

LRB File No. 069-04

**LABOUR RELATIONS BOARD
Saskatchewan**

BETWEEN:

United Food and Commercial Workers, Local 1400

APPLICANT

and

Wal-Mart Canada Corp., operating as
Wal-Mart Canada, Sam's Club and Sam's Club Canada

RESPONDENT

BEFORE:

James Seibel, Chairperson
Leo Lancaster
Gloria Cymbalisty

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DATED at Saskatoon, Saskatchewan, on
the **4th** day of **December, 2008.**

ORDER

THE LABOUR RELATIONS BOARD, pursuant to Section 5 (a), (b) and (c) of *The Trade Union Act*, **HEREBY ORDERS:**

(a) **THAT** all employees of Wal-Mart Canada Corp. in Weyburn, Saskatchewan, except department managers, those above the rank of department manager, employees in the pharmacy and office staff, are an appropriate unit of employees for the purpose of bargaining collectively;

(b) **THAT** the United Food and Commercial Workers, Local1400, a trade union within the meaning of *The Trade Union Act*, represents a majority of employees in the appropriate unit of employees set out in paragraph (a);

(c) Wal-Mart Canada Corp., the employer, to bargain collectively with the trade union set forth in paragraph (b), with respect to the appropriate unit of employees set out in paragraph (a).

LABOUR RELATIONS BOARD



James Seibel,
Chairperson

**Labour Relations Board
Saskatchewan**

LRB File No. 069-04

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 Applicant, v. WAL-MART CANADA CORP. at Weyburn, Saskatchewan, operating as WAL-MART, WAL-MART CANADA, SAM'S CLUB and SAM'S CLUB CANADA, Respondent,

and

BARBARA WOLOSCHUK, TRENA TELENGA, KYLA GIBBS, HOLLY VANDALE, KATHY KOCH, ANGELA FEDUN, TRENT CARLSON, ELAINE MOORE, MICHAEL SIOUROUTIS, and CHARMAINE SPENCER, Interested Parties,

and

THE ATTORNEY GENERAL FOR THE PROVINCE OF SASKATCHEWAN, Intervenor

LRB File No. 122-04

TRENA TELENGA, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent

LRB File No. 123-04

KYLA GIBBS, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent

LRB File No. 124-04

HOLLY VANDALE, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent

LRB File No. 125-04

KATHY KOCH, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent

LRB File No. 126-04

ANGELA FEDUN, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent

LRB File No. 127-04

TRENT CARLSON, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent

LRB File No. 128-04

**ELAINE MOORE, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL 1400, Respondent**

LRB File No. 129-04

**MICHAEL SIOUROUNIS, Applicant v. UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 1400, Respondent**

LRB File No. 130-04

**CHARMAINE SPENCER, Applicant v. UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 1400, Respondent**

December 4, 2008

Chairperson, James Seibel; Members: Leo Lancaster and Gloria Cymbalisky

For United Food and Commercial Workers, Local 1400:
For Wal-Mart Canada Corp.:
For the Interested Parties and Individual Applicants:
For the Attorney General for the Province of Saskatchewan:

Drew S. Plaxton
John Beckman, Q.C.
Michael Nolin¹
Thomson Irvine

REASONS FOR DECISION

Background and History of the Applications and the Preliminary and Interim Proceedings:

[1] In LRB File No. 069-04, United Food and Commercial Workers, Local 1400 (the "Union"), filed an application pursuant to ss. 5(a), (b), and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act") to be designated as the certified bargaining agent for a unit of employees of Wal-Mart Canada Corp. (the "Employer" or "Wal-Mart") at its store in Weyburn, Saskatchewan. The bargaining unit applied for is described as follows:

All employees employed by Wal-Mart Canada Corp. in Weyburn, Saskatchewan, except department managers, those above the rank of department manager, and employees in the Pharmacy, Portrait Studio, Tire and Lube Express, Optical Department, and office staff.

¹ On November 21, 2005, Mr. Nolin withdrew the applications in LRB File Nos. 123-04 & 124-04 and withdrew as counsel on their behalf and on behalf of each of the applicants in LRB File Nos. 122-04, 125-04, 126-04, 127-04 & 129-04, and also on their behalf as Interested Parties in LRB File No. 069-04. No evidence was called with respect to LRB File Nos. 122-04, 125-04, 126-04, 127-04 & 129-04, and the applications were dismissed by the Board.

