed to be there on the line only at peak times and at lunch. Complaints were made to the Lounge Supervisor, who raised the issue with Mr. Gawley. She stated that after that, Mr. Lala would advise other employees that he was going on break.

Sometimes he would be gone as long as 40 minutes. Full-time employees were entitled to two 10-minute breaks.

[386] She acknowledged that the food and beverage service is a balancing act due to fluctuating demand. She also acknowledged that she was a part-time employee with fluctuating hours and that she was not working at all times when Mr. Lala was working.

[387] Mr. Gawley testified that Mr. Lala was in a working supervisory position and was preparing food and that he had varying work hours. He would commence as early as 6 a.m., while at other times, he would work 3 p.m. to midnight or sometimes an 8-hour shift. His work hours were all over the map on the weekend and on holidays because it was a seven-day-per-week operation, and there was always an event going on.

[388] In addition, Mr. Lala worked significant overtime and free time, without compensation.

[389] None of the bargaining agent's witnesses knew his scheduled hours of work. While Ms. Van Hees observed that Mr. Lala came to the facility as he pleased, she did not know his schedule and acknowledged that the food and beverage service was a balancing act with fluctuating demand. Further, Mr. Gawley stated that Mr. Lala's hours were all over the map that responded to the demands of the workplace.

[390] More significantly, Ms. Van Hees confirmed that complaints were made to Mr. Gawley concerning Mr. Lala's comings and goings reportedly related to the application, following which Mr. Lala was more circumspect when he took his breaks.

[391] I am not persuaded that the employer facilitated Mr. Lala's revocation campaign by permitting him to carry it out during his working hours after September 10, 2015.

B. Did the employer provide Mr. Lala with crucial information about bargaining unit members that enabled his decertification efforts?

1. Ms. Stewart

[392] Ms. Stewart testified that during her telephone conversation with Mr. Lala on or about September 10, 2015, she asked him about the number of employees who worked at the base. He advised her that it was 76. He told her that he had a list of employees with their job titles and contact information, which he had received from HR.

[393] As Ms. Stewart was newly hired, she was surprised that Mr. Lala knew the number of employees in the bargaining unit. The only information she had was that there had been layoffs and that they were RAND formula employees. At that time, she did not have knowledge of the employees at the base.

[394] After the email exchange, she met with Mr. Lala on September 15 or 16. She wanted to talk to him with witnesses present because of their telephone discussion. She was accompanied by Mr. Zima, the previous bargaining agent representative, and its national representative.

[395] They were concerned about where Mr. Lala had obtained the list of employees. Without scheduling a meeting with him, they went to the golf course and to his office late in the afternoon.

[396] During cross-examination, Ms. Stewart was asked whether she had followed up with the employer after Mr. Lala had told her that he had received a list of employees, together with their addresses. She stated that she did not follow up.

2. Ms. Fanjoy

[397] Mr. Lala talked about the size of the bargaining unit and advised Ms. Fanjoy of a three-quarter majority that was looking to get rid of the bargaining agent. He did not discuss where he had obtained the information. She assumed that he had received it from the employer. Although he did not mention how he had received it, he hinted that it had been from the HR department. She did not ask him.

3. Mr. Martin

[398] On September 10, 2015, Mr. Lala wrote to Stephanie Au-Yeung of HR because he wanted to know how many members were represented by the UFCWC, Local 401. As Mr. Lala was just asking about the numbers and not the names of the people in the bargaining unit, Ms. Au-Yeung answered him on September 17, 2015, and advised him that there were currently 42 active part-time and 27 active full-time unionized employees, for a total of 69 employees.

[399] On December 23, 2015, Mr. Lala wrote to Ms. Dauphinee as follows:

> *I revived a letter from the Public Relations Board on December 21st 2015*

> *The Letter indicated that I would receive the full staff list of NPF Employees that are part of the UFCW Local 401 at CFB Edmonton*
>
> *I did request the list back in October from your Office and was denied based on policy*
> *I have now been granted the list from the Public Relations Board ,once they receive them from you.*
>
> *Since i will be getting the list from the Public Relations Board after January 9th 2016*
>
> *my request would be to get the list locally before that time.*
>
> [*Sic* throughout]

[400] Ms. Dauphinee spoke with Mr. Martin, who advised her to check with Ms. Stevens. She wrote to Ms. Stevens, requesting direction. Ms. Stevens advised her that without direct instruction from the Board, the employer could not release this information. Ms. Dauphinee advised Mr. Lala that she could not provide the list directly to him.

4. The bargaining agent's argument

[401] The bargaining agent notes that at this stage, the employer failed to call Ms. Dauphinee to easily rebut the assertion that she provided confidential information to Mr. Lala to assist with his revocation campaign. In addition, as she was an employee of the employer, the employer "… was the natural and logical party to call [her] evidence …" (see *Vector Energy*, at para. 35). The employer offered no explanation for failing to call her; she was a key participant in the workplace during the revocation campaign.

[402] Therefore, the bargaining agent submits that this is an ideal case for the Board to draw an adverse inference with respect to the employer's failure to call Ms. Dauphinee, and it should conclude that she would not have contradicted Ms. Stewart's testimony, which was that Mr. Lala received a list of bargaining unit members through Ms. Dauphinee. This is supported by the test for adverse inferences (see *The Law of Evidence in Canada*, adopted in *Vector Energy*, at para. 32).

[403] In any case, the employer's witness, Mr. Martin, admitted that Ms. Stevens instructed him and his staff to release to Mr. Lala a breakdown of the number of employees in the bargaining unit at the time of his request. It is difficult

to overstate the extent to which that information assisted Mr. Lala in his revocation application [emphasis added by the bargaining agent]. The workplace is extremely diffuse, with multiple worksites and with other bargaining agents present. Without the breakdown of the active staff, Mr. Lala would have been unable to assess how many bargaining unit members he had to convince for a revocation application to be successful. At Ms. Stevens's explicit direction, the employer provided Mr. Lala with strategic information that acted as a shortcut to the normal organizing process and advantaged his revocation application. This constitutes *per se* employer interference [emphasis added by the bargaining agent].

5. The employer's argument

[404] The union alleges that the employer somehow supported or assisted the application and Mr. Lala by providing confidential information relative to the workplace in the form of a seniority list or employee contact list.

[405] Based on Mr. Martin's testimony, the evidence shows that the employer denied Mr. Lala's request for an employee contact list. The employer did provide Mr. Lala with the number of members in the bargaining unit. However, it submits that this was basic, public information, and as such, it was of no additional assistance to Mr. Lala in his efforts to bring the application forward.

[406] If an employer provides general or even public information, doing so has not been considered as constituting employer interference. In *Re Williams*, the employer was accused of interference in a decertification process because its labour relations manager had provided the applicant with general information about the decertification process, including the contact information for the Saskatchewan board (see *Re Williams*, at para. 7).

[407] In commenting on this assistance, the Saskatchewan board noted that it is typical of employees to seek information in decertification situations, since they are at an information disadvantage compared to the union, which is not the only source of information. Therefore, it is reasonable for employees to turn to their employers for basic information as to the process and their rights. This type of general information is not considered as motivating an employee to file a revocation application or to impair the ability of employees to express their wishes as to representation (see *Williams*, at paras. 40 to 42).

[408] Similarly, in *24/7 Traffic*, the fact that the employer provided employees with basic information relative to the decertification process was ruled to not constitute interference in the process (see paragraphs 68 to 70). Considering that case and *Re Williams*, the employer submits that providing the applicant with the number of employees in the bargaining unit did not interfere with the decertification process.

6. Conclusion

[409] In *Re Williams*, the Saskatchewan board determined that certain basic information may be obtained from or provided by an employer without that necessarily constituting interference in a revocation application, so long as the employer remains demonstrably neutral in its dealings with its employees on the representational question.

[410] The onus is on the bargaining agent to establish on a balance of probabilities that it is more likely than not that the employer provided Mr. Lala with the list of employees in the bargaining unit, together with their contact information.

[411] Ms. Stewart testified that during her telephone conversation with Mr. Lala on or about September 10, 2015, he told her that he had received a list of employees together with their contact information from HR. However, in his correspondence dated December 23, 2015, to Ms. Dauphinee, he acknowledges that he requested this information in October 2015. His request was denied.

[412] Again, in December 2015, the employer refused to provide Mr. Lala with this information. I am not satisfied that the bargaining agent has met its onus of establishing that it is more likely than not that HR provided him with the list of employees.

[413] Nor am I prepared to draw an adverse inference based on the fact that the employer did not call Ms. Dauphinee to testify. Mr. Lala's letter is a matter of record. In his correspondence, he acknowledged that he had made a prior request for this information, which had been refused. Mr. Martin testified first-hand that the renewed request for this information and refusal were based on advice from Ms. Stevens.

[414] The fact that Mr. Lala had some email addresses for employees in the bargaining unit is not surprising given that both he and Ms. Arey were supervisors of a significant number of employees in the bargaining unit who as a matter of course for attendance

purposes would have provided them with their email addresses.

[415] The employer did provide Mr. Lala with the number of full-time and part-time employees in the bargaining unit.

[416] The bargaining agent argues that the workplace is extremely diffuse with multiple worksites and with other bargaining agents on the base and that this strategic information acted as a shortcut to the normal process of organizing information.

[417] I have difficulty understanding how the raw number of full and part-time employees in the bargaining unit, without their names, positions, or work locations, would have been of strategic assistance to Mr. Lala in obtaining employee support for the revocation application.

[418] Accordingly, I am not persuaded that providing Mr. Lala with the raw numbers of employees in the bargaining unit constituted interference in the revocation application.

C. Did the employer allow Mr. Lala to use the title "Manager", and did his allegedly close relationship with managers make it reasonable for employees to perceive that he had a close relationship with the employer with respect to his active decertification drive at work?

1. For the bargaining agent

a. Ms. Stewart

[419] When Ms. Stewart learned that Mr. Lala was a supervisor, she believed that there was a conflict of interest in having supervisors in the bargaining unit. At that time, she did not know they were in it.

[420] She was not aware of his title. She knew that he was a chef.

[421] During their telephone discussion on or about September 10, 2015, Ms. Stewart inquired as to whether they could meet to discuss the issues. She emailed him, which provided him her email address for the purpose of arranging a meeting with the members.

[422] Mr. Lala responded and provided Ms. Stewart with Mr. Gawley's email. He advised her as follows:

…

> *I had coffee with him, we work as a unit here, saying that , I always as an open book policy do let him know if staff has issues on both sides of the fence.*
>
> *His belief is that as a GM, His mandate is that all employees work in unison regardless of status.*
>
> *I forwarded his e-mail to you for filing, he is an awesome leader ….*
>
> [*Sic* throughout]

[423] Ms. Stewart stated that sometime in the middle of the email exchange with Mr. Lala to arrange a meeting, she noticed that he was using the title "Manager" under his name. She talked to the bargaining agent representative about it. It was not common to have someone with that title in the bargaining unit.

[424] At the meeting at the golf club on September 10, 2015, Mr. Lala explained to her that he referred to himself as a manager because that title carried more weight when he attempted to secure better deals in contract negotiations with suppliers.

[425] He stated that he and his direct supervisor had a good relationship.

[426] Mr. Lala gave her a copy of his business card that bears the title "Food and Beverage Manager CFB Chef". She believed that he had the authority to negotiate contracts on behalf of the employer.

b. Mr. Nanson

[427] As far as Mr. Nanson was aware, Mr. Lala was a supervisor and not a manager.

c. Ms. Fanjoy

[428] In Ms. Fanjoy's view, Mr. Lala's comings and goings suggested that he possessed a higher rank than regular employees and that he was at least a supervisor, or in a higher position.

[429] During cross-examination, she stated that she was aware that Mr. Lala, her supervisor Ms. Arey, and her current supervisor were members of the bargaining unit.

d. Ms. Van Hees

[430] Ms. Van Hees was asked how Mr. Lala referred to himself. She stated that it depended on whom he was speaking with. He implied that he had the highest position of those who were paid on an hourly basis.

[431] Those in management and higher positions are paid a salary. She stated that even though Mr. Lala was a bargaining unit member, he implied that he was part of management, depending on whom he was speaking with.

[432] For example, minors who were working at the golf club would likely have not known his position.

[433] Mr. Lala did not give Ms. Van Hees a business card. She has seen his card and took a picture of one, which was filed in evidence with the Board.

[434] She stated that the advantage of Mr. Lala being a manager would have meant that he would not have had to go through management when dealing with suppliers. She witnessed him making purchasing decisions.

[435] She stated that Mr. Lala was in the offices of management on a regular basis as it was part of his job.

[436] She provided evidence that representatives of suppliers, including representatives of liquor companies, would provide promotional items to Mr. Lala. After the representatives had left, she observed Mr. Lala coming out of his office waving a bottle of alcohol, purportedly on his way to Mr. Gawley's office to have a drink.

[437] She did not ever witness them drinking together.

[438] She observed Mr. Lala hosting Mr. Pigden and Mr. Gawley.

[439] She stated that Mr. Lala had a close relationship with Ms. Dauphinee, the head of HR. When she would come for lunch at the golf club, he would give her special treatment, including larger portions and a dessert.

e. Mr. Zima

[440] At the meeting on September 10, 2015, Mr. Lala talked about how he negotiated contracts with suppliers. He was exuberant about how he had contracted with one supplier to supply the golf and curling club with beverages at a cheaper rate than a competing supplier. He stated that he had received notification that the employer's headquarters in Ottawa was pleased.

[441] With respect to the history of the positions in the bargaining unit and the job evaluations, the bargaining agent had been advised that a "Category 1" unionized employee, in the position that Mr. Lala occupied, was not able to do this type of negotiation.

f. Ms. Lachance

[442] In September 2015, when Mr. Lala spoke with Ms. Lachance about the revocation application, she assumed that he was in a higher position, like a manager position.

2. For the employer

a. Mr. Gawley

[443] Reporting to Mr. Gawley's position is a food and beverage supervisor, who is responsible for preparing a work schedule for employees for his review. In the past, there had been two supervisors, one for food, and one for the bar. A realization was made that the operation had become busier. It was difficult to go to two different supervisors.

[444] A food and beverage supervisor position was created as the operations needed a single conduit so that direction could be given to the bar and kitchen. The position is currently vacant. It was occupied by Mr. Lala, who resigned in November 2016. He had occupied the position for approximately two years. All employees engaged in the operations are unionized except for the manager and assistant manager.

[445] He had a good working relationship with Mr. Lala. He was able to rectify issues quickly. Mr. Lala had a difficult relationship with the assistant manager; consequently, Mr. Lala reported to Mr. Gawley.

[446] Mr. Lala was responsible for everything to do with the kitchen. He ordered supplies and made recommendations on capital purchases. Mr. Gawley gave him a long

leash when it came to ordering supplies as Mr. Lala tried to save the employer money.

[447] Mr. Lala would negotiate contracts with suppliers; however, he did not have signing authority, and he brought contracts to Mr. Gawley to sign.

[448] The cooks and kitchen helpers all reported to Mr. Lala, who gave them their day-to-day assignments.

[449] When it came to hiring, Mr. Lala would recommend potential employees to Mr. Gawley, and they would go to Mr. Pigden, the senior PSP manager. In terms of authority to discharge, Mr. Pigden would make a recommendation to the PSP's senior vice president in Ottawa.

[450] If there were problems in the workplace, such as lateness, the supervisors dealt with them. If problems recurred, they would be brought to Mr. Gawley or to his assistant. He had the authority to impose discipline, such as verbal or written warnings. Mr. Pigden handled more serious discipline, such as suspensions.

[451] Mr. Lala was in a working supervisory position of varied hours; he prepared food. He would commence as early as 6 a.m., while at other times, he would work from 3 p.m. to midnight or sometimes an 8-hour shift. His hours of work were all over the map and included weekends and holidays, because it was a seven-day-per-week operation, and there was always an event going on.

[452] Mr. Gawley's management style is to give managers and supervisors a great deal of independence. His view is that micromanaging is counterproductive. If he has to do that, then he is not free to do his own job. He tours the workplace every day.

[453] Shortly after Mr. Lala was hired as a chef and promoted to the new supervisory position, he asked for a new business card with the title "Manager" on it, to obtain better deals from suppliers. Mr. Gawley agreed. Mr. Lala was still a supervisor, not a manager. There was no change to authority in the workplace.

[454] He stated that giving Mr. Lala the title "Manager" was not unique to this organization and was not unusual in the golf industry, in which the title "Food and Beverage Manager" is typical. The title was given to him to assist him in his dealings with outside vendors.

[455] Mr. Lala told Mr. Gawley that the new representative could not answer his questions and that he might try to get rid of the union. Mr. Gawley said the following: "I cannot help you; I am management."

[456] Subsequently, Mr. Lala came to see him and advised him that he had signed people up for a decertification. Mr. Gawley would not give him any satisfaction. Mr. Lala tried to talk to him about decertification on another occasion, and Mr. Gawley said he could not help him with it and told him that if he was going to work on the decertification, he had to do it on his own time.