[2] In the application filed April 19, 2004, the Union estimated there were approximately 85 employees in the proposed bargaining unit. After the application was filed, some employees filed documents purporting to revoke their support for the application; they were advised of the Board's policy that evidence of support or revocation of support filed after an application for certification is filed will not be considered. At the time the application was filed the store did not have a portrait studio, lube and tire express or optical department.

[3] In its reply to the certification application filed May 6, 2004, the Employer stated there were 91 employees in the proposed bargaining unit. The Statement of Employment filed by the Employer lists 91 employees. However, the Employer also took the position that the proposed unit was not an appropriate unit for the purpose of collective bargaining, and that an appropriate unit would be one of all employees (whom the Employer's corporate nomenclature refers to as "associates"), the only exclusions being the store manager and four assistant managers. The Employer filed a second Statement of Employment listing 120 persons in such a unit. More specifically, the reply asserted, in summary, that: (a) the bargaining unit proposed by the Union excludes employees who share a community of interest with those in the proposed unit, and it would fragment the bargaining unit; (b) the store manager and assistant managers are the only employees that perform functions of a managerial character; (c) the department managers sought to be excluded by the Union perform "lead hand" functions but not functions normally associated with managers; (d) the employees in the pharmacy and the office staff share a community of interest with the employees, or as the Employer's nomenclature terms them, "associates", in the bargaining unit proposed by the Union.

[4] The Union did not object to the composition of the Statement of Employment.

[5] The Interested Parties sought to appear and make representations on the application by their counsel, Michael Nolin (see, f.n. 1, *supra*). They were advised by the Board that it was necessary to file a reply. On May 25, 2004, one Barbara Woloschuk filed a reply on behalf of herself and: (a) all employees that signed a petition opposing certification after the application for certification was filed; and, (b) the individual

employees named as applicants in LRB File Nos. 122-04 to 130-04, inclusive.² On behalf of all of the persons listed on the petition, Ms. Woloschuk declared, as did each of the applicants in LRB File Nos. 122-04 to 130-04, that the Union committed unfair labour practices within the meaning of s. 11(2)(a) of the Act, by engaging in improper organizing tactics. The Interested Parties and the individual applicants sought to have the application for certification dismissed, or alternatively, a representation vote.

[6] In its reply to the individual applications, the Union alleged that the applications were made on the advice of, or as a result of the influence or interference or intimidation by the Employer or its agents, and should be dismissed by the Board pursuant to s. 9 of the Act.

[7] All of the applications were consolidated for hearing. The hearing commenced on May 7, 2004, the initial issue being that of the production of documents by the Employer in response to a subpoena *duces tecum* served by the Union. The Board issued a ruling on that matter on May 24, 2004.

[8] At the hearing on May 25 and 26, 2004, the parties joined issue as follows: (a) the appropriateness of the proposed bargaining unit; (b) the admissibility of some or all of the evidence of support for the application, by reason of the allegations of Union misconduct in garnering such evidence; (c) the alleged employer influence and interference with respect to the allegations by the Interested Parties. On that date, the Board heard a number of preliminary applications, including: (a) the scope of the subpoena *duces tecum* served by the Union on the Employer seeking production of certain documents, and, (b) whether the Interested Parties must file a reply or replies to the certification Application in order to participate in the hearing.

[9] Evidence on the applications proper was heard on June 10 and 11, 2004. At the hearing on June 10, 2004, the Board ruled on the order of evidence as follows: (1) the evidence on the certification application in LRB File No. 069-04 on behalf of the Union and Employer; (2) the evidence of the Interested Parties on the certification application and on the individual applications in LRB File Nos. 122-04 to 130-04; (3) the

² Respectively, Trena Tcloga,, Kyla Gibbs, Holly Vandale, Kathy Koch, Angela Fedun, Trent Carlson, Elaine Moore, Michael Siourounis, and Charmaine Spencer.

evidence on behalf of the Union on the allegations by the Interested Parties and on the individual applications.