[457] During cross-examination, Mr. Gawley was asked about permitting Mr. Lala to use the title "Food and Beverage Manager" and was referred to the "NPF Values and Ethics Policy". In particular, he was referred to paragraph 14(b), which reads as follows:

> *14. NPF employees shall serve the public's and the organization's interest by:*
>
> …
>
> *b. never using their official roles to inappropriately obtain an advantage for themselves or to advantage or disadvantage others ….*

[458] It was suggested to Mr. Gawley that if Mr. Lala used an inappropriate title, he would be taking advantage of suppliers, contrary to that policy. He disagreed. In his view, it gave Mr. Lala more credibility as he had delegated to Mr. Lala his authority to negotiate.

b. <u>Mr. Pigden</u>

[459] Mr. Pigden described the organization. It has a "Category 2" deputy manager, a fitness and sports manager, a community recreation manager, two mess managers, a golf course manager (Mr. Gawley), and a health and promotions manager. There is another Category 2 non-unionized management layer below this level.

[460] Category 1 employees include supervisors, who are in the bargaining unit.

[461] When Mr. Lala's supervisory position was established, it was necessary to contact HR at the national level to obtain approval to create a position to manage both the lounge and the kitchen. The bar supervisor reported to Mr. Lala.

[462] Mr. Pigden stated that Mr. Lala's position was new and that it combined a number of job descriptions. He stated that there had been a head chef position, which did not allow the base to attract good candidates. Together with HR, the employer looked at pay bands and created a new position one pay band higher that combined the chef duties with administration duties. While previous chefs had been good at their profession, they had not been good on the administrative side. In addition, management wanted one person responsible for both the kitchen and the lounge.

[463] He interacted with Mr. Lala. He described him as an outgoing character.

[464] He was aware that Mr. Lala had a business card with the title "Manager" on it. He explained that Mr. Gawley came to him and asked if the employer could give him a card with that title to use with suppliers. Mr. Pigden agreed, as he knew what it was for, which was the sole purpose of negotiating with suppliers.

[465] Mr. Pigden was referred to the NPF Values and Ethics Policy and in particular to the section on integrity. Section 14(b) provides that "NPF employees shall serve the public's and the organization's interest by … never using their official roles to inappropriately obtain an advantage for themselves or to advantage or disadvantage others …"

[466] It was suggested to Mr. Pigden that Mr. Lala's use of a business card with the title "Manager" was a contravention of policy. Mr. Pigden did not agree, stating that Mr. Lala was not using the card for personal gain but for the advantage of the organization.

[467] He was asked about his discussions with Mr. Lala about union activities. Mr. Lala came to talk to him. He did not initiate the conversation. Mr. Lala was upset about a union meeting that occurred in or about June 2015. Mr. Pigden told him to discuss his concerns with his union. The conversation took place in the lounge or in the clubhouse, and Mr. Lala had come out from behind the kitchen.

c. <u>Mr. Martin</u>

[468] He was not aware that Mr. Lala had used the title "Manager" while working on the base. He had heard rumours about it but confirmed that Mr. Lala was definitely not a manager.

3. Summary of the arguments

a. For the bargaining agent

[469] The employer's failure to prevent Mr. Lala's revocation campaign was particularly egregious because of his position at the workplace. The union presented uncontradicted evidence that he and his manager, Mr. Gawley, were close friends and "drinking buddies". That characterization is consistent with Mr. Gawley's description of his close relationship with Mr. Lala; Mr. Gawley testified that they were close and that Mr. Lala was close with Mr. Gawley's family. Mr. Gawley's preference for Mr. Lala was also clear in the workplace. For example, when Mr. Lala and the Assistant Manager (to whom Mr. Lala reported) had disagreements, Mr. Gawley allowed Mr. Lala to report directly to him, rather than insisting that Mr. Lala respect the proper chain of command and continue answering to the Assistant Manager.

[470] The employer permitted Mr. Lala to identify himself as a manager and even printed business cards to that effect. Ms. Fanjoy and Ms. Lachance gave evidence that they believed that Mr. Lala was in a "higher-level position", with significant power, consistent with the "Manager" title that the employer permitted him to use. The union submits that that violated the HR "Ethics Policy".

[471] Mr. Lala's close relationship with and preferential treatment of Ms. Dauphinee, the employer's former HR manager, also made it reasonable for employees to believe that when he approached them about the revocation, the employer "might become aware of [their] decision to sign or not sign it" (see *C.J.A., Local 1338*, at para. 32).

[472] Mr. Pigden, during his testimony, when pressed to explain whether Mr. Lala's misuses of the title "Manager" to take advantage of suppliers violated the employer's Values and Ethics Policy, went to great lengths to avoid admitting that it did. He refused to concede that dishonesty for monetary gain constituted "using … official roles to … obtain an advantage for themselves or to advantage or disadvantage others …" He did so despite his agreement about the importance of ranks in the military and his extensive experience with military discipline as he was a retired major. Mr. Pigden demonstrated that he had a greater interest in protecting his and the employer's handling of Mr. Lala's actions than in providing a truthful and straightforward account of the facts.

[473] In any case, even if the Board chooses to believe the bulk of Mr. Pigden's testimony, he admitted to discussing the revocation campaign with Mr. Lala at the workplace and during Mr. Lala's work time. He indicated that Mr. Lala would come and speak to him from the back of the kitchen while Mr. Pigden was visiting the lounge and that Mr. Pigden would thank him for giving him information about the status of the revocation. Even if Mr. Pigden did not explicitly support Mr. Lala, other employees would have noticed that Mr. Lala spoke to Mr. Pigden, a very senior official in the workplace, about the revocation, in a friendly way. Mr. Pigden said that in some cases, he thanked him for the information. The fact that these conversations took place during work hours, in front of other employees in the lounge, while Mr. Lala and Mr. Pigden were on shift, is sufficient in and of itself to vitiate the application for revocation.

[474] Overall, this accumulation of evidence strongly supports that it was reasonable for employees to perceive that there was a close relationship between Mr. Lala and the employer with respect to his active decertification drive at work. This further vitiates the voluntariness of the revocation application and justifies its dismissal (see *Re Ross*, at para. 69).

b. <u>For the employer</u>

[475] The union argues that employees of CFB Edmonton perceived Mr. Lala as a manager and as someone in a higher position and with significant power, consistent with the "Manager" title, because of a business card issued to him by his manager, Mr. Gawley, for him to use when dealing with external suppliers and vendors. The union argues that that violated the employer's Values and Ethics Policy, despite the fact that the policy applies only internally, to employees of the employer.

[476] The union argues that the key to determining the employer's involvement or interference with the application or the representation vote is the perception of the employees that it was the case. It further states that the Board should consider how a reasonable employee would perceive the employer's actions and from there, draw a reasonable inference as to interference. The union notes that the test is objective.

[477] The test is indeed objective. While subjective evidence (such as on the perceptions of individual employees) may be considered in an objective test, the Board should take a guarded approach when relying on such evidence or on affording it

much, if any, weight. Subjective evidence is not conclusive or determinative, and the Board is justified in adopting a guarded approach.

[478] Accordingly, the employer submits that the union provided only subjective evidence as to why the employees perceived Mr. Lala (or even Ms. Arey) as someone akin to a manager, enjoying a "higher level" position with "significant" power, "consistent with the manager title he was permitted to use". Its witnesses testified to their impressions as to Mr. Lala's managerial authority, but in the same breath, they recognized him as a bargaining unit member. They did not seem to equate him (or Ms. Arey) with those they clearly identified as managers (Ms. Stanners, Mr. Gawley, and Mr. Pigden).

[479] Objectively, the evidence showed that neither Mr. Lala nor Ms. Arey had any authority or displayed any characteristics proper to those of a manager. Neither he nor she was shown to have had any effective control or to have made effective recommendations that materially affected the economic lives of the employees they supervised (see *Tundra Boiler*, at paras. 19 to 21). They had no authority to hire, discipline, or dismiss employees. Even the work schedules they created had to be authorized by their managers. They were not shown to have had latitude in carrying out their duties; they did not have significant autonomy over decisions and had no budgeting authority or real decision-making ability or the ability to exercise discretion (see *Feldsted*, at para. 10; *Nishnawbe*, at paras. 22, 23, and 83); and *Torre*, at paras. 13, 16, and 17).

[480] Mr. Lala could negotiate terms with vendors and suppliers but could not bind the organization to any contracts. His business cards were for external use. Mr. Gawley and Mr. Pigden spoke to how interchangeable the employer's titles are and that Mr. Lala's title did not confer on him any authority in the workplace. In any event, titles are irrelevant in the determination of whether someone is a manager or can be identified as one (see *Tundra Boiler*, at para. 20).

[481] In light of that objective evidence, the employer submits that the perception of the employees, as presented by the union, to the effect that they believed that Mr. Lala held a manager-level position or had "significant power consistent with a manager title", is not reasonable. As such, the employer submits that there is no objective evidence according to which it may be determined that Mr. Lala (or

Ms. Arey) might have been perceived as managers.

[482] The employees' subjective perception is unreliable and should be afforded little weight. What matters is objective evidence on which to base this conclusion, which is lacking. Mr. Lala was not a manager, and by reason of his duties, responsibilities, inclusion in the bargaining unit, and level of authority, he could not have been reasonably confused with someone having managerial authority. The same is applicable to Ms. Arey. As such, they could not have been viewed as managers interfering with the application.

[483] The union alleges that Mr. Lala misrepresented his title as "Manager" and that by doing so, he committed a serious offence because independently from the fact that he was a civilian, working in a civilian workplace with civilian employees, the workplace is located on a military base.

[484] The union led no evidence to equate the civilian titles used by the employer in its civilian workplace with military titles. The union led evidence as to the importance of rank in the military and the seriousness of misrepresenting it. The employer did not challenge that evidence. However, the employer's employees are not in the military. The evidence showed that they are civilian employees working for an organization that serves the military. The union led no evidence in support of any equation of military titles to the civilian workplace titles of this civilian employer.

[485] Therefore, as outlined, the employer submits that an employee's title is not useful to the determination of whether he or she is a manager or can be perceived as one. Further, the evidence was that Mr. Lala used his "Manager" title when dealing with outside vendors and suppliers and not in interactions with his colleagues in the workplace. The employer's evidence confirmed that Mr. Lala's title had no impact on his authority in the workplace, and the staff all recognized him as a fellow bargaining unit member. There was no objective evidence led in support of any allegation of him using his manager title for any personal benefit. As such, it cannot be concluded that he was afforded preferential treatment or "permitted" to violate policy, as suggested by the union's insinuation that his use of "Manager" in dealings with suppliers flouted the employer's ethics policy.

4. Conclusions

[486] Based on the jurisprudence, while subjective evidence may be considered in an objective test, I am persuaded that the Board should take a guarded approach when relying on such evidence. Further, from my review of the jurisprudence, in the absence of a provision in the *PSLRA* similar to that in the pre-1995 *Ontario Labour Relations Act*, the Board should be more concerned about the employer's actual involvement in revocation applications as opposed to perceptions of its involvement.

[487] The bargaining agent argues that the employer permitted Mr. Lala to identify himself as a manager and that it even gave him a business card to that effect. It argues that Ms. Fanjoy and Ms. Lachance gave evidence that they believed he was in a higher-level position with significant power consistent with the "Manager" title.

[488] As far as Mr. Nanson was aware, Mr. Lala was a supervisor and not a manager. Ms. Fanjoy stated that in her view, Mr. Lala's comings and goings suggested he possessed a higher rank than regular employees, at least a supervisor position or higher. During cross-examination, she acknowledged that she knew that both Ms. Arey and Mr. Lala were bargaining unit members.

[489] Ms. Gracie acknowledged that she knew that Ms. Arey was a supervisor and that she was in the bargaining unit. She did not testify with respect to her knowledge of Mr. Lala's position.

[490] Ms. Van Hees acknowledged that she knew that Mr. Lala was a supervisor and that he was in the bargaining unit. She had seen his business card, which identified him as a food and beverage manager. She stated that the advantage of him being identified as a manager on his business card was that he would not have to go through management when dealing with suppliers.

[491] She did not suggest that Mr. Lala had any greater authority than a supervisor in dealing with employees.

[492] She speculated that some minors working at the golf club would not likely have known his position.

[493] Ms. Lachance worked on a casual basis in the Officers' Mess in a position not in the bargaining unit from August 2014 until June 2015, when she became a part-time

employee in a position in the bargaining unit.

[494] Sometime in September 2015, she conversed with Mr. Lala during her shift in the lower bar, at which time he gave her some papers. She put them in the back of the bar and did not sign them. She had assumed that he was in a higher position, like a manager position. A couple of days later, she advised her supervisor about it, who advised her that Mr. Lala could not enter the Officers' Mess and that she did not have to sign the papers.

[495] All employees who testified, save for Ms. Lachance, knew that Mr. Lala and Ms. Arey were supervisors and that they were in the bargaining unit. Ms. Van Hees did not suggest that Mr. Lala exercised any greater authority over the employees than any other supervisor did and that the use of the title "Manager" was solely for the purpose of dealing with suppliers.

[496] The suggestion that minors working in the golf club might not have known of Mr. Lala's position is speculative at best.

[497] Ms. Lachance, a new employee, perceived that Mr. Lala was in a higher position, like a manager position, when he spoke with her in September 2015. Yet within two days, she had discussions with her supervisor, who told her that Mr. Lala could not enter the Officers' Mess and that she did not have to sign the papers. She did not sign them.

[498] There is no evidence to suggest that Mr. Lala actually exercised a manager's responsibilities in the workplace at issue. Moreover, I am not persuaded on a balance of probabilities that it is more likely than not that employees perceived, assuming that that is the appropriate test, Mr. Lala to be a manager or to be acting on behalf of management.

[499] The bargaining agent also contends that based on the evidence, it was reasonable for employees to perceive that there was a close relationship between Mr. Lala and the employer with respect to his decertification drive at work that vitiates the voluntariness of the revocation application even if the employer did not explicitly support Mr. Lala's application.

[500] As stated, the Board should be more concerned about evidence of actual employer involvement in a decertification application as opposed to perceptions of its

involvement.

[501] Ms. Van Hees stated that Mr. Lala was in the offices of managers on a regular basis as it was part of his job.

[502] She stated that on one occasion, Mr. Lala came out of his office with a bottle of liquor purportedly provided by an industry representative. She stated that he was on his way to Mr. Gawley's office to drink it. She did not observe them drinking together.

[503] She observed Mr. Lala hosting Mr. Gawley, Mr. Pigden, and Mr. Wittier. No further detail was provided.

[504] Mr. Gawley worked closely with Mr. Lala because Mr. Lala was the conduit between management and the bar and kitchen for which he was responsible. His position carried significant responsibilities, and he supervised a large staff. Mr. Gawley stated that he had a good working relationship with Mr. Lala.

[505] Mr. Pigden had business interactions with Mr. Lala. He recalled one meeting with him at which Mr. Lala came out from the kitchen to discuss the union meeting that had been held in June of 2015. The meeting occurred either in the lounge or in the golf club. There was no evidence that any other employees were present. Mr. Pigden advised him to discuss his concerns with the union.

[506] The *Code* includes in the definition of "employee" persons who supervise others but who do not exercise sufficient management functions to be excluded from collective bargaining. Despite supervisors' rights to bargain collectively, the CIRB usually places them in their own bargaining unit to avoid potential conflicts of interest with the employees they supervise. (See *Clarke's Industrial Relations Board*, I 8-61 Commentary S27(5).)

[507] This workplace is more like a private-sector workplace than a federal public service workplace in which bargaining units are based on occupational groups. Unlike most private-sector workplaces, supervisors are in the same bargaining unit as the employees they supervise. When Ms. Stewart learned that Mr. Lala was a supervisor, she believed there was a conflict of interest in having supervisors in the bargaining unit. At that time, she did not know that supervisors were included in the bargaining unit.

[508] In the circumstances of this case, it is clear that Mr. Lala must have had a close relationship with management as it was part of his job, as attested to by Ms. Van Hees.

[509] Based on the evidence, describing Mr. Gawley and Mr. Lala as "drinking buddies" is an exaggeration. Nevertheless, Mr. Gawley stated that he had a good working relationship with Mr. Lala. In my view, a good working relationship between a manager and a supervisor exercising the kinds of responsibilities that Mr. Lala was assigned is critical for an effective organization.

[510] On the one occasion described in the evidence in which Mr. Lala came out from behind the kitchen to speak with Mr. Pigden either in the lounge or in the golf club, there is no evidence that other employees were present or that anyone present overheard the discussion. Assuming that employees were present and that they overheard the discussion, Mr. Pigden advised Mr. Lala to raise his concerns with the bargaining agent. No employee testified about having been present.

[511] Although eligible for collective bargaining, supervisors are nevertheless part of the management team and must have effective working relationships with managers. In my view, it is an unjustifiable leap to conclude that because supervisors have good working relationships with their managers, one can assume that management was involved in the revocation campaign that was initiated by two supervisors who were members of the bargaining unit.