[10] At the hearing on June 24, 2004, counsel on behalf of the Employer requested an adjournment of the hearing to apply for judicial review of the Board's order for production of documents. The adjournment was granted.

[11] The following excerpt from a ruling by the Board dated January 27, 2005 summarises the proceedings had and taken from June 24, 2004 to that date with respect to that application:

[2] The Board commenced hearing certain preliminary matters and the substantive applications over the course of seven days on May 7, 25 and 26 and June 10, 11, 24 and 25, 2004 when, in mid-hearing, counsel for Wal-Mart applied to the Saskatchewan Court of Queen's Bench for a stay of the Board's proceedings and for judicial review of two interim decisions of the Board compelling a witness under cross-examination (presented as the representative of Wal-Mart charged with answering to a subpoena duces tecum directed to the company) to produce documents. Wright J., in Court of Queen's Bench Chambers, granted a stay of the Board's proceedings on June 28, 2004. Pending the decision of the Court of Queen's Bench on the judicial review application, tentative dates for the resumption of the hearing at the Board were scheduled by agreement of counsel for August 17 through 20, 2004. On July 23, 2004, Baynton J., in Court of Queen's Bench Chambers, quashed the interim decisions of the Board.

[3] The Union appealed the judgment of Baynton J. to the Saskatchewan Court of Appeal, obtaining, on application to Court of Appeal Chambers, an early hearing date of September 10, 2004. The parties consented to adjourn the Board's August, 2004 hearing dates and subsequently agreed to new dates in late September and early October, 2004. Those dates were again adjourned at the request and by the consent of the parties. In its unanimous decision of November 23, 2004, the Saskatchewan Court of Appeal allowed the Union's appeal, set aside the judgment of Baynton J. and reinstated the interim decisions of the Board.

[4] On December 1, 2004, by the agreement of the parties, dates were scheduled for the continuation of the hearing of this matter by the Board for nine days in February and March, 2005. At that time, counsel for Wal-Mart indicated that his client

had not determined whether to seek leave to appeal the decision of the Court of Appeal. On January 14, 2005, counsel for Wal-Mart served the Board with a Notice of Application for Leave to Appeal to the Supreme Court of Canada.

[12] The unanimous judgment of the Court of Appeal (at [2004] S.J. No. 704, 2004 SKCA 154, 257 Sask. R. 12) allowed the appeal by the Union and dismissed the Employer's application in its entirety, finding, *inter alia*, that there was no basis upon which one could find that the Board abused its powers and that the comment by the chambers judge in that regard should not have been made. The Court also noted that the Employer had not previously raised the constitutional issue at the Board and declined to consider the issue.

[13] On April 7, 2005 the Supreme Court of Canada dismissed the Employer's application for leave to appeal the judgment of the Saskatchewan Court of Appeal dismissing its application for judicial review of the Board's Orders (See, [2005] S.C.C.A. No. 13).

[14] The Employer filed a draft amended reply to the certification application on July 6, 2005, adding averments that the Union is a "company dominated organization" within the meaning of s. 2(e) of the *Act*, and that the Employer is thereby prohibited from bargaining collectively with the Union in that it would be an unfair labour practice for it to do so. The Employer did not apply for leave to amend its reply in this respect until at the hearing on November 7, 2005.

[15] The hearing continued on November 7, 8, 9, 21 and 22, 2005 and December 12 and 13, 2005.

[16] On November 7, 2005, the Board dealt with the issue of the Employer's production of certain documents, reviewing the same, *in camera*, in consideration of the Employer's objections regarding relevancy and claims of privilege. After reviewing the documents, the Board made an oral ruling that production need not be made of the documents because they did not meet the test of relevancy; accordingly, there was no necessity to rule with respect to the claims of privilege.

[17] Also on November 7, 2005, the Employer applied for leave to amend its reply to include the averments with respect to the allegation that the Union is a "company dominated organization" within the meaning of s. 2(e) of the Act. The Board heard argument with respect to leave to amend and with respect to the merits of the proposed amendment.

[18] On November 8, 2005, the Board continued to hear evidence in the case for the Employer with respect to the application proper. The Employer closed its case that day.

[19] At the hearing on November 9, 2005, Mr. Nolin led the evidence on behalf of three of the Interested Parties (Barbara Woloschuk, Elaine Moore and Charmaine Spencer) and two of the individual unfair labour practice applicants (Elaine Moore, LRB File No. 128-04, and Charmaine Spencer, LRB File No. 130-04). Cross-examination of those witnesses by counsel on behalf of the Union included the issue surrounding Employer interference in the making of the applications and s. 9 of the Act.

[20] At the start of the hearing on November 21, 2005 Mr. Nolin closed the case on behalf of his clients and withdrew as counsel on behalf of the individual applicants in LRB File Nos. 122-04 to 130-04, inclusive, and the Interested Parties on the certification application, LRB File No. 069-04. The applications in LRB File Nos. 123-04 (Kyla Gibbs, Applicant) and 124-04 (Holly Vandale, Applicant) were withdrawn. The applications in LRB File Nos. 122-04 (Trena Telenga, Applicant), 125-04 (Kathy Koch, Applicant), 126-04 (Angela Fedun, Applicant), 127-04 (Trent Carlson, Applicant) and 129-04 (Michael Siourounis, Applicant) were dismissed for lack of evidence on the motion of counsel for the Union. Therefore, the remaining extant individual applications are LRB File Nos. 128-04 (Elaine Moore, Applicant) and 130-04 (Charmaine Spencer, Applicant). On that date, Mr. Plaxton, counsel on behalf of the Union, adduced his client's evidence with respect to the issues raised by the Interested Parties and the remaining unfair labour practice applications. Both Mr. Nolin and Mr. Beckman, counsel on behalf of the Employer, were allowed to cross-examine. No evidence was called in rebuttal. That day marked the close of all of the evidence.

[21] At the hearing on November 22, 2005, the Board orally delivered its ruling with respect to the application for amendment regarding the allegations that the Union is a "company dominated organization", dismissing the application and advising that written reasons would be provided in the omnibus reasons for decision on the entire case.

[22] Also on November 22, 2005, the Employer filed a Notice Under *The Constitutional Questions Act*, dated August 17, 2005, stating its intention to raise the issue that s. 9 of the *Act* is unconstitutional in that the provision: (a) prohibits employers' expression; (b) penalizes employers who express opinions or belief about unions "in that it authorizes the Board to compel employers to bargain collectively with the union in circumstances where that union may not be supported by the majority of employees"; (c) subjects employers "suspected of anti-union sentiments...to inquisitorial document production orders of the Board"; infringes s. 2(b) of the *Charter* which limitation is not demonstrably justified in a free and democratic society; (d) infringes s. 2(d) of the *Charter* by restricting the freedom of an employer to associate with its employees and authorizes the Board to compel association with a union through collective bargaining, which limitation is not demonstrably justified in a free and democratic society.

[23] Argument of the constitutional issue, and of the other issues in the case proper, was set for December 12 and 13, 2005. Mr. Thomson Irvine, Crown Solicitor, appeared on behalf of the Attorney General for Saskatchewan as Intervenor.

[24] Late in the proceedings, by letter dated November 28, 2005, after all of the evidence was in, Mr. Beckman, counsel on behalf of the Employer, gave notice that he intended to raise the argument that all of the evidence of support filed by the Union should be disregarded because the Union had engaged in bribery to secure support.

[25] On December 12 and 13, 2005, the parties presented their arguments on the constitutional issue and on the applications proper.

[26] Since then there have been further proceedings affecting this case. In June 2006, six-months after the close of the case before the Board, the Employer made an application to the Saskatchewan Court of Queen's Bench for an order prohibiting "the Board as presently constituted from hearing and/or making any orders involving Wal-

Mart Canada Corp.", including in the present matter, on the alleged grounds that the Board was biased against it or that there was a reasonable apprehension of bias. Wal-Mart had not raised this issue with the Board. The Hon. Mr. Justice Gerein struck nearly all of the material filed by Wal-Mart in support of the application on the basis that it was either hearsay or unsworn, and dismissed the application in its entirety, finding that there was no basis for the allegation of bias: see, [2006] S.J. No. 463.

[27] Wal-Mart appealed the decision to the Saskatchewan Court of Appeal. The unanimous Court orally dismissed the appeal on November 15, 2006. Written reasons for its decision were issued on December 19, 2006: see, [2006] S.J. No. 788; 2006 SKCA 142; 289 Sask. R. 20.