[512] I am not persuaded that the bargaining agent has established on actual evidence that it is more likely than not that it was reasonable for employees to conclude that the employer was involved in the application for revocation based on this allegation.

XIII. Did Mr. Lala or Ms. Arey intimidate, threaten, or use undue influence on employees to support the revocation application, and did the employer support them?

A. Mr. Nanson

[513] Mr. Nanson testified that he filled out a Form 5 supporting the revocation application in September 2015 and that his supervisor, Ms. Arey, showed and explained the form to him. He stated that she advised him that the collective agreement provided no additional benefits over the HR personnel policy and that paying dues to the bargaining agent was a waste of money. He did his own research and concluded that the HR policy contained substantially less benefits than provided

in the collective agreement, which is why he later signed a statement of opposition (Form 4).

B. Ms. Gracie

[514] Ms. Gracie was contacted by her supervisor, Ms. Arey, while she was on sick leave. When she returned to work, Ms. Arey provided her with a form with respect to the application for revocation and requested that it be returned to her by the end of the day. Ms. Gracie stated that she felt pressured to sign it because Ms. Arey continually asked for it.

[515] Within a couple of weeks of signing the statement of opposition, Mr. Lala confronted her, telling her that she should not have signed it and that he was working to get pay raises, benefits, and full-time positions. Ms. Gracie stated that she became upset. It was not clear from her evidence whether she was upset because Mr. Lala confronted her or because he had been informed that she had signed the statement of opposition.

C. Ms. Fanjoy

[516] Ms. Fanjoy testified that she had been approached by Ms. Arey during her lunch break. Ms. Arey asked her if she could sign the paperwork and stated that she needed it before the end of the day. Ms. Arey stood behind her and then sat down and asked her to quickly sign the paperwork. She signed the application saying she felt pressured as she only had a short time for lunch.

D. Ms. Van Hees

[517] Ms. Van Hees emailed Mr. Zigart on July 15, 2016, and attached a written statement that she had prepared and that she and another employee had signed. It read that on Wednesday, June 29, 2016, she had spoken with an employee, who had stated that she wanted to make it clear that she was neither for nor against the bargaining agent. She said that she and other kitchen staff had been repeatedly asked to sign the revocation application by her supervisor, Mr. Lala. At one point, she was asked to come into his office to sign the revocation. She stated that she felt pressured to sign it and that she did, to end the harassment.

[518] The employee in question was not identified or called to testify. It was acknowledged that the document was hearsay and that although it was admissible into

evidence, arguments could be made concerning its weight.

E. Ms. Lachance

[519] In September 2015, Ms. Lachance had a conversation with Mr. Lala during which he gave her a paper and informed her that if she agreed that the bargaining agent's certification should be revoked, she should sign it. He told her that he did not want to tell her what to do and that it was her choice. She stated that she felt pressured as Mr. Lala was insistent. She did not sign it and discussed the matter with her supervisor.

F. For the bargaining agent

[520] The bargaining agent argues that Mr. Lala and Ms. Arey intimidated employees into signing the documentation in support of the revocation application. It referred to the evidence of Ms. Van Hees, Ms. Lachance, Ms. Gracie, Mr. Nanson, and Ms. Fanjoy.

G. For the employer

[521] Mr. Nanson, Ms. Gracie, and Ms. Fanjoy testified and produced statements of opposition speaking against the voluntariness of their signatures in support of the application, citing influence from Mr. Lala or Ms. Arey. Mses. Lachance and Van Hees also testified to having observed or felt pressure from Mr. Lala. However, absent objective evidence showing that Mr. Lala or Ms. Arey could be or have been a member of management or could have acted on the employer's behalf, this is merely evidence of pressure from fellow bargaining unit members. The evidence showed that they could have reported the incidents to their managers and that they chose not to.

[522] These witnesses led no evidence to suggest they were in any way forced to sign that they supported the application. Neither Ms. Lachance nor Ms. Van Hees signed the application. In any event, this alleged forcing did not come from anyone identifiable as a manager but from fellow bargaining unit members. None of Mr. Nanson, Ms. Fanjoy, or Ms. Gracie expressed any fears in relation to signing their subsequent statements of opposition with the assistance and in the presence of their union representative. None testified of any fear that anyone from management would become aware of it or of any fear of repercussions for having revoked their support for the application.

H. Conclusion

[523] In *FedEx*, in interpreting s. 94 of the *Code*, the CIRB stated as follows at paragraph 81:

> *… The definition of intimidation, coercion and undue influence in a labour relations context contains this basic element: the invocation of some form of force, threat, undue pressure or compulsion, for the purpose of controlling or influencing an employee's freedom of association….*

[524] In *Re Williams*, the Saskatchewan board stated that in exercising the discretion to reject an application for revocation as a result of influence of or interference or intimidation by the employer, the board must carefully balance the right of employees to revisit the representational question (now recognized as protected associational activities) against the need to be alert to signs of improper employer interference. It stated as follows at paragraphs 32 and 33:

> *32 … To do so, this Board examines the impugned conduct of the Employer and measures the likely impact of that conduct on employees of reasonable fortitude giving due consideration to the circumstances occurring in the workplace at the relevant time, including the maturity and status of collective bargaining.*
>
> *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.…*

[525] I am not persuaded on a balance of probabilities that that it is more likely than not that either Mr. Lala or Ms. Arey engaged in intimidation or coercion or exercised undue influence in soliciting employees to sign Form 5s in support of the campaign. Based on the facts, the invocation of some form of force, threat, or undue influence is missing.

[526] The fact that Ms. Arey continued to ask for the form during the course of the workday or that a lunch hour might have been cut short due to pressure does not meet

that threshold.

[527] The statement by the unidentified employee, who was not called to testify, which was made some nine months after the application was filed with the Board and stated that Mr. Lala had pressured her to sign the application, as observed at the hearing, is hearsay evidence. I am not able to make a finding of fact based on the nature of this evidence on such a critical issue in the case.

[528] More significantly, there is no cogent evidence that management was involved or could be perceived as having been involved in these meetings with employees.

XIV. Did the employer offer any reward or benefit to employees to support the revocation application?

A. Mr. Nanson, Ms. Gracie, and Ms. Fanjoy

[529] Mr. Nanson stated that in the middle of the summer of 2015, Mr. Lala offered him free golf at the club. He felt that Mr. Lala was trying to build camaraderie and trust with him to bring him over to his side of the argument to remove the union. He felt that way because Mr. Lala had never offered him anything before. He stated that Mr. Lala asked him if he played golf, told him that he could get him a free round of golf, and that he should just ask. Mr. Lala did not discuss revocation with him.

[530] He also witnessed Mr. Lala bringing food to employees on shift at the Expressmart. He believed that it was an attempt to win people over to Mr. Lala's side of the argument. Mr. Nanson stated that before then, it had not been common for food to be delivered to employees free of cost. He did not know if the revocation was discussed with these employees.

[531] He did not tell anyone in management about having been offered a free round of golf or about observing Mr. Lala bringing food to employees on shift.

[532] Ms. Gracie confirmed that she was not offered any perks by Mr. Lala, such as food, during the summer of 2015.

[533] Ms. Fanjoy stated that during the time the application for revocation was being prepared, an employee of the golf and country club who worked in groundskeeping brought her poutine, said it was from Mr. Lala because she was working so hard, and did not mention anything about the revocation application. She had never received

food from the golf and country club before.

[534] Ms. Fanjoy's impression was that it was a bribe.

[535] She also heard second-hand that employees could get a free round of golf from Mr. Lala.

[536] Mr. Gawley was asked to explain how the kitchen handles excess food. He stated that if it cannot be used, it is given to the staff. On occasion, Mr. Lala had taken desserts that could not be saved and given them to the HR staff. It was typical procedure in the food and beverage industry and at golf courses to give excess food to the staff.

[537] Only he and the assistant manager were authorized to give away free golf. It would have to be accounted for in their budget, under promotional items.

B. <u>For the bargaining agent</u>

[538] The bargaining agent argues that Mr. Lala offered bargaining unit members food and passes to the golf course on the base, which were perceived to be bribes in the circumstances, to sway their votes for revocation. This is from the evidence of Mr. Nanson and Ms. Fanjoy.

C. <u>For the employer</u>

[539] The evidence did not establish that Mr. Lala had given away food in the golf club in a manner that was not customary for the industry in which he worked or that was against the directions or policies of its manager, Mr. Gawley. The food brought to Ms. Fanjoy arrived without mention of or connection with the application. Both Mr. Nanson and Ms. Fanjoy testified about interactions with Mr. Lala, and neither mentioned the revocation. The employer submits that they came to these conclusions on their own and further that it does not establish that the food was offered with any impropriety in connection with any knowledge of, or authorization from management.

D. <u>Conclusions</u>

[540] I am not persuaded on a balance of probabilities that Mr. Lala gave away food in a manner that was not customary for the industry or against the directions or policies of Mr. Gawley, who was not cross-examined on this evidence.

[541] There is no evidence that in fact Mr. Lala actually gave away golf passes. He did not have the authority to, and if either Mr. Gawley or the assistant manager, who had that authority, did give away a free golf pass, it would have to be accounted for. While I have no reason to disbelieve Mr. Nanson's account of this discussion with Mr. Lala, he did not characterize the offer as a bribe but as an attempt by Mr. Lala to build camaraderie with him. He was entitled to this perception.

[542] In any event, there is no evidence to suggest that the offer of a golf pass or providing excess food was done with the knowledge or authorization of management for the purpose of supporting the revocation application.

XV. Conclusions with respect to the alleged interference with the revocation application

[543] I have concluded that the bargaining agent has not met its onus of establishing that the employer inappropriately supported Mr. Lala's revocation by failing to prevent him from campaigning at work during working hours.

[544] I have concluded that the bargaining agent has not met its onus of establishing that the employer provided Mr. Lala with crucial information about bargaining unit members that enabled his decertification efforts.

[545] I have also concluded that while Mr. Lala used the title "Manager" when dealing with outside suppliers, he did not use it in his interactions with employees in the bargaining unit. There is simply insufficient evidence to establish that it is more likely than not that he had exercised any authority as a manager over them.

[546] There is no evidence that Mr. Lala or Ms. Arey intimidated, threatened, or used undue influence on employees to support the revocation application; nor is there any evidence to suggest that the employer supported them.

[547] There is no evidence that the employer offered any reward or benefit to employees to support the application.

[548] There is no evidence that the employer threatened employment terminations or wage reductions if employees did not support the revocation application.

[549] There is no evidence that the employer led Mr. Lala to believe that it would reimburse him for the costs of the application.

[550] Accordingly, I am not persuaded on a balance of probabilities that the employer improperly interfered in the application for decertification.

XVI. Did the employer improperly interfere in the revocation campaign after October 26, 2015, in such a way as to make it unlikely that the secret-ballot vote would reflect the employees' true wishes?

[551] The bargaining agent made a number of allegations that are based on facts that occurred after the application for revocation was filed and that are arguably pertinent to this issue, as follows:

- the posting of a bulletin in the workplace in November 2015 authored by Mr. Lala and its distribution to employees and whether the employer provided Mr. Lala with email lists for the employees in the bargaining unit;
- an alleged statement by Mr. Pigden overheard by an employee in the CANEX in the spring of 2016 that "[Mr. Lala] is our guy and the Union is dicking him about".
- the employer's alleged delay paying negotiated pay raises and retroactive pay;
- the failure to investigate Mr. Lala's alleged misconduct in a timely way;
- the employer's promises and threats on the eve of the vote; and
- bad-faith bargaining.

[552] In this section I will summarize the events that arose after October 26, 2015, and address the first three issues, other than those related to the failure to investigate Mr. Lala's misconduct, the bad-faith bargaining, and the alleged promises and threats made on the eve of the vote. I will address each of those allegations separately.

A. The posting in the workplace of Mr. Lala's letter to employees dated November 25, 2015 and whether the employer provided Mr. Lala with employees' email addresses

1. For the bargaining agent

a. Ms. Stewart

[553] Ms. Stewart produced an email that Mr. Zigart sent her about a letter that Mr. Lala had allegedly put up in the workplace on or about November 25, 2015. It was attached to the email. An employee had provided it to Mr. Zigart.

[554] The letter was addressed to all employees. It referred to the application for revocation and advised them that it was in process with the Board. The letter stated that it had been written in response to emails that the bargaining agent had sent to employees.

[555] The letter contained some 13 comments. Ms. Stewart addressed comments 7 and 13. Comment 7 stated that other bargaining agents have Christmas parties but not theirs. Ms. Stewart said that this was true. Comment 13 stated that the bargaining agent indicated that all dues collected go to Washington D.C., its head office. Ms. Stewart stated that this was not true.

[556] Ms. Stewart referred to the last paragraph, which states as follows:

> ***We, the employees of CFMWS, are led by the Values and Ethics that serve the Members of the Canadian Armed Forces.*** *Organizations that represent the employees of CFMWS, such as the UFCW 401 which take monies in lieu of services, should also be judged by the same values and ethics.*
>
> [Emphasis in the original]

[557] Ms. Stewart took that to mean that the base had high values and ethics and that a self-governed bargaining agent should be held to the same values and ethics.

b. <u>Mr. Nanson</u>

[558] Mr. Nanson was referred to a document authored by Mr. Lala and addressed to the employees of NPF associated with the UFCWC, Local 401, which refers to the application for revocation and was purportedly authored in response to emails forwarded to employees by the bargaining agent.

[559] Mr. Nanson saw the document taped to a countertop in the CANEX that was located close to the till. Bargaining agent bulletins are posted on a board in the back office. He did not have direct knowledge of who had taped it to the countertop but was informed by a co-worker that it was Ms. Arey. The document was there for approximately one week.

[560] Mr. Nanson read the document. He was referred to the passage at the end.

[561] In Mr. Nanson's opinion, the statement implied that the UFCWC did not abide by the ethics of the Canadian Armed Forces (CAF).

c. Ms. Gracie

[562] Ms. Gracie saw it taped to a counter in the Expressmart where reference manuals and time sheets are located, several feet away from the cash register.

[563] She asked the manager, Ms. Stanners, if it was appropriate to display it where it was. Ms. Gracie felt that as it pertained to bargaining agent matters, it should have been posted on the bargaining agent bulletin board. Ms. Stanners told her to speak about it with her supervisor, Ms. Arey.

[564] Ms. Gracie asked Ms. Arey if it was appropriate that the document be posted where it was. Ms. Arey answered that it was appropriate.

[565] Ms. Gracie did not know who had posted the document. She was asked whether there were any rules in place with respect to posting documents. She stated that as far as she knew, it would have had to be approved by either Ms. Arey or Ms. Stanners.

[566] Ms. Gracie believed that management approved of posting the document.

[567] Both Ms. Gracie's father and brother are serving members of the military.

[568] She was referred to the last paragraph in the document. She interpreted it as suggesting that the bargaining agent does not have the same ethics and values as the military.

[569] Her impression was that Ms. Stanners would have seen the document as the cameras would likely have caught it. Further, Ms. Stanners and Ms. Arey both like coffee and likely would have seen it as it was located near the coffee machine.

d. Ms. Fanjoy

[570] Ms. Fanjoy received an email on November 24, 2015, from Mr. Lala, enclosing the document addressed to the employees and members of the bargaining unit. She forwarded it to Mr. Zigart the next day.

[571] She had no idea how Mr. Lala had obtained her personal email address. She stated that the only ones with access to it were her employer, her manager or supervisor, and HR. She believed someone had provided the address to Mr. Lala, possibly Ms. Arey or someone in HR. She acknowledged in cross-examination that she did not ask him how he had obtained her email address.

e. Ms. Van Hees

[572] Ms. Van Hees received an email from Mr. Lala that was forwarded by the bar supervisor. It included the document prepared by Mr. Lala directed to all members of the bargaining unit.

[573] She was directed to the last paragraph of the document, which referred to the values and ethics of the members of the CAF. She was asked for her impression of that message. She stated that it implied that the bargaining agent was unethical.

[574] She stated that she had seen the document posted on the employee bulletin board or in the back of the house at the golf course.

f. Mr. Zigart

[575] Mr. Zigart referred to Mr. Lala's letter to employees of November 25, 2015. He stated that in his opinion, a number of the statements in Mr. Lala's response to bargaining agent emails were false. In particular, he referred to the statement that the NPF HR policy covers more than the collective agreement.

[576] With respect to union dues, there is a fixed weekly rate based on hours of work.

[577] The statement that part-time workers working 15 hours or less give up to 8% of their gross pay to bargaining agent dues was not incorrect, but Mr. Zigart questioned how Mr. Lala would have known this as only management could have explained it to him.

[578] As for the statement that HR policy does not allow the employer to just fire people but that in fact it is more difficult to do that based on just the HR policy and not the collective agreement, Mr. Zigart stated that there were some half-truths in it but that the collective agreement allows for filing grievances.

[579] With respect to the statement that those who are not bargaining agent members receive the same or a better benefits package under the HR policy without having to pay union dues, Mr. Zigart stated that if the part for management is taken out, it is an accurate statement.

[580] Mr. Zigart stated that Mr. Lala paid dues although he was not a member of the bargaining agent but was a RAND formula employee.

[581] He found Mr. Lala's commentary offensive about the bargaining agent's ethics, given the reasons for suspending Mr. Lala.

2. <u>For the employer</u>

a. <u>Ms. Stanners</u>

[582] Ms. Stanners recalled overhearing a conversation between Ms. Arey and Ms. Dauphinee about the terms and conditions of employment of employees at Cold Lake, Alberta, in the event she were to relocate there, sometime after the union meeting on the base in June 2015.

[583] She was able to identify the letter dated November 25, 2015, from Mr. Lala, which was addressed to bargaining unit members, about the application for revocation. She thought that it might have been located on the bulletin board in the back office or that it could have been in the front area of the CANEX. She stated that she did not put the document there but that possibly Ms. Arey had done so.

b. <u>Mr. Martin</u>

[584] Mr. Martin stated that in or about November 2015, many questions were being raised about the decertification. Managers were concerned about bargaining agent officers coming onto the base and making misleading statements and portraying managers in an unfavourable light. The managers asked what they could do.

[585] Adrian Scales, the director of labour relations for the employer, sent an email to the managers on November 24, 2015, setting out management's role and responsibilities and telling managers to remain neutral. His direction to remain neutral was taken very seriously by the employer.

[586] The email read in part as follows:

…

Is the Employer involved in the revocation process?

No. The determination of whether or not our employees are represented by a union is entirely up to the employees themselves. We as an employer have maintained a neutral position on this process from the outset. This approach is not only consistent with our corporate policy; it also accords with our legal obligations. An employer is prohibited from taking any action which interferes with employees' decisions as to whether they wish to continue to be represented by their union.

We ask all managers to continue to refrain from discussing this process with employees, either in person, over the phone, or via email.

Under the PSLRA, *anyone who occupies a managerial position is prohibited from taking any action which would have the effect of discouraging an employee from becoming or ceasing to be a member of a union. Should a manager be found to have been involved in the revocation process or to have coerced employees to support revocation, the board can deny the application for revocation.*

This is an example of an "unfair labour practice", which is prohibited by the Act. We have been advised that this board has zero tolerance for any Employer involvement in 'de-certification'. Should an employer been [sic] seen to be involved, employees may lose their rights to determine for themselves whether they wish to keep their union.

…

If asked by a member of the bargaining unit about this process, we can tell our employees that we are not involved in the application process, and will remain neutral as to resolution of the application. It is inadvisable to engage further with the employee regarding the application since any statement may be misconstrued and become the subject of a complaint by the union.

…

What is the union's role in this process? Why is the Employer not publicly responding to the union's communications?

> *You will have observed that the union has taken a very active role in the revocation process. In the correspondence they have sent to our employees and in their presence on the Employer's premises, they have signaled to employees that they strongly disagree with the revocation application. They have adopted an aggressive and accusatory tone in their communications in order to discourage employees from supporting the revocation. Although there are statements in the union's communications which are misleading, inaccurate, and, possibly threatening to our employees, we have been advised that it … would be poor strategy for the employer to respond. Any effort to do so will be seized upon by the union as an attempt to interfere with the revocation process and will result in a further unfair labour practice complaint and a request that the revocation application be dismissed by reason of employer interference. We have been advised that the board grants unions a wide latitude in making such communications while, at the same time, insisting that employers adopt a neutral posture. We note that the employees who support the application for revocation have exercised their right to communicate their views and have responded fully to many of the union's misleading statements.*
>
> …

[587] The email also reminded managers that bargaining agent representatives who wished to visit the workplace had to provide notice, per clause 9.03 of the collective agreement. After reciting the text of that clause, the email continued as follows:

> …
>
> *If the union's representatives are preventing our employees from performing their work, or seem to be harassing or aggressively interacting with our employees, we can ask them to cease this conduct. If managers observe this in the workplace, they should inform their chain of command and the HR Manager immediately.*
>
> …

[588] The email concluded with a draft communiqué advising managers that it would be sent to all bargaining unit members immediately under a separate communication. It is dated November 23, 2015, and is entitled, "Notice to all Category One Operational Employees Re: Application for revocation of certification". It reads as follows:

> *On 2 November 2015, the Employer received a copy of an application for revocation of certification from the Public Service Labour Relations Board.*

> *The Employer would like to advise all employees affected by the application that the employer has remained neutral from the outset of this application process and will continue to do so.*
>
> *In order to remain neutral, we will not respond to public statements made by the union so that we do not interfere in any manner with the revocation process. This process is a matter which is strictly between the members of the bargaining unit and their union, and the Employer will act accordingly.*

[589] This email was sent to all Category 1 operational employees on November 24, 2015, under the signature of Ginette Champagne, vice president of HR at the NPF.

[590] Mr. Martin believed that the email from Mr. Scales dated November 24, 2015, to managers about what they could or could not do during the revocation process and the email to all employees dated the next day was the first formal communication about what managers could and could not do during the revocation process.

3. Summary of the bargaining agent's arguments

[591] Mr. Lala used his perceived relationship with the employer to communicate inaccurate information to bargaining unit members and to pressure them to support the revocation. As a result, when Mr. Lala claimed that the parties' collective agreement was less advantageous to members than the employer's general HR policies or that the bargaining agent's dues were prohibitively expensive, a reasonable employee would have perceived that he was communicating a position in line with that of the employer.

[592] Not only was this perception reasonable, but also the employer's witness testified that the misleading information about how employees would be treated if the bargaining agent were decertified was given to Ms. Arey by Ms. Dauphinee, the manager of HR at the time. Again, this alone would have been sufficient to undermine the revocation campaign: "If employees are motivated to sign a petition … by an expectation that they will be financially rewarded by their employer for doing so, the petition will not be 'voluntary' …" (see *Pombinho*, at para. 7).

4. Summary of the employer's arguments

[593] The union alleges that Mr. Lala misled fellow members of his bargaining unit via a poster or an email that included his views on the union.

[594] While the evidence showed that the document was connected to Mr. Lala, there was no connection between management and its generation or even its posting.

[595] There was evidence that it had been posted in the CANEX Expressmart via being taped to a counter behind the tills and possibly on the employee bulletin board for approximately one week and that it was taken down.

[596] The evidence suggested that the unionized supervisor, Ms. Arey, was able to post things there and that Mr. Lala could not access that location behind the tills. In any event, the poster was taken down in short order, likely by either Mses. Arey or Stanners.

[597] The employer submits that the poster's presence at the back counter does not and of itself lead to a conclusion that Ms. Stanners or the employer supported it or its contents, since it was barely recognizable to Ms. Stanners, who had not participated in its creation or posting.

5. Conclusions

[598] I am not persuaded that the bargaining agent has met its onus of establishing that it is more likely than not that management supported the contents of Mr. Lala's communication to other employees in the bargaining unit. There is no evidence of any management involvement in the composition of the poster or in its dissemination or of management support for the positions articulated in the poster.

[599] The bargaining agent argues that a reasonable employee would perceive that Mr. Lala communicated a position in line with that of the employer. The principle that "employee perception is the key" is derived from the pre-1995 OLRB jurisprudence interpreting the *OLRA*, which mandated the OLRB to ascertain the number of employees in the bargaining unit who had voluntarily signed in writing that they no longer wished to be represented by a trade union. There is no analogous provision in the *Act*.

[600] There is no evidence before the Board that Ms. Dauphinee provided to Ms. Arey misleading information concerning the terms and conditions of employment of employees at Cold Lake. There is no evidence that Ms. Arey provided information to Mr. Lala. In the event that she did, there is no information as to whether it reflected accurately the information provided to her by Ms. Dauphinee. The bargaining agent's

theory is speculative at best. I am not prepared to draw an inference that Ms. Dauphinee provided misleading information to Ms. Arey for the purpose of supporting the revocation application.

[601] The argument that employees were motivated to sign the petition by an expectation that they would be financially rewarded by their employer is not supported by any evidence.

[602] Moreover, on the same day that Mr. Lala circulated his email to employees, the employer communicated to all employees in the bargaining unit that it would remain neutral and that the process was strictly between bargaining unit members and their union.

[603] With the respect to the allegation that the employer provided email addresses of employees in the bargaining unit to Mr. Lala, Ms. Fanjoy believed someone had provided her email to Mr. Lala, possibly Ms. Arey or someone in HR. Ms. Van Hees received the email from Mr. Lala that was forwarded to her by the bar supervisor. The covering email from Mr. Lala dated November 24, 2015, including his response to the union's position related to the application for revocation is addressed to some 23 employees. The covering email states that "I only emailed to members that had email addresses, please pass to other members I did not get to.as well as members that are in favor of the union".

[604] As I stated at para. 414, the fact that Mr. Lala had some email addresses for employees in the bargaining unit is not surprising given that both he and Ms. Arey were supervisors of a significant number of employees in the bargaining unit who as a matter of course for attendance purposes would have provided them with their email addresses. From Mr. Lala's November 24, 2015, covering email, it is apparent that Mr. Lala only had email addresses for some 23 of the some 69 employees in the bargaining unit. The email itself suggests that it had not been sent to members that were in favour of the union. Most of the statements of employees who signed in support of the application for revocation prior to October 25, 2015, included their email address on the statement. These statements were filed with the board by Mr. Lala. The source of those email addresses were the employers themselves. For the foregoing reasons I am not persuaded on a balance of probabilities that the employer improperly provided email addresses of the employees of the bargaining unit to Mr. Lala.

B. Base visits by bargaining agent representatives

[605] The issue of base visits by bargaining agent representatives continued to be raised after the application for revocation was filed. Mr. Zigart explained that because of issues going on at the base, those representatives would visit the base regularly. The employer requested that they identify themselves to the managers of the different facilities. Issues were raised between the parties. I will not recite all the evidence on these issues as their relevance is marginal.

C. Mr. Pigden's comments in the Expressmart in spring 2016

1. The bargaining agent's evidence

a. Ms. Gracie

[606] Ms. Gracie testified that it was her impression that the employer was involved in the revocation application. She observed Mr. Pigden in the Expressmart in the early spring of 2016. He was with two other persons that she did not know. He came to her till to purchase cigars. She said that she overheard him say the following to the persons he was with: "Ajay [Mr. Lala] is our guy and the Union is dicking him about".

[607] During cross-examination, she acknowledged that she did not know what was said before or after the statement was made; nor did she know the context. She inferred that they were talking about the revocation application, although nothing outright was said. She could not be 100% certain that they were discussing the revocation application.

2. The employer's evidence

a. Mr. Pigden

[608] Mr. Pigden did not recall saying anything like "Ajay [Mr. Lala] is our guy and the Union is dicking him about", in the presence of employees in the CANEX. It was not what a military person would say.

[609] He said that thinking as a commander, it would have been a good strategic move for the bargaining agent to take the guy (Mr. Lala) out. He stated that he was impressed with the bargaining agent's tactics.

[610] He did discuss the approach the bargaining agent was taking with Mr. Lala with Colonel McLachlan, the commanding officer of the base, either in the mess or in his

office.

3. The bargaining agent's submissions

[611] Ms. Gracie believed that the employer was involved in the application because of what she overheard Mr. Pigden say in the Expressmart. In cross-examination, she indicated that she assumed that Mr. Pigden was speaking about the application for revocation but admitted she did not know for certain.

[612] Mr. Pigden denied that Ms. Gracie's observation in the Expressmart occurred, but inconsistencies in his testimony significantly weakened his credibility. In cross-examination, he gave convoluted testimony on the issue. He initially admitted to making the statement to Colonel McLachlan in private, then admitted that it was said in the golf club lounge, but he said that employees did not hear it. Regardless, he admitted that the statement was made to Colonel McLachlan and further that it was akin to something that he was thinking at the time.

4. The employer's submissions

[613] The employer states that all its communication to its employees fell well short of any intimidation, coercion, or undue influence. There was no evidence of any use of force, threat, or undue pressure or compulsion for the purpose of controlling or influencing an employee's freedom of association.

5. Conclusions

[614] On reviewing the evidence, I conclude that it is more likely than not that Mr. Pigden was overheard saying words to two unidentified persons accompanying him in the line at the Expressmart to the effect that the union was "dicking about" with Mr. Lala. He acknowledged that he held this view and that he had expressed it in different words to Colonel McLachlan either in the Colonel's office or in the mess.

[615] The evidence does not support the conclusion that the statement was intended to be overheard by employees or that he was expressing support for Mr. Lala's revocation campaign. There has been evidence that some bargaining agent representatives had been "slagging" Mr. Lala's background and character and that managers had raised concerns that had prompted the employer to advise its managers to remain neutral, lest they provide the bargaining agent with the grounds to file an unfair labour practice complaint.

[616] Subsection 186(5) of the *Act* provides that an employer does not commit an unfair labour practice only by reason of expressing its point of view, so long as it does not use coercion, intimidation, threats, promises, or undue influence.

[617] In *FedEx*, at para. 81, the CIRB dealt with the virtually identical provision in the *Code* and stated that the fact that an employer does not want a union and expresses its opinion to that effect is not necessarily a violation of the *Code*. A factual analysis must be conducted to determine whether the manner in which this opinion is expressed contains an element of coercion, intimidation, threats, promises, or undue influence.

[618] I am not persuaded on a balance of probabilities on the evidence that Mr. Pigden expressed support for the revocation campaign but instead acknowledged the effectiveness of the bargaining agent's tactics. Certainly, the context in which the statement was made did not contain any element of coercion, intimidation, threat, promise, or undue influence directed at members of the bargaining unit.

D. Employer communications, summer 2016

[619] As part of the chronology of the events, Ms. Stanners testified that in July 2016, all "Category Two" employees, i.e., managers outside the bargaining unit that compose the management team, were called to a meeting and again told to follow the guidelines. A logbook located at the front of the facility set out rules about what the bargaining agent could and could not do. It stated that employees were not to discuss the application while they were working at the till. If they wanted to discuss the application, they were to do it while on break.

E. The employer delayed paying the bargaining unit members' agreed-to wage increases and retroactive pay and failed to explain why, despite employee concerns

1. Summary of the bargaining agent's evidence

a. Ms. Fanjoy

[620] She testified that the most recent collective agreement was ratified in July 2016. In her opinion, it took a considerable amount of time to receive the retroactive pay. In the past, retroactive pay had been paid almost immediately. She felt that the employer was stalling to wait and see whether the bargaining agent would be decertified so that it would not have to give the employees the pay increase.

[621] Together with other employees in the bargaining unit, on October 14, 2016, she received an email authored by Mr. Pigden on a number of topics, including back pay. The part on back pay reads as follows:

…

> *I have consulted with our HQ labour relations staff. Any staff who were employed as of the 30 August 2016 (the date of ratification) will receive retroactive pay commensurate with his/her service. Laid off employees are also entitled to retroactive payment in accordance with the time worked between the expiry of the previous agreement (June 30 2015) and the date of ratification… If an employee has a specific question about their retro pay, or the contents of this correspondence, they are encouraged to contact the HR office.*

…

[622] The payout of the retroactive pay was postponed a number of times. The employees did not receive retroactive pay until after the revocation vote was held.

[623] She had discussions with bargaining agent members. They were upset and wondered why the bargaining agent could not make the employer follow through on its promises. In her opinion, the delay made the bargaining agent look weak. Bargaining agent members would ask what was in it for them if the bargaining agent could not deliver the money. She could not say whether the delay influenced the vote.

[624] During cross-examination, she was asked whether she recalled that the employer had advised the bargaining agent that it was going to pay the retroactive pay by a certain date and that management had had to hire staff to do the calculations. She could not recall. She was referred to Mr. Pigden's email that dealt with the back-pay issue. She acknowledged that the retroactive pay issue arose as a result of the collective agreement renewal. She was asked whether she ever discussed with Mr. Zigart whether the bargaining agent should clarify the situation with employees. She did not believe so, as he had the same information.

b. <u>Mr. Zigart</u>

[625] Mr. Zigart acknowledged receiving an email from Ms. Petruk on September 7, 2016, advising the union of the dates on which the salary increases and the retroactive pay would be made, namely, October 17 and 31, 2016, to be processed

on November 1, 2016.

[626] He acknowledged that the email predated the notice from the Board setting the dates for the secret-ballot vote, which were October 17 to 21, 2016. However, his opinion was that the dates for the payment were set so far back for the purpose of tarnishing the union.

[627] It was suggested to him that the employer could not reasonably have known about the dates for the vote when it sent its email of September 7, 2016. He answered that he did not know whether Mr. Scales had a greater connection with the Board.

c. Mr. Zima

[628] In the past, retroactive pay had always been paid within a month of the collective agreement's ratification, which involved one to three pay periods. Mr. Zima stated that the employer's payroll system is a typical computer system and that increases can be calculated within that structure. In the event that the system cannot deal with increases, it may be necessary to manually calculate them, as was the case in 2002. He was of the view that this could be accomplished within a month.