[28] Wal-Mart filed an application with the Supreme Court of Canada seeking leave to appeal the decision of the Saskatchewan Court of Appeal. The Supreme Court denied leave to appeal on April 19, 2007: see, [2007] S.C.C.A. No. 22.

The Evidence:

[29] For the purposes of the issues on the certification application, including the structure and composition of the bargaining unit and determination of the level of support, the Union and Employer filed an agreement as to the identity of the persons occupying the positions in dispute.

[30] For simplicity sake, and to avoid the necessity of witnesses having to testify more than once, the evidence on all of the applications was heard in one proceeding. Following is a brief summary of what was fairly voluminous *viva voce* and documentary evidence. While counsel for the Employer had prepared transcripts of certain portions of testimony in the case, we have not used same, preferring our own notes.

Greg Eyre

[31] Greg Eyre has been a Union representative for more than 15 years. He testified on behalf of the Union. He was involved as a coordinator in the organization drive regarding the Wal-Mart Weyburn store.

[32] Mr. Eyre referred to the general difficulties the Union currently experiences in trying to organize broad retail operations, because of the high rate of turnover of employees – it is difficult to determine who all is employed at any given time. He said that the Union and other unions have tried to organize bargaining units of Wal-Mart employees in both Canada and the U.S. many times in past years with no long-term success. He referred to several published labour relations tribunal decisions evidencing some of these attempts.

[33] With respect to the Union's position that the pharmacy ought not to be included in the proposed bargaining unit, he referred to certain corporate registry documents pertaining to the status of the Employer and of the pharmacy department in the Employer's Weyburn store. The Employer, Wal-Mart Canada Corp., is a federally incorporated entity with its registered office in Nova Scotia. It is registered extra-provincially in Saskatchewan. The appellations "Wal-Mart", "Wal-Mart Canada", "Sam's Club" and "Sam's Club Canada", are registered business names. "Wal-Mart Pharmacy (Sask.) Limited" is a Saskatchewan corporation with its registered office in Saskatoon. It has registered the name "Wal-Mart Pharmacy" as a business name. The 18 directors of Wal-Mart Pharmacy (Sask.) Limited include what appears to be the 12 individual managing pharmacists in the pharmacies in the Employer's stores in Saskatchewan, including one Colleen Cowan in the Weyburn store. The shareholders include Wal-Mart Canada Corp. in Regina, and the president and CEO.

[34] Mr. Eyre testified that the Union had previously represented some pharmacists in Saskatoon employed by Westfair Foods Ltd. and Saskatoon Cooperative Association Limited, but negotiated their removal from the bargaining units because of the difficulties associated with a shortage of pharmacists – the collective bargaining agreements could not keep up with the high wage rates they commanded of more than \$40 per hour and rising quickly, and the Union felt they could not be effectively represented. In the present case, the Union is essentially seeking to represent the non-supervisory floor staff, for example, cashiers, floor clerks, night stockers and cleaning staff.

[35] Mr. Eyre testified that in his experience, departmental supervisors do not have an integral community of interest with the ordinary lower-level staff, because they

are moving up in the company and identify more closely with higher management. The Union represents workers at some of the Employer's partial competitors, The Real Canadian Superstore and The Real Canadian Wholesale Club.³ The department supervisors are not included in the bargaining units of either of those chains. Mr. Eyre explained that, while the original certification orders for these included "department managers", they were amended in 1985 to exclude them and the employer changed their title from "department manager" to "department supervisor". He further explained that the inclusion of department supervisors in a bargaining unit has a tendency to stifle candid complaints by employees about individual supervisors, creating an atmosphere of distrust; many decertification attempts are led by supervisors in bargaining units, because of a tendency to identify with management. The department supervisors at these competitors' chains only have a right to recommend discipline of employees in their departments, but cannot impose it – indeed, even the store managers can only reprimand, but not suspend or terminate. While these supervisors are involved in the hiring process, they do not have the final say. There is a Real Canadian Wholesale Club store in Weyburn.