[629] He was aware that the parties had reached a settlement and that had it taken an extensive amount of time to implement the retroactive pay increases. Given his experience, he was of the view that this was out of the ordinary. He acknowledged in cross-examination that he has never had to calculate retroactive pay.

[630] He was of the view that the delay could have had an impact on the revocation vote as employees could have viewed the bargaining agent as ineffective even though 100% of them had accepted the new collective agreement.

2. Summary of the employer's evidence

a. Mr. Pigden

[631] Mr. Pigden recalled emailing the staff in October 2016, subsequent to the collective bargaining negotiations, about the employer's commitment to paying back pay. He stated that he had received a number of written inquiries from employees who were being told that if they did not vote against revocation, they would not receive back pay. He advised them to contact their bargaining agent. He decided to email the staff to make it clear that back pay was not tied to the revocation vote.

b. Mr. Martin

[632] An HR manager and two assistants are located in Edmonton NPF office. They serve some 300 staff of the NPF. Some of the employees are unionized and some not. They provide advice on staffing, labour relations, and pay and benefits.

[633] There was a complete turnover of the staff in the Edmonton HR office of both managers and assistants in or about July 2016.

[634] Ms. Dauphinee had been the manager of HR and had 12 years of experience. She left her employment in July 2016. There was a two-week overlap with the new manager, Ms. Petruk. At or about that time, the two assistants went on maternity leave. The person hired to temporarily fill in for one of the assistants then went on maternity leave too, leaving one temporary assistant.

[635] It is a complicated process to generate retroactive pay. To process it, one must ascertain the old rates, determine whether there has been a status change, such as a move from part-time to full-time employment, and whether there has been acting pay or leave without pay. In this case, it involved many manual calculations with a completely new HR staff.

[636] Ms. Petruk wrote to Mr. Zigart on September 7, 2016, advising him that a retroactive payment as it pertained to the recently ratified collective agreement would be included in the pay for the period of October 17 to 31, 2016, which would be processed on November 1, 2016, and paid out on the regular payday of November 10, 2016.

[637] Mr. Zigart referred the matter to Lee Clarke, the bargaining agent's chief negotiator, who wrote to Mr. Scales, advising him that it would be an issue for employees and that had this been communicated to the union before the ratification vote, he would have definitely taken issue with it. Mr. Scales in turn referred Mr. Clarke's email to Mr. Martin for a response.

[638] On September 8, 2016, Mr. Martin wrote to Mr. Clarke, as follows:

…

> *We are short staffed in the Edmonton HR office in September leaving only one HR Assistant to do her own work and cover off the other HR Assistant desk as well. We will do our best to*

> *process the retroactive pay for an earlier pay period, but with the complexity of the hourly rate changes and for the number of staff that we have, we are unable to commit to an earlier date than what was originally conveyed. I understand your position, on this but feel that it will be in everyone's best interests to ensure that we get the pay changes correct due to the complexity involved.*
>
> …

[639] When Mr. Martin wrote that, the Board had not yet set a date for the secret-ballot electronic vote.

3. Summary of the bargaining agent's arguments

[640] The employer's delay paying the bargaining unit members' bargained-for wage increase undermined the bargaining agent and communicated to employees that the bargaining agent was weak and unable to hold the employer accountable for its agreements. This refusal compounded the pre-existing challenges caused by the employer's unlawful refusal to bargain in good faith and strengthened Mr. Lala's revocation campaign message that employees would be better off without the bargaining agent.

[641] Mr. Zigart gave evidence that it was not a past practice of the parties to insert language into the collective agreement in relation to a deadline by which the salary increases and retroactive pay would need to be paid out. Mr. Zigart and Mr. Zima gave evidence that such a matter was never an issue in the past as these items were always paid out within one or two pay periods or within a month of the ratification date.

[642] The evidence indicates that the employees received their new rates of pay on October 27, 2016, and that their retroactive pay appeared on their November 10, 2016, paycheques. It is not coincidental that the employer waited until after the revocation vote to finally pay out these items.

4. Summary of the employer's arguments

[643] The bargaining agent alleges that the employer intentionally delayed paying the retroactive pay that resulted from the renewed agreement, to affect the outcome of the secret-ballot representation vote ordered by the Board.

[644] However, no evidence was adduced during the hearing that established that the delay of the retroactive payments and the wage adjustments was related to the

representation vote. The evidence shows that the employer complied with this wage commitment. Per Mr. Martin's testimony, it advised the union of the retroactive pay dates on September 7, 2016, well before any knowledge of the representation vote dates. It explained the reasons for the delay to the union, which it could have communicated to its members.

[645] There was also no evidence of any employees inquiring with the employer about the timing of the retroactive pay. The employer submits that the union could have quelled any of its members' questions about their wages by providing the explanations it received from the employer on September 7, 2016, but the evidence shows that it neglected to.

5. Analysis and conclusion

[646] The onus was on the bargaining agent to establish on a balance of probabilities that it was more likely than not that the employer intentionally delayed paying the retroactive pay to undermine the bargaining agent and to affect the outcome of the secret-ballot representation vote.

[647] On September 10, 2016, Ms. Petruk advised Mr. Zigart that the retroactive payments would be included in the pay for the pay period of October 17 to 31, 2016, which would be processed on November 1, 2016, and paid out on the payday of November 10, 2016.

[648] On September 8, 2016, Mr. Martin advised Mr. Clarke that the employer was short-staffed in HR in the Edmonton NPF office, leaving only one HR assistant. He referred to the complexity of the hourly rate changes but nevertheless stated that the employer would do its best to process the retroactive pay in a timely way.

[649] At the time of this correspondence, no date had been set for the electronic vote.

[650] The bargaining agent did not significantly challenge Mr. Martin's testimony on this issue. I conclude that there was an innocent explanation for the delay.

[651] Ms. Fanjoy, a member of the bargaining agent's negotiating team, stated that she had discussions with bargaining agent members who were upset and wondered why the bargaining agent could not make the employer follow through on its promises. In my view, it is significant that the bargaining agent, although having been informed

of the reasons for the delay in early September, took no steps to explain those reasons to its members.

[652] Only when Mr. Pigden received a number of written inquiries from employees, who were being told that if they did not vote against the revocation, they would not receive back pay, and after he advised them to contact their bargaining agent did he decide to send an email to the staff to make it clear that back pay was not tied to the revocation vote.

[653] I am not persuaded that the bargaining agent has met its onus on this allegation.

F. The employer failed to reasonably investigate Mr. Lala for serious workplace misconduct, which undermined the bargaining agent

1. Summary of the bargaining agent's evidence

a. Ms. Van Hees

[654] As Ms. Van Hees was the shop steward, one of the employees made her aware of a situation that in turn led to an investigation of Mr. Lala's workplace conduct. He was suspended during the investigation and resigned before the investigation concluded.

[655] She was asked about her impression about the time it took to complete the investigation. She stated that because Mr. Lala was spearheading the revocation application, if he were no longer employed, it would affect the outcome of the decertification. She stated that for whatever reason, it appeared to her that the investigation dragged on.

[656] If the employer could have postponed the investigation and the bargaining agent were decertified, then there would have been no need to continue the investigation.

[657] As far as Ms. Van Hees knew, the employer interviewed every staff member of the golf club. The interviews occurred from July until November 2016. The staff from the front and the back of the house were interviewed over a two-week period. She did not know whether employees at the golf shop were interviewed.

[658] In her view, other investigations of employees alleged to have engaged in misconduct were completed much quicker.

[659] She and other golf club employees received an email from Mr. Gawley on July 23, 2016, advising them in part as follows:

…

> *… This week, several allegations have been brought to light towards Food & Beverage Supervisor, Ajay Lala. Because of the severity of the allegations, Ajay has been directed to not to come to work until the investigation into the allegations is complete. He has been directed to not contact, or be in contact, with any employees of the EGMGCC. If Ajay tries to contact any of you in any way, please do not respond and report it to your supervisor or manager. If Ajay is seen at the EGMGCC unaccompanied by a manager or a supervisor, you are to find a manager or supervisor immediately. If a manager or a supervisor is not on-site at the time, you are to ask him to leave. If he does not leave when asked, call the Military Police immediately followed by a phone call to myself.*
>
> *Effective immediately, the back door of the kitchen is to be locked AT All TIMES. This is for the safety and well-being of all of our employees.*

…

[660] I heard extensive evidence to the effect that the person who complained about Mr. Lala's actions thought that she saw Mr. Lala following her in a car on the base. This led to an investigation and the email noted earlier. I do not find the evidence of assistance in resolving the allegation before me concerning the length of the investigation and have not recited it.

b. <u>Mr. Zima</u>

[661] In the past, Mr. Zima had been involved in investigations into employee misconduct. He was asked how the timelines in those cases compared to that of the investigation of Mr. Lala. The length of that investigation seemed excessive to him. He acknowledged that he was not involved in it.

c. <u>Mr. Zigart</u>

[662] Mr. Zigart learned of Mr. Lala's suspension from Ms. Dauphinee or Mr. Scales. Mr. Lala was suspended on July 22, 2016. The employer started an investigation.

Mr. Zigart stated that by August 10 or 11, the investigation had been concluded as all the employees from the lounge, the waiters, the bartenders, and the kitchen staff had been interviewed, except for Mr. Lala. In his view, after that, the investigation seemed to depend on Mr. Lala's schedule.

[663] Mr. Zigart was upset with the course of the investigation. He wanted to be involved with it and to attend the interviews. He was not involved in the interviews. Mr. Gawley was allowed to attend them. In Mr. Zigart's opinion, Mr. Gawley had a vested interest in the outcome of the investigation. Mr. Zigart was of the view that there had been policy infractions involving Mr. Lala that could have been carried out only with the manager's permission.

[664] He had discussions with Mr. Scales about attending the interviews. He was not informed of the schedule of the interviews. He claimed that the employer was catering to Mr. Lala's schedule. He was not able to attend scheduled interviews on two occasions. His lawyer was unavailable on one occasion. He did attend one meeting, at which the employer provided a summary of the charges against him.

[665] Mr. Zigart complained to Ms. Dauphinee. She was replaced as the HR manager at or about that time by Ms. Petruk.

[666] Ms. Petruk emailed Mr. Zigart on September 27, 2016, stating that as indicated on a number of occasions via email or telephone, the employer was committed to ensuring that the investigation was conducted with the utmost of integrity, respecting all employees involved. She advised him of the course of the interviews to that date. Mr. Lala had been presented with the allegations in writing on September 14, 2016. He had provided limited written submissions to the allegations; however, he did not address the allegations at the in-person interview. He had been given a final opportunity to meet with the employer in person before it made its decision.

[667] She stated as follows:

…

> *If you are asking us to ignore or refuse to provide procedural fairness to the employee under investigation, we must advise you that we are not willing to do so. If the accused employee is terminated and pursues a grievance, you can be assured*

> *that, should we be forced to defend our decision at adjudication, and are accused of having not afforded him procedural fairness, we will advise the adjudicator that the union was actively bullying and pressuring the Employer to rush the investigation and limit the opportunities for the employee to provide evidence.*
>
> …

[668] She concluded the email by stating that the employer conducted the investigation and that it would conclude when the employer deemed procedural fairness had been provided to all employees. The bargaining agent would be informed of the progress of the investigation.

[669] Mr. Zigart replied to her the same day, claiming that he had never come across an investigation in which the person being investigated was able to direct its course and had allowed the manager of the golf course to not only attend but also to take part in it, even though he had a vested interest in the outcome.

[670] He concluded as follows:

> …
>
> *I cannot believe any adjudicator would deem your investigation as fair or honest. Going into three months to investigate complaints against a supervisor who refuse [sic] to cooperate in the investigation is not procedural fairness, its [sic] allowing Ajay to direct the course of your investigation. When will the employer feel the investigation was procedurally fair, when the complainant quits so Ajay could be reinstated to his position?*

[671] Ms. Petruk subsequently informed Mr. Zigart that he would be advised once the employer had rendered a decision in the matter.

[672] On November 14, 2016, Mr. Zigart emailed Ms. Petruk, inquiring whether there had been any further progress with the investigation.

[673] Ms. Petruk emailed Mr. Zigart on November 16, 2016, advising him that on November 1, the final investigation report had been sent to PSP leadership; that the decision maker, was away from October 31 to November 10; and that the decision was deferred until his return. In the interim, the employer had received a resignation letter from Mr. Lala on November 3, 2016, which had been accepted, effective November 8.

[674] Mr. Zigart stated that the bargaining agent was concerned about the time the investigation was taking because it made the bargaining agent look bad as Mr. Lala was spearheading the revocation vote. If the investigation had been handled in a timely manner, it would have been resolved before the revocation vote was held. He also stated that Ms. Arey was kept on staff to keep the revocation application alive. They needed a figurehead. Mr. Zigart stated that the employer said it was not involved.

[675] During cross-examination, it was suggested to him that every workplace is different. He acknowledged that that is so but stated that certain violations of conduct are handled with more urgency and given more priority.

[676] He acknowledged that he had been assigned as the bargaining agent representative to CFB Edmonton in January 2015 and that he had limited experience with this employer. However, he stated that he was aware of two recent investigations that had wrapped up quickly, although they had involved less serious alleged misconduct.

[677] Although Mr. Zigart sought greater bargaining agent involvement in the investigation into Mr. Lala's alleged misconduct, it was suggested to him that none of the employees interviewed had been prevented from bringing a bargaining agent representative to their interviews. Mr. Zigart stated that that is what the employer said. He did acknowledge that no one had complained.

[678] He stated that the bargaining agent sent a letter to Mr. Lala offering him representation. Mr. Lala declined it.

[679] Mr. Zigart acknowledged receiving an email from Mr. Scales on September 6, 2016, outlining the steps that the employer had taken in the investigation and encouraging him to contact Ms. Petruk for updates on the investigation.

[680] Mr. Zigart acknowledged that he had instructed counsel for the bargaining agent to write to Mr. Scales on October 17, 2016, and express the view that the bargaining agent had serious concerns with the progress in which the investigation of Mr. Lala had proceeded.

[681] He acknowledged that he believed that counsel received a response from Mr. Scales to the effect that the employer was in the process of reviewing the evidence gathered, including Mr. Lala's submissions, to determine his culpability and what

disciplinary action might need to be imposed and that it anticipated that a decision from the vice president of the PSP was forthcoming.

[682] He acknowledged that no one from the employer ever advised him that the revocation application influenced the investigation.

2. Summary of the employer's evidence

a. Mr. Gawley

[683] Mr. Gawley sent an email to all the staff after Mr. Lala was suspended, advising them that Mr. Lala was directed not to come onto the base unless he was accompanied by a manager or supervisor.

[684] He was the lead investigator into the allegations. He interviewed all the staff in the food and beverage department personally. He had the assistance of two HR managers, Ms. Dauphinee, who was in the process of retiring, and Ms. Petruk, her replacement. At the conclusion of the investigation, the findings were provided to Mr. Pigden. Mr. Lala had been suspended indefinitely until the investigation concluded.

[685] The investigation commenced in the third week of July 2016 and finished in November 2016.

b. Mr. Martin

[686] As the regional manager of HR, Mr. Martin was aware of the serious allegations of misconduct involving Mr. Lala and of the fact that he had been suspended without pay.

[687] Mr. Martin was advising Ms. Petruk, who was the HR advisor responsible for the file. He understood that the investigators spoke to many witnesses. He also understood that it was a difficult time to meet with witnesses. In the end, the investigators met with everyone who had information to provide.

[688] The investigators attempted to meet with Mr. Lala. He was reluctant to meet until he had consulted his counsel. He did not respond effectively and was of the view that the employer was in league with the bargaining agent to discredit him.

[689] He was given a third opportunity to meet with the investigators; however, he never did return to work, and he resigned his employment.

[690] Mr. Martin has held his position since 2009 and stated that the process followed for Mr. Lala was the same as the process that is followed in every situation of an allegation of misconduct.

[691] The process is that the employer speaks with all the witnesses. Once it has obtained the facts from them, it then meets with the employee to obtain his or her side of the story. After that, it makes a decision.

[692] This investigation took longer than usual because of the number of witnesses, their unavailability, and the lack of cooperation from Mr. Lala, who was given two or three opportunities to answer the allegations. He was off-site throughout the whole process.

[693] During cross-examination, it was suggested to him that the interviews had been completed by August 10, 2016. He disagreed, stating that they had taken longer than that. Mr. Lala had advised the employer that there were other witnesses that had not been interviewed. The employer agreed to interview them.

[694] He stated that Ms. Petruk gave Mr. Lala a hard deadline of Wednesday, September 21, 2016, for his reply. If the employer had not received anything back for him by then, it would have to make its decision. Mr. Martin stated that no decision had been reached with respect to Mr. Lala's culpability when he resigned from his employment on November 3, 2016.

[695] During re-examination, Mr. Martin was referred to an email from Mr. Scales, dated October 18, 2016, and addressed to Kelly Nychka, counsel for the UFCWC, Local 401, in response to a letter from her, dated October 17, 2016, in which she advised that the bargaining agent had serious concerns with the process under which the investigation of Mr. Lala had proceeded. The letter from Mr. Scales reads in part as follows:

…

> *… there have been no complaints from* [the complainant] *about the length of the investigation.*

The length of this investigation is not uncharacteristic for this Employer. As you are aware, the employee accused of misconduct has not availed himself of union representation, and had indicated to us that he was relying on an 'advisor', although his counsel was not specifically identified to us, nor did Mr. Lala bring a representative with him to our investigation meetings.

In the weeks following Mr. Lala's suspension, the Employer interviewed numerous employees regarding the allegations, and during the course of those interviews additional serious allegations were raised. We deferred meeting with Mr. Lala until all evidence had been collected and reviewed. The Employer requested Mr. Lala meet with the Employer on the 19th of August. Mr. Lala indicated he wanted to postpone meeting with the Employer until September. Mr. Lala provided a written statement on the 7th of September. Following receipt of the statement, the Employer once again requested to meet with Mr. Lala to discuss the evidence collected during the investigation.

Mr. Lala met with the Employer on the 14th of September 2016, during which the Employer's evidence was presented to Mr. Lala, but he did not speak to the evidence. He indicated he would reply in writing, and did so on the 21st of September. Following receipt of that submission, the Employer once again met with Mr. Lala on the 29th of September to discuss the contents of his submissions. Mr. Lala's written submissions have been deficient in clarity, thus warranting a need to meet with him in person to understand what evidence he wishes to convey to the Employer. Early in October, Mr. Lala contacted the Employer indicating that a member of the kitchen staff had not been interviewed during the investigation, and Mr. Lala wanted the Employer to meet with this staff member prior to rendering its decisions. This interview took place on the 14th of October.

The Employer has afforded him ample opportunity to respond to the allegations so as to accord with Employer's obligations to provide procedural fairness. The Employer is in the process of reviewing the evidence gathered, including the submissions of Mr. Lala, to determine his culpability, and what disciplinary action may need to be imposed, should the delegated authority deem his actions to be misconduct. We anticipate a decision of the Vice President of PSP (the delegated authority on HR matters of this nature) to be forthcoming.

…

3. Summary of the bargaining agent's arguments

[696] The employer's refusal to reasonably investigate Mr. Lala for serious at-work misconduct facilitated his ongoing decertification drive and communicated to other employees that he was favoured by the employer and that he could act with impunity. As the bargaining agent set out, the employer had already demonstrated a hands-off approach to Mr. Lala's decertification activities at work, in addition to giving significant weight to his opinions on bargaining. The subsequent failure to investigate and discipline him in a reasonable manner strengthened the association between him and the employer and further undermined the voluntariness of employees he approached to support the revocation.

[697] Mr. Lala was accused of serious at-work misconduct and was suspended in July 2016. Bargaining agent and employer witnesses agreed that interviews about the alleged misconduct were completed within a few weeks of the alleged incident, by August 2016 (see the evidence of Mr. Gawley and Ms. Van Hees). The employer acknowledged that the accusations against Mr. Lala were serious enough that the staff should have felt free to call the military police if he was seen on the base and declined to leave (again, see the evidence of Ms. Van Hees and Mr. Gawley). Despite this, Mr. Lala was permitted to continually delay the investigation into his misconduct, until November 2016 (see the evidence of Mr. Zigart). In fact, Mr. Lala was never disciplined for his misconduct as he eventually resigned.

[698] Mr. Martin testified that further investigation was necessary due to additional witnesses suggested by Mr. Lala. Even if this was the case, the employer failed to enforce its subsequent deadlines. On September 8, 2016, Ms. Petruk indicated that she had given Mr. Lala one additional week to provide his response. Despite this final warning, the employer did not proceed to the decision-making phase the following week. In fact, it never even rendered a decision, as Mr. Lala resigned on November 2, 2016, more than six weeks after the employer's hard deadline. The four-month delay between when the allegations first arose and when the matter concluded with Mr. Lala's resignation was unreasonable, especially in light of the seriousness of the allegations. The employer's actions illustrate that it allowed Mr. Lala undue latitude as he refused to meet and provide information, such that he was effectively controlling the investigation. The bargaining agent submits that the employer's actions with respect to the investigation, and the lack of its conclusion,

are not a coincidence given the backdrop of the impending revocation vote. Whether intentional or not, the employer interfered with voluntariness of the vote.

[699] The employer's failure to investigate and discipline in a reasonable way is an example of a failure to act that reasonable employees would perceive as related to the revocation application; "employee perception is … key", from *Fallico*, at para. 8.

[700] The bargaining agent led evidence that there have been no cases of employee misconduct that took as long to investigate or to impose discipline as that of Mr. Lala (see the evidence of Mr. Zigart). Further, Mr. Pigden and Mr. Martin confirmed in their respective testimonies that the investigation took a considerable amount of time. A reasonable employee would conclude that, particularly in the context of Mr. Lala's relationships and influence as described earlier, the employer's failure to discipline Mr. Lala was related to his revocation application. The extraordinary length of time it took to conclude the investigation, and the fact that Mr. Lala was permitted to resign months after the alleged incident rather than be disciplined, support this reasonable perception. This is especially the case in light of the seriousness of the allegations.

4. <u>Summary of the employer's arguments</u>

[701] The employer submits that its actions and conduct in the investigation were not influenced or motivated by the decertification process, and it did not deviate from its common practice with respect to disciplinary investigations.

[702] Evidence showed that the employer investigated the allegations immediately and thoroughly. Mr. Lala was suspended from the workplace immediately and directed not to attend it unless accompanied or authorized by a manager.

[703] The bargaining agent alleges that the employer intentionally delayed concluding its investigation to keep Mr. Lala as a figurehead for the revocation, but no evidence was led to support this allegation.

[704] Mr. Zigart surmised that had the employer concluded its investigation more quickly, the revocation would probably have died sooner, which hints at urging the employer to rush concluding its investigation, to affect the outcome of the revocation, a matter in which it could not and did not want to be involved.

[705] The bargaining agent led no evidence to suggest that the employer did not follow protocol in investigating the misconduct; nor did it lead any evidence to suggest that the employer breached any of its policies or usual processes in workplace investigations.

[706] Mr. Martin gave evidence about the employer's investigation process and its adherence to the process that was not challenged.

[707] The bargaining agent lamented that it was not involved in the investigation and that it was not informed of the progress, although it admitted that Mr. Lala had declined its representation.

[708] There is written evidence that the employer and the bargaining agent discussed the progress of the investigation.

[709] The bargaining agent led no evidence to establish that the employer handled this serious disciplinary investigation in any manner differently from other disciplinary investigations.

[710] Mr. Zigart gave his personal views on the investigation but admitted to having limited experience with disciplinary investigations with this employer, which is in the federal public sector, since he had served as a bargaining agent representative for this unit only since 2015 and could defer only to his experience with the Safeway system, which is a private-sector employer.

5. Conclusions

[711] The bargaining agent argues that the employer's failure to investigate and discipline in a reasonable way is an example of a failure to act that a reasonable employee would perceive as related to the revocation application.

[712] The only employee in the bargaining unit who gave evidence on this issue was Ms. Van Hees. She stated that for whatever reason, it appeared to her that the investigation dragged on. In her view, other investigations of employees alleged to have engaged in misconduct had been completed more quickly. It was her impression that because Mr. Lala was spearheading the revocation application, if he were no longer employed, it would affect the outcome of the revocation vote.

[713] As noted earlier, the principle that "perception is the key" arises from OLRB decisions decided before 1995, under the *OLRA*, which mandated that board to determine the voluntariness of signatures on a petition for revocation. There is no actual or analogous provision in the *Act*.

[714] There is no factual evidence that the employer deliberately delayed the investigation, to keep Mr. Lala as the figurehead for the revocation application.

[715] In fact, Mr. Lala had been banned from the workplace by the employer from July 22, 2016, for the three months before the vote, during which time he was unable to campaign on the employer's premises.

[716] Based on Ms. Van Hees's evidence as well that of Mr. Zigart, I conclude that it would have been in the bargaining agent's interests to have the investigation wrapped up quickly, concluding with terminating Mr. Lala's employment. If the employer's investigation had been unduly rushed with that result, it certainly would have affected the revocation application.

[717] I accept Mr. Martin's evidence that the process followed for Mr. Lala was the same as the process followed in every situation of an allegation of serious misconduct. His explanation for the length of the investigation was reasonable in all the circumstances, keeping in mind that this is a federal public sector employer, for which the authority for terminating employment has not been delegated to local management.

[718] A review of the Board's decisions supports my view that the length of this investigation, taking into account the seriousness of the misconduct, the number of potential witnesses, and the requirement for procedural fairness as well as the authorities for imposing discipline, was not out of the ordinary.

G. The bargaining agent's allegation that the employer issued promises and threats directly to employees on the eve of the revocation vote

1. The bargaining agent's evidence

a. Ms. Fanjoy

[719] On October 14, 2016, with other employees in the bargaining unit, Ms. Fanjoy received an email authored by Mr. Pigden on the topic of back pay, discussed in the section of this decision on the delay issuing back pay. The letter reads in part

as follows:

> *I have received specific queries regarding the status of "back pay" with respect to the outcome of the decertification vote.*
>
> *This* [decertification] *is an issue that will be decided by unionized employees and that the employer and local management have no role in. The management team in Edmonton has been briefed several times regarding their responsibility to refrain from commenting on this issue and they have complied with direction.*
>
> *I have consulted with our HQ labour relations staff. Any staff who were employed as of the 30 August 2016 (the date of ratification) will receive retroactive pay commensurate with his/her service. Laid off employees are also entitled to retroactive payment in accordance with the time worked between the expiry of the previous agreement (June 30 2015) and the date of ratification. The collective agreement is binding on the employer as of the date of ratification. The employer will operate in accordance with the terms of the CBA and will not rescind nor revoke retroactive payments made in accordance with the terms of that agreement. The CBA remains in effect until the certification of the bargaining agent has been revoked by the Public Service Labour Relations Board. If an employee has a specific question about their retro pay, or the contents of this correspondence, they are encouraged to contact the HR office.*
>
> *We recognize that employees may be engaging in discussions on the topic of "decertification" while at work. Such discussions may be of a divisive or hostile nature and I ask that everyone respect the fact that employees will have varying opinions on this subject. I ask that these discussions take place during your lunch hour or coffee breaks, so as to ensure such discussions do not detract from your work and the running of our operations. Please also remember that all employees are entitled to a safe and harassment free workplace.*
>
> ***In closing we must always be cognizant that the only reason our organization exist** [sic] **is to "Serve those who Serve"-that is what the CAF have funded us to do. While you are working this must be your primary focus as it is the sole reason we are all employed.***
>
> [Emphasis in the original]

[720] Ms. Fanjoy's opinion was that the last paragraph in the letter, in bold text, was given greater significance and that it advised employees not to focus on matters relating to the union, which was of less importance, and which detracted them from

focusing on the employees' interests in serving the CAF.

2. The employer's evidence

a. Mr. Pigden

[721] Mr. Pigden sent the email to the staff in October 2016 subsequent to the collective bargaining negotiations that resulted in a new collective agreement. He stated that he had received a number of written inquiries from employees who were being told that if they did not vote against the revocation, they would not receive back pay. He advised them to go to their union.

[722] He decided to email the staff to make it clear that back pay was not tied to the revocation vote. He drafted the original email, which was reviewed by HR and Labour Relations.

[723] Mr. Pigden explained why he inserted the last paragraph in the letter. Before 1997, the employees' work was done by civilians hired directly by the military. The PSP is an alternate service deliverer. That delivery is tied to the Department of National Defence's budget. He was asked questions about the service the organization provides to the military. He wanted to remind the employees that their job was to serve those who serve.

[724] During cross-examination, he elaborated on his intent in adding the sentence. He stated that that he wanted to remind everyone that there were pressures on the base and that he had responsibility for the NPF budget, which is soldier's money. He was reminding everyone that that they should focus on their jobs and that if they did not, the CAF could decide not to fund the NPF.

[725] He stated that all proceeds from the CANEX operations come back into the base funds. Last year, the base received $170 000 from CANEX operations.

3. The bargaining agent's argument

[726] The employees received an email from the employer on October 14, 2016, three days before the revocation vote commenced, which they would reasonably have concluded contained veiled threats and promises. Written by Mr. Pigden, it improperly promised that regardless of the outcome of the vote, the "… employer will operate in accordance with the terms of the [collective bargaining agreement] …" and

guaranteed that back pay and retroactive pay would be paid. A promise of financial gain to employees made by an employer during a certification or revocation campaign constitutes "… illegal interference with the formation or administration of a trade union or its representation of employees" (see *Re Robinson*, at para. 40).

[727] In addition, Mr. Pigden testified that the continued employment of bargaining unit members could be at risk if they underperformed. He communicated that to them in his email by stating "… the only reason our organization exist [*sic*] is to 'Serve those who Serve'–that is what the CAF have funded us to do." When giving evidence about this statement, Mr. Pigden indicated that it was connected to the funding pressures facing the base at the time, and he said that he wanted to take the opportunity to remind employees of that reality.

[728] When Ms. Fanjoy was specifically asked about the last statement of Mr. Pigden's email, she said that she interpreted it to mean that "the union is not looking after the best interests of employees on the base" and that "we are here to serve those who serve, not to focus on things such as what's going on with the union." The bargaining agent submits that Ms. Fanjoy's evidence on this statement was direct and subjective and that the statement was of a threatening nature that suggested the employer's anti-bargaining-agent animus.

[729] Furthermore, from an objective perspective, juxtaposing this statement in a document next to a direction from management not to discuss the revocation application on work time would lead reasonable employees to feel threatened or coerced into voting against the bargaining agent. They could understand that their jobs might be at risk if they did not focus solely on their work and if they participated in the bargaining agent's activities. This was especially damaging, given that it was communicated to employees on the eve of the vote.

4. <u>The employer's argument</u>

[730] The union insinuates that the employer made job-security-related threats to unionized employees by way of a letter from the senior PSP manager, in which he asked the employees to refrain from discussing the revocation application while working and to restrict discussions to break times or to off-work periods.

[731] All the employer's communications to its employees fell well short of any intimidation, coercion, or undue influence. There was no evidence of any use of force, threat, or undue pressure or compulsion for the purpose of controlling or influencing an employee's freedom of association; see *FedEx*, at para. 81.

[732] The only evidence adduced was that the employer communicated its neutrality and urged employees to remain respectful and to keep union discussions to breaks or off-work periods. No threats were made to working hours or wages or of layoffs. No evidence was heard from any union witness as to him or her having felt any such threat from any employer communication.

5. Analysis and conclusion

[733] I have recited s. 186(5) of the *Act* a number of times in this decision. It also applies to the resolution of this allegation.

[734] An employer does not commit an unfair labour practice only because it expresses a point of view, so long as it does not use coercion, intimidation, threats, promises, or undue influence.

[735] As noted, the survey of jurisprudence under the virtually identical statutory provision in the *Code*, s. 94(2)(c), recited in *FedEx*, at para. 81, indicates as follows:

> *[81] From the case law, the Board derives the following non-exhaustive principles:*
>
> *- An Employer is entitled to express its views and is not confined to mere platitudes. There is a middle ground, between mere platitudes and interference and undue influence, in which an employer is free to express its views.*
>
> *- In evaluating employer conduct, the Board should seek to establish whether the employer's conduct has detrimentally affected the employees' ability to express their true wishes. In other words, has the employer's conduct deprived the employees of the ability to express their true wishes in exercising their decision to associate or not?*
>
> *- The definition of intimidation, coercion and undue influence in a labour relations context contains this basic element: the invocation of some form of force, threat, undue pressure or compulsion, for the purpose of controlling or influencing an employee's freedom of association.*
>
> …

> *- The Board should consider the context in which the statements are made and the probable effect on a reasonable employee of the means used. Circulation of written material is the preferable mode, as the choice of written text is less intrusive than captive audience meetings or private discussions with employees.*

[736] The bargaining agent argues that Mr. Pigden's email of October 14, 2016, on the eve of the revocation vote, would have led employees to reasonably conclude that it contained veiled threats and promises. In particular, it argues that the statement that the employer would operate in accordance with the terms of the recently negotiated collective agreement constituted a promise of financial gain. As the statement was made during a revocation campaign, it constituted illegal interference.

[737] The only employee who spoke about this email was Ms. Fanjoy. She did not comment on the part of the email where the employer states that it will comply with the collective agreement. There is no evidence, subjective or direct, from employees that this commitment constituted a promise of financial gain.

[738] I accept the evidence of Mr. Pigden that this commitment that stated that the employer would honour the collective agreement was in response to written inquiries from employees who were being told that if they did not vote against revocation, they would not receive back pay.

[739] I am not persuaded that this statement contains the basic elements of intimidation, coercion, or undue influence in a labour relations context, namely, the invocation of some force, threat, undue pressure, or compulsion.

[740] The bargaining agent also argues that Mr. Pigden's email, which states "… the only reason our organization exist [*sic*] is to 'Serve those who Serve'-that is what the CAF have funded us to do", is of a threatening nature and suggests the employer's anti-union animus. From an objective perspective, it would lead a reasonable employee to feel threatened or coerced into voting against the bargaining agent.

[741] The only employee who gave evidence on this issue was Ms. Fanjoy, which was that in her view, the paragraph advised employees that they were not to focus on matters relating to the union, that the union was of less importance, and that doing so would detract them from focusing on their interest in serving the CAF.

[742] The email addressed the fact that employees might have been discussing decertification during working hours and that these discussions might have detracted them from work and running the operations. The email requested that the discussions take place during lunch hours or coffee breaks.

[743] In my view, the final paragraph must be read in this context by requesting employees to focus on their work and the purpose of the organization while at the same time reserving discussions about decertification to non-work time, such as during lunch hours or coffee breaks.

[744] Again, I am not persuaded that this paragraph contains the basic element of intimidation, coercion, or undue influence, namely, the invocation of some form of force, threat, undue pressure, or compulsion to constitute intimidation, coercion, or undue influence.

H. The employer unlawfully refused to bargain in good faith

[745] The bargaining agent alleged that the employer failed to bargain in good faith by not returning to the bargaining table during the period when Mr. Lala was conducting his revocation campaign.

1. Summary of the bargaining agent's evidence

a. Mr. Zigart

[746] Mr. Zigart stated that he was involved in the last round of bargaining as the representative with the smaller units normally sits in with the negotiating team.

[747] Mr. Clarke was the negotiator for the bargaining agent. During the first three days set aside for bargaining in August 2015, all non-monetary issues were concluded. There were no major stumbling blocks.

[748] Bargaining dates were set for November 2015. Mr. Lala filed his revocation application in October 2015. The employer called and said that it was cancelling bargaining until the revocation application was resolved. It was not a pleasant conversation.

[749] On November 10, 2015, Mr. Lala emailed representatives of the bargaining agent and the employer, advising them, in part, as follows:

…

> *Upon discussions with the employee's [sic] of the NPF (CFB Edmonton), we have elected to advise all respected representatives to cease all CBA negotiations until the Application for Revocation of Certification is resolved. It is our understanding and belief that it undermines the severity of the application process in the first place.*
>
> *Regards*
>
> *Ajay Lala*
> *CCFCC/ Chef de Cuisine*
> *EGMGCC/ Chef / Food & Beverage Manager*
> *AMC / Food & Beverage Consultant*

…

[750] Mr. Scales had acknowledged by email receipt of Mr. Lala's request. He copied the bargaining agent representatives.

[751] Then the union had a telephone call with the employer, and the employer backed Mr. Lala and cancelled bargaining. Mr. Zigart stated that he was surprised as his colleagues had assured him that Mr. Lala was just chest thumping, nothing more.

[752] The telephone discussion between representatives of the bargaining agent and the employer occurred on November 13, 2015. Ms. Stevens and Mr. Scales represented the employer. Mr. Clarke and Mr. Zigart represented the bargaining agent. During that discussion, Ms. Stevens said that Mr. Lala had the majority support of employees. She was asked how she knew that. She did not respond.

[753] Based on the discussion, Ms. Stevens forwarded Mr. Clarke a letter authored by Mr. Scales advising the bargaining agent that it would be inappropriate to continue negotiations while the application for revocation was outstanding.

[754] The letter, dated November 13, 2015, reads as follows:

> *As you are aware, the Public Service Labour Relations and Employment Board has notified the Employer and the Bargaining Agent of the Application for Revocation of Certification, dated 19 October 2015. Further to this application, the Employer sought the Board's direction as to whether the parties should proceed with the scheduled dates for bargaining. The Board, as per the letter from Ms. Lisa Woodstock of 10 November 2015, has advised the parties that it is up to the Employer and the Bargaining Agent to determine whether to suspend or continue negotiations.*

> *Following the Board's direction, the applicant, Mr. Ajay Lala, requested the parties cease negotiations until the application is resolved.*
>
> *As per your email of 11 November 2015, requesting the Employer indicate its agreement or opposition to maintaining the scheduled dates for bargaining (24-25 November), the Employer wishes to postpone the scheduled negotiation dates until the resolution of the application. Taking into consideration the Board's correspondence, the request of the applicant, as well as the preference of the Bargaining Agent, we believe that it would be inappropriate to continue negotiations while the application is outstanding. Immediately following resolution of the application, we will reschedule dates for negotiations as required.*

[755] Mr. Zigart was of the view that if Mr. Lala were successful in his application for revocation, then there would be no need to bargain. The cancellation of bargaining breathed considerable life into the revocation application. Even strong bargaining agent members questioned the power of the bargaining agent.

[756] Following the conference call with Mr. Scales and Ms. Stevens and the employer's written response, the bargaining agent decided to file its complaint alleging bad-faith bargaining on the following Monday.

[757] Although management never said that it supported Mr. Lala, in Mr. Zigart's opinion, it violated the law.

b. <u>Ms. Stewart</u>

[758] Ms. Stewart produced an email that Mr. Zigart sent her about the poster that had been put up in the workplace on or about November 25, 2015, which Mr. Lala addressed to the employees in the bargaining unit. She referred to paragraph 11, which states as follows:

> *11) The negotiations between the Union and our employer, which the union claims was nixed by our employer is untrue.* ***In fact, after reviewing with members, I Ajay Lala had submitted a letter to the Public Services Labour Relation Board in Ottawa to cease all Negotiations which were stated to resume November 24th to 25th. With this, the filing of the Application for Revocation of Certification by the NPF employees of CFB Edmonton needs to be resolved by December 3rd before future negotiations can resume.***
>
> [*Sic* throughout]

[759] Ms. Stewart stated that she knew that this was coming because of an earlier telephone conversation she had had with Mr. Lala. She knew that negotiations were scheduled for November. By representing that his actions contributed to the cessation of negotiations, Mr. Lala made the bargaining agent look bad. In her opinion, being the person leading the revocation application would have given him significant power and authority.

c. Ms. Gracie

[760] Ms. Gracie was also referred to the paragraph in the document attributed to Mr. Lala's posting that referred to negotiations between the bargaining agent and the employer.

[761] She was asked what she understood about negotiations. She understood that bargaining had ceased and that they would not resume until the revocation application was resolved. Her perception as to why negotiations had stopped was that they were related to the application for revocation.

d. Ms. Fanjoy

[762] Ms. Fanjoy was referred to the document prepared by Mr. Lala and addressed to the employees in the bargaining unit. She had seen it taped to the counter at the front of the Expressmart, behind the till and next to the coffee area. It was posted for approximately one to two weeks. She stated that in her opinion, negotiations were stalled, and the employer had backed off and was waiting to see if something would happen that would get rid of the bargaining agent.

[763] Her impression was that Mr. Lala was taking command and that it was within his power or clout to stop things.

e. Ms. Van Hees

[764] On November 28, 2015, Ms. Van Hees received an email from Mr. Lala, forwarded from the bar supervisor. It included a document prepared by Mr. Lala and directed to all employees in the bargaining unit, together with a cover letter.

[765] In the paragraph on negotiations, Mr. Lala suggested that he was very powerful and that a single person, who is supposed to be the kitchen supervisor, can take down a bargaining agent.

[766] She had seen the document posted on the employee bulletin board or in the back of the house (kitchen area) at the golf course.

[767] When collective bargaining resumed in August 2016, Ms. Van Hees was a member of the bargaining agent's bargaining team. Salary increases were bargained, as was retroactive pay.

[768] One hundred percent of those who turned out for the ratification vote voted to accept the new collective agreement. She was asked during cross-examination about that turnout. She stated that she did not recall whether it was more or less than 30 people.

2. Summary of the employer's evidence

a. Ms. Stevens

[769] Ms. Stevens has been assigned to the CFB Edmonton since she began her employment and is a co-negotiator with Mr. Scales representing the employer in bargaining with the bargaining agent. She has been the sole negotiator a number of times representing the employer with this bargaining agent.

[770] She emailed Mr. Clarke on November 13, 2015, advising him that following his November 11 email and their conversation of that afternoon, the scheduled bargaining dates of November 24 and 25 would be cancelled and rescheduled as required upon the resolution of the application for revocation. She attached the employer's response.

[771] On November 3 or 4, 2015, the Board's case manager provided her with a letter advising that an application for revocation had been filed, together with a poster to be put up in the workplace. She exchanged email with the Case Manager. She requested a copy of the application, which was sent on November 4, 2015.

[772] She reviewed the application together with the *Act* and its *Regulations*. She understood that the applicant would have to file evidence that at least 40% of the employees in the bargaining unit no longer wished to have the employee organization represent them.

[773] She asked the Case Manager if the Board had received the evidence; she said that it had. Ms. Stevens asked her to confirm it in writing, which she did.

[774] The email exchange of November 4, 2015, reads as follows:

> [From Ms. Stevens:]
>
> …
>
> *Based upon the contents of this application, the applicant claims that the 'employee organization no longer represents a majority of employees within the bargaining unit', however, there is no specific information as to the actual number of employees who support the application. As per our conversation yesterday, I just want to confirm that the applicant has provided additional documentation to that effect, but such information is confidential and not discussed to [sic] the employer nor the bargaining agent?*
>
> [From the Board:]
>
> *Yes, it's section 20 of the Regulations that prohibits of [sic] from sharing that portion of the documentation received:*
>
> …
>
> *When issuing the decision on the application, the Board normally indicates the numbers or percentage in its reasons.*

[775] Ms. Stevens reviewed the situation with Mr. Scales. They were perplexed. They had never been down this road before. They had already completed some bargaining in September, and the next bargaining sessions had been scheduled for November 24 and 25.

[776] She called the Board's case manager and asked her what they should do. She informed Ms. Stevens that she was not in a position to advise her but that if the employer wanted direction, Mr. Scales should write to the Chairperson of the Board.

[777] Mr. Scales sent a letter to the Board on November 4, 2015, asking it for direction, given that bargaining was scheduled to resume shortly.

[778] On November 10, 2015, the Board advised that it was up to the employer and the bargaining agent to determine whether to suspend or continue their negotiations in light of the application for revocation.

[779] Sometime after receiving the Board's letter, Mr. Lala requested that the parties cease negotiations until the application was resolved.

[780] Ms. Stevens stated that having reviewed the *Act*, the *Regulations*, and the Board's letter, she and Mr. Scales decided that it might be best to remain neutral, but they wanted to speak with Mr. Clarke first.

[781] A conference call was scheduled for November 13, 2015. It was made from Mr. Scales' office. Ms. Stevens had never been through this type of issue before and did not remember exactly what she had said. She recalled stating that Mr. Lala had asserted that the majority of the employees no longer wished to be represented by the bargaining agent and said something to the effect that it might not make sense to continue bargaining if the bargaining agent did not have the support of the majority of the membership.

[782] She recalled Mr. Zigart commenting that there was no way she would know whether the bargaining agent did or did not have majority support unless she was involved in the application for revocation.

[783] She responded that her view was based on looking at the application and at what it asserted. She recalled saying that the employer did not have the evidence, and neither did Mr. Clarke or Mr. Zigart.

[784] Mr. Clarke was very disappointed with Mr. Scales's decision. He stated that it was very telling of the employer and that he would have to follow up with an unfair labour practice complaint and an allegation that the employer violated its duty to bargain in good faith.

[785] This led to the email exchange referred to earlier in the evidence of Mr. Zigart and the letter from Mr. Scales stating that it would be inappropriate to continue negotiations while the application for revocation was outstanding.

[786] During cross-examination, she stated that with her assistance, Mr. Scales drafted the letter of November 15, 2015, postponing bargaining. She was asked if she recalled the evidence that she had given at the Board's hearing of the bad-faith bargaining complaint, at which time she stated that she had drafted the letter and that Mr. Scales had signed it.

[787] Ms. Stevens explained that both statements were correct as she usually prepares an initial draft for Mr. Scales to review, amend, and sign.

[788] She was referred to her testimony in which she stated that after considering the *Act* and *Regulations*, in the employer's view, the only way to remain neutral was to postpone negotiations.

[789] She was referred to the summary of her evidence in that proceeding, the bad-faith bargaining decision, at paragraphs 149 to 152.

[790] In that case, in her evidence-in-chief, in its summary of the evidence, the Board reflects Ms. Stevens stating that she and Mr. Scales took into account four factors when deciding whether the employer should proceed with bargaining: the November 10, 2015, email from Mr. Lala requesting that the parties stop bargaining pending the revocation application; the UFCWC's position that bargaining sessions should proceed as scheduled; Mr. Lala's application being resolved quickly; and the Board's November 10, 2015, letter.

[791] Following her cross-examination in that case, the Board concluded that while Ms. Stevens stated that the employer had considered many factors, by the time her testimony was complete, the evidence before the Board disclosed only two: Mr. Lala's request to cease bargaining, and the UFCWC's request to maintain the scheduled bargaining sessions.

[792] Ms. Stevens did not agree with the Board's characterization of her evidence in that case and stated that its November 10 letter was still a factor in the decision. She agreed that they did consider Mr. Lala's letter and the bargaining agent's preference.

[793] Ms. Stevens was referred to the letter dated November 13, 2015, to Mr. Clarke from Mr. Scales that reads in part as follows: "Taking into consideration the Board's correspondence, the request of the applicant, as well as the preference of the Bargaining Agent, we believe that it would be inappropriate to continue negotiations while the application is outstanding." She agreed that those were the three matters taken into consideration in making the decision to postpone bargaining.

[794] She stated that she and Mr. Scales made the decision to postpone bargaining on their own, as the Board's direction had said it was up to the parties. She agreed that this decision was found to be an unfair labour practice.

[795] Ms. Stevens was asked whether she would agree that it was reasonable that the perception of the bargaining agent's members would be that the employer had sided with Mr. Lala. She answered that in her opinion, a member's perception to that effect was not reasonable. She explained that she had facts that the members did not have.

[796] She was asked when she had formed the opinion that the bargaining agent no longer had the support of the majority of the employees in the bargaining unit, to confirm that she did not have evidence. She answered that she had confirmed that the Board had the evidence. She then stated that there would have to be a vote to determine whether that majority did or did not support the bargaining agent.

[797] In re-examination, she was asked whether the fact that the revocation application would be resolved quickly was a factor in the decision to suspend bargaining.

[798] She answered that she anticipated that after the 30-day notice period following placing the poster in the workplace had expired, a vote would be ordered.

3. Summary of the bargaining agent's arguments

[799] The employer's unlawful failure to bargain in good faith undermined the bargaining agent and left employees with the impression that the bargaining agent was ineffective. Bad-faith bargaining can constitute employer interference when it creates "… a climate in the workplace which would be propitious to an application for revocation" (from *Chapman*, at para. 58). When this occurs in the context of a revocation application, it "… is a form of undue influence which vitiates the validity of the decertification vote" (again at paragraph 58).

[800] The Board previously found that the employer bargained in bad faith when it refused to meet with the bargaining agent, which violated s. 106 of the *Act* (see the bad-faith bargaining decision). The employer's decision undermined the employees' perception of the usefulness of the bargaining agent, the consequences of which were particularly severe because of the revocation campaign occurring at the time. The Board concisely summarized as follows the effects of the employer's breach of its statutory duty to bargain in good faith (see the bad-faith bargaining decision at paragraph 162):

[162] It is well known in the field of labour law and labour

> *relations that the purpose of bargaining agents is to represent groups of employees in matters against their employers. The pre-eminent area in the relationship in which a bargaining agent represents employees is in bargaining collective agreements, which define the very employment relationship. It is trite to state that if a bargaining agent is unable to bargain with an employer or appears as such, it will be viewed as weak and ineffectual; this is because the foundation of the labour movement (the establishment of bargaining agents and collective bargaining) is in the strength of bargaining as a group (of employees) as one as opposed to each individual employee bargaining on his or her own against an employer. The employer, through its representatives, Mr. Scales and Ms. Stevens, should have known this.*
>
> [Emphasis added by the bargaining agent]

[801] The bargaining agent has provided direct evidence of the effect of the employer's failure to bargain on the employees' perception of the bargaining agent's effectiveness, although direct evidence is not necessary to establish that harm to the bargaining agent's standing has occurred (see the bad-faith bargaining decision, at paragraph 158).

[802] Ms. Van Hees, Ms. Fanjoy, and Ms. Gracie gave evidence that they perceived that there was a connection between the reason the employer ceased bargaining and the application to revoke the bargaining agent's certification. Furthermore, during the bad-faith bargaining decision hearing, two bargaining agent members testified that fellow members — the subjects of the decertification campaign — perceived that the bargaining agent was weaker because of stalled bargaining (see the bad-faith bargaining decision at paragraph 158).

[803] In addition to undermining the bargaining agent by delaying legally required bargaining, the employer's action also empowered Mr. Lala's revocation campaign. As the Board found in the bad-faith bargaining decision, Mr. Lala's request to the employer to stop collective bargaining, which was something to which he was not a party and in which he was in no way involved, was the determining factor in the employer's refusal to bargain (the bad-faith bargaining decision at paragraph 157). When presented with a request from the bargaining agent and a single employee uninvolved with collective bargaining (Mr. Lala), the employee deferred to Mr. Lala (the bad-faith bargaining decision at paragraph 152).

[804] The unmistakable message communicated to bargaining unit members by the employer was that Mr. Lala was a man of significant influence whose opinion it took seriously. He communicated that message explicitly in a poster that he distributed around the workplace and emailed to members, in which he "advised" that he wrote to Ottawa and asked the employer and the bargaining agent "… to cease all [collective bargaining agreement] negotiations until the Application for Revocation of Certification is resolved", purportedly on behalf of "… the employees of the NPF (CFB Edmonton)".

[805] Although the bargaining agent highlights several other serious examples of employer interference, as will be noted later in this decision, the bargaining agent notes that the employer's failure to bargain in good faith, prompted as it was by interference from the central organizer of a revocation campaign, is sufficient in and of itself to vitiate the voluntariness of the revocation petition and the subsequent vote. A reasonable member of the bargaining unit would think that the employer had a close relationship of confidence with Mr. Lala and that it was willing to violate labour legislation to avoid interfering with or lending support to his revocation campaign.

4. <u>Summary of the employer's arguments</u>

[806] The union alleges that the employer refused to negotiate a new collective agreement, to support Mr. Lala in his decertification activities. It alleges that despite the fact that Ms. Stevens stated that the employer never indicated that that was its reason for suspending bargaining and despite the fact that it concluded a renewal agreement with the union.

[807] The reality of the facts is that significant time passed between the filing of the application for revocation and the secret-ballot vote, which resulted in the union's application to amend its pleadings to include allegations that the employer's post-application-for-revocation conduct had interfered with the authenticity of the representation vote.

[808] Given the amended allegations, the union asked the Board to review both the employer's conduct leading to the filing of the application for revocation and its conduct leading to the representation vote. In light of these allegations, as noted earlier, post-application conduct should be reviewed according to the test established in the case law for assessing employer conduct before a secret-ballot vote was

conducted. As discussed, the cases of *Kolbina Care, Laidlaw, Re Robinson*, and *Tundra Boiler* state that a level of interference is required amounting to "… some evidence of circumstances from which an inference can reasonably be drawn that the true wishes of the employees are unlikely to be disclosed in the vote" (from *Kolbina Care*).

[809] With respect to the allegations pertaining to the cancellation of bargaining, the employer and union resumed bargaining in August of 2016, and the deal reached in bargaining was accepted by the membership at a ratification vote on August 30, 2016. Although the union argues that the cancellation of bargaining should be seen as a form of interference warranting dismissing the vote, the facts that transpired after bargaining ended indicate that the employees who participated in the ratification vote accepted the union's proposed deal. The union argues that a successful ratification vote should be accepted as a vote of confidence, nullifying the application and cancelling the vote, because it would demonstrate that the employees support the union.

[810] The logical inference from the assertion that the employees demonstrated their ongoing support for their bargaining agent through ratification of the collective agreement is that the secret-ballot vote (which was conducted <u>following</u> the ratification vote) would confirm that support if <u>none</u> of the evidence arising from the period between the ratification and the representation vote amounts to interference.

[811] As such, counting the ballots could be perceived at most as redundant, since if the previous assertion is accepted, they would likely confirm the employees' support for their union. Thus, the employer posits that if the union's assertion pertaining to ratification is accepted, then it must be concluded that the secret ballot that followed can be seen as a vote cast in the absence of employer interference and as confirmation of the true wishes of the employees.

[812] If a successful ratification vote is considered an expression of employee will, what evidence, if any, from August 30 to October 17, 2016, could amount to interference significant enough to have altered the employees' ability to express their true wishes? The employer is of the view that no evidence heard rises to this level of interference. During this period, the union alleged that the employer's delay paying retroactive wages and its treatment of Mr. Lala during its investigation of his misconduct amounted to interference.

[813] However, no evidence was adduced at the hearing establishing that the delay of the retroactive payments and wage adjustments was related to the representation vote or that the employer's conduct vis-à-vis a disciplinary investigation was somehow a form of preferential treatment suggesting employer support for the application.

[814] Therefore, once again, it is submitted that no finding of employer interference can be rendered on the facts heard, and thus, the results of the vote should not be dismissed. Further, it is submitted that even if interference is found in the employer's initial decision to suspend bargaining, it did not affect the decertification vote in a manner such that it is not likely to disclose the true wishes of the employees.

5. <u>Analysis and conclusion</u>

[815] The underlying facts concerning this allegation are not in dispute. They are succinctly set out as follows in the bad-faith bargaining decision, at paragraphs 136 to 142:

> ***[136]*** *The parties had a long and apparently generally good relationship until the fall of 2015. The collective agreement governing their relationship expired in June 2015, and the UFCW 401 gave notice to bargain on March 4, 2015. The parties scheduled bargaining sessions in September 2015, met on the scheduled dates, and appeared to successfully reach agreement on all non-monetary issues. On September 18, 2015, the last day of bargaining during the September sessions, the UFCW 401 delivered to the employer its written proposal on monetary issues, the parties agreed to meet again, and they scheduled the next bargaining session for November 24 and 25, 2015, in Edmonton. Hotel meeting rooms were booked for it within a few weeks of the last day of the September bargaining session.*
>
> ***[137]*** *On October 26, 2015, the Lala application was received by the Board, requesting decertification of the UFCW 401 (file 550-18-10).*
>
> ***[138]*** *On November 4, 2015, after receiving the application, the employer wrote to the Board, advised it that the parties had scheduled "tentative" bargaining dates, and sought direction from the Chairperson of the Board as to whether the parties should temporarily suspend negotiations and cancel all "tentative" meeting dates until the application was resolved. The employer's letter of November 4, 2015, was sent to the UFCW 401 and to Mr. Lala.*
>
> ***[139]*** *On November 10, 2015, the Board wrote to the parties*

and Mr. Lala and stated that the Chairperson had directed that it was up to the parties to determine whether to suspend or continue their negotiations in light of the application for revocation of the UFCW 401's certification. A few hours later on that same day, after receiving the Board's letter, Mr. Lala wrote to the employer, the Board, and the UFCW 401 and stated that it was his preference that all collective bargaining negotiations cease.

[140] *Upon receipt of the Board's November 10, 2015, letter, the employer and UFCW 401 exchanged emails in which the UFCW 401 stated that its view was that collective bargaining should proceed as scheduled on November 24 and 25, 2015, and it referred the employer to relevant provisions of the* Act. *After exchanging correspondence, the employer and UFCW 401 held the November 13 conference call to discuss the issue, during which the UFCW 401 reiterated its position.*

[141] *The employer decided that it would not participate in the previously agreed to and scheduled bargaining set for November 24 and 25, 2015, and put its position in writing in an email sent on November 13, 2015. In the email, which enclosed the letter of that same day, Ms. Stevens, who also drafted the letter, stated the following: "The scheduled dates of 24/25 November will be cancelled, to be rescheduled as required upon resolution of the application." The letter stated as follows:*

…

> The Board … has advised the parties that it is up to the Employer and the Bargaining Agent to determine whether to suspend or continue negotiations. Following the Board's direction, the applicant, Mr. Ajay Lala, requested the parties cease negotiations until the application is resolved.
>
> As per your email of 11 November 2015, requesting the Employer indicate its agreement or opposition to maintaining the scheduled dates for bargaining (24-25 November), the Employer wishes to postpone the scheduled negotiation dates until the resolution of the application. Taking into consideration the Board's correspondence, the request of the applicant, as well as the preference of the Bargaining Agent, we believe that it would be inappropriate to continue negotiations while the application is outstanding. Immediately following resolution of the application, we will reschedule dates for negotiations as required.

…

> ***[142]*** *No bargaining took place on November 24 and 25, 2015, and as of the date of the hearing, the employer has maintained its position of not returning to the bargaining table.*

[816] The Board concluded as follows at paragraphs 157 and 158:

> ***[157]*** *The evidence before me disclosed that on November 10, 2015, only hours after the Board's letter was sent, Mr. Lala wrote to everyone and asked that bargaining stop. Not only did the employer consider this request, it is also clear that that factor won the day when the employer considered its options when deciding whether to continue to bargain with the UFCW 401. Bargaining stopped because the employer decided not to attend and bargain on November 24 and 25, 2015. Ms. Stevens testified that she and Mr. Scales made the decision to cancel bargaining.*
>
> ***[158]*** *Two members of the UFCW 401 testified that they believed that its members viewed it as weak due to the fact that bargaining had stopped.…*

[817] The Board stated as follows at paragraph 162:

> ***[162]*** *It is well known in the field of labour law and labour relations that the purpose of bargaining agents is to represent groups of employees in matters against their employers. The pre-eminent area in the relationship in which a bargaining agent represents employees is in bargaining collective agreements, which define the very employment relationship. It is trite to state that if a bargaining agent is unable to bargain with an employer or appears as such, it will be viewed as weak and ineffectual; this is because the foundation of the labour movement (the establishment of bargaining agents and collective bargaining) is in the strength of bargaining as a group (of employees) as one as opposed to each individual employee bargaining on his or her own against an employer. The employer, through its representatives, Mr. Scales and Ms. Stevens, should have known this.*

[818] On June 28, 2016, the Board upheld the complaint and declared that the employer was in breach of the duty to bargain in good faith. The Board ordered that within two business days, the employer had to arrange dates for the continuation of collective bargaining, post copies of the decision in a conspicuous location at all workplace locations, and distribute copies of the decision to all bargaining unit members.

[819] I am not persuaded on the evidence that by cancelling the scheduled dates for bargaining until the revocation application was resolved, the employer deliberately intended to interfere in the revocation campaign. However, the bargaining agent did not have to prove anti-union animus to establish employer interference. See *Re Air Canada*, at para. 33.

[820] Bad-faith bargaining can constitute employer interference when it creates "… a climate in the workplace which would be propitious to an application for revocation …"; see *Chapman*.

[821] The union has provided direct evidence of the effect of the employer's failure to bargain. Ms. Van Hees, Ms. Fanjoy, and Ms. Gracie were of the view that there was a connection between why it ceased bargaining and the application to revoke the union's representation. In light of the objective factual circumstances surrounding the cancellation of collective bargaining at the request of Mr. Lala, who had initiated the application for revocation, I conclude that the employer contravened s. 186(1)(a) of the *Act* and that it improperly interfered in the representation of employees by an employee organization.

[822] In *Kolbina Care*, the BC board applied a two-stage analysis applicable to determining allegations of employer interference in a decertification. The *BC Code* authorizes that board to cancel or refuse to cancel the certification of a trade union in any case in which it considers that because of improper interference by any person, the representation vote is unlikely to disclose the true wishes of the employees.

[823] The BC board stated as follows at paragraphs 79 and 80:

> *79 … First, the Board must find that improper interference occurred. If such a finding is made, the second stage of the analysis requires the Board to determine whether the improper interference makes it unlikely that the decertification vote would reflect the true wishes of the employees ….*
>
> *80 … At the second stage of the analysis, in deciding whether the employees' true wishes have been affected, the Board applies an objective standard… In this regard, there must be some evidence of circumstances from which an inference can reasonably be drawn that the true wishes of the employees are unlikely to be disclosed in the vote ….*

[824] In *Lansdowne*, the Alberta board dealt with a fact situation in which the employer refused to meet and bargain with the bargaining agent, which filed its complaint on March 24, 1992. Subsequent to the employer's refusal to bargain, an employee filed an application to revoke the union's bargaining rights on April 1, 1992.

[825] On April 24, 1992, a panel of the Alberta board concluded that the employer had failed to bargain in good faith, and it ordered the parties to commence collective bargaining.

[826] On April 28, 1992, the Alberta board conducted a representation vote on the revocation application and sealed the ballots.

[827] A combined panel of the Alberta board heard the parties' representations on the revocation application and any additional remedies pertaining to the unfair labour practice complaints.

[828] The Alberta board concluded at page 24 as follows:

…

> *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.*

…

[829] In that case, the Alberta board directed that bargaining commence. With respect to the disposition of the application for revocation, the board directed that it would conduct a representation vote on it. However, that vote would not take place if the union and the employer achieved a memorandum of settlement ratified by employees in the bargaining unit, if the union applied for a board-supervised strike vote that then resulted in a majority vote in favour of strike action, or if the employer applied for a lockout poll.

[830] The Alberta board stated as follows at page 25:

…

> *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 the 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.*

…

[831] In that case, only four days had elapsed from the date of the panel of the Alberta board's decision, which had determined that the employer had failed to bargain in good faith, before it made the order to commence collective bargaining and fixed the date of the secret-ballot vote.

XVII. Did the employer's cancellation of bargaining in November 2015 make it unlikely that the secret-ballot vote would reflect the employees' true wishes?

[832] Subsequent to the Board's decision of June 28, 2016, which found that the employer had failed to bargain in good faith, the parties resumed bargaining, in August 2016, and reached a new collective agreement with increased wage rates and retroactive pay. The agreement was ratified by employees in the bargaining unit on August 30, 2016, by 100% of the members who voted.

[833] I have already concluded that the bargaining agent's allegations that the employer's alleged delay paying retroactive wages and investigating Mr. Lala's misconduct, as well as the allegations that it made threats and promises to employees on the eve of the vote, did not amount to interference within the meaning of s. 186 of the *Act*.

[834] There must be some evidence of circumstances from which an inference can reasonably be drawn that the true wishes of the employees were unlikely to be disclosed in the vote.

XVIII. Conclusion

[835] Having regard to all the circumstances, I find that there is no reasonable basis to conclude that the representation vote would not disclose the employees' true wishes. I am not persuaded on a balance of probabilities that those true wishes were unlikely to be disclosed in the vote that occurred on October 19 to 25, 2016.

[836] The bargaining agent requests that the revocation application be dismissed as the ratification of the collective agreement made the application moot. It relies upon the Alberta board's decision in *Lansdowne* for the proposition that in the context of a revocation application, the subsequent ratification of a collective agreement demonstrates employee support for the bargaining agent and justifies dismissing the application.

[837] In *Lansdowne*, the Alberta board concluded that when it conducted its representation vote, the employees would have been unduly influenced by its inability to achieve bargaining results on their behalf, as it would have been the inevitable result of the employer's failure to engage in the bargaining process. As a consequence, the board directed that the ballots cast in the representation vote be set aside and destroyed.

[838] It was in that context that that board stated that it would view the subsequent ratification of the collective agreement as an affirmation of employee support for their union's role as bargaining agent.

[839] The same argument was made in *Triac*, an OLRB decision.

[840] Counsel for the union in that case argued that a ratification vote superseded the revocation vote, rendering it moot. It was suggested that the ratification vote was a better (because it was more recent) expression of employee wishes. If the OLRB had any doubt about the reliability of the ratification vote, the circumstances were such as to warrant taking a fresh representation vote. In that case, the ratification vote took place subsequent to the representation vote.

[841] The OLRB rejected the argument, stating as follows at paragraph 26:

> *26 The flaw in this argument is its failure to acknowledge the central importance in the statutory scheme in the Act of the right of employees to endeavour to terminate the bargaining*

> *rights of their union during periodic open periods. The right of employees to apply for the termination of the bargaining rights of their union is not foreclosed by the subsequent ratification of a renewal collective agreement and the existence of such an agreement. The Act contemplates that renewal collective agreements will be concluded, but they do not have the effect of closing the open periods provided in the Act. Subsection 63(18) of the Act makes that clear. The open periods are sacrosanct; the institutional parties, who may have an interest in the continuation of the collective bargaining relationship, are unable to foreclose or prevent the exercise of employee rights to terminate a union's bargaining rights during an open period. Thus a successful ratification vote and the conclusion of a renewal collective agreement do not have any adverse effect upon the validity and viability of a termination application. In a sense a renewal collective agreement (and its ratification) are subordinate to a timely termination application. The existence of the renewal collective agreement depends upon the outcome of the termination application.*

[842] I find the ratio in *Triac* persuasive. Employees have the statutory and *Charter* right to terminate the bargaining rights of their union at periodic openings, and that right is unaffected by the interests of the bargaining agent and the employer.

[843] In conclusion, I have found that the employer committed an unfair labour practice when it cancelled bargaining in November 2015 at the request of the applicant and will make a declaration to that effect.

[844] Notwithstanding this determination, I have also concluded that there is no reasonable basis to find that the representation vote would not reflect the employees' true wishes, given the events that transpired after the Board's decision of June 2016.

[845] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

XIX. Order

[846] I declare that the employer committed an unfair labour practice when it cancelled bargaining at the applicant's request.

[847] I deny the bargaining agent's request to dismiss the revocation application.

[848] I direct that the ballot box be unsealed and the votes be counted.

November 29, 2017.

David Olsen,
a panel of the Federal Public Sector Labour Relations and Employment Board