[36] Mr. Eyre referred to another example of problems the Union has encountered because supervisors or "lead hands" have been included in the bargaining unit with ordinary service or production staff. When the Union applied for certification at Peak Manufacturing in North Battleford, it sought to exclude the lead hands, but in the Board's order they were included. During the first two open periods following certification, decertification attempts were led by one or more of the lead hands, creating an unstable situation during the early period of the new bargaining unit, and the employer at the plant has now proposed that they be excluded from the bargaining unit during the latest round of bargaining.

[37] Mr. Eyre further submitted that the Employer's formal "Store-Within-a-Store" ("S.W.A.S.") operational program, where each department is established as an essentially discrete enterprise and department managers are encouraged to treat the department as their own store, emphasizes the potential divide between them and the subordinate floor staff working in their departments.

³ The two organizations partially compete with Wal-Mart in that Wal-Mart has more extensive selection of hard and soft merchandise and a lesser selection of groceries, while the former have extensive grocery lines

[38] In the present situation, Mr. Eyre testified that, as far as he was aware, the floor staff and cashiers did not have much interaction or involvement with the office staff – the latter, as might be expected, largely work directly with and for management in the office, rather than down on the store floor. He said that he did not know whether the floor staff move from department to department.

[39] With respect to the viability of the proposed bargaining unit, Mr. Eyre said that similar units have proven their effectiveness at competitors' operations.

[40] Mr. Eyre testified that the organizing drive at the Weyburn store ran from April 16 to 18, 2004, and the application was filed with the Board on April 19, 2004. Approximately 12 persons, including local and national union representatives and some members employed in other workplaces represented by the Union, were involved. Any inexperienced organizers worked with an experienced organizer. He said that it is of no advantage to the Union to mislead potential members because it could result in a weak bargaining unit. In general, prospective supporters are not given any guarantees, but are told what the Union may be able to accomplish for them and what has been achieved elsewhere. Common themes are wages, benefits and recognition of seniority. Confidentiality of the employee's choice is a key element because they are often afraid of their employer finding out. The issue of whether there is likely to be a representation vote or about the rescission of a certification order if one is obtained are not usually discussed unless an employee asks. Employees are told that if support is obtained from fifty per cent plus one of the employees, the Union will apply for a certification Order. In the present case, Mr. Eyre testified that the Union received only an inquiry from one employee about revoking their support; it was few days after the certification application was filed, and the person was advised that they could call the Board.

[41] In cross-examination by Mr. Beckman, Mr. Eyre confirmed that the Union and Employer were agreed that at least the store manager and assistant managers be excluded from the proposed unit. Based on the Statement of Employment, there are 91 employees in the proposed unit. The addition of department managers and other excluded employees would increase the number to 120. Mr. Eyre admitted that he had

and a lesser selection of hard and soft merchandise.

no personal knowledge of the job functions of persons in the latter group. He acknowledged that in the Union's application for certification of the Employer's Thompson, Manitoba, store, it sought to include the department managers in the bargaining unit, but lost the representation vote.

[42] In cross-examination by Mr. Nolin, Mr. Eyre agreed that organizers have a duty to be honest in speaking to prospective members. He testified that common ways for the Union to obtain contact information regarding employees is from the telephone directory, the internet and from co-workers and others in the community.

[43] Further in cross-examination by Mr. Nolin, Mr. Eyre denied his suggestion that one of the organizers, one Matthew Rose, a former employee of Wal-Mart in Weyburn, was instructed to "purchase" signatures of support from employees. The arrangement was that he was paid a set amount for each signature in support that he was able to obtain.

Kevin Vandale

[44] Kevin Vandale is employed at the Weyburn store as a floor maintenance person working the night shift from 11 p.m. to 7 a.m. He was called to testify on behalf of the Union. There are approximately 15 persons working in the store on nights. He reports to the night assistant manager. From management communications, he said that the department managers are in charge of their respective departmental S.W.A.S.'s, responsible for ordering the merchandise and the activities of floor employees in their departments. When he was hired, he was instructed with respect to the discipline process, referred to as "coachings". He testified that he would not be comfortable having department managers in the bargaining unit because he viewed them as "a branch of the management team". He said this was based on his understanding that they are the leaders of their S.W.A.S. and "run the employees" in their department.

[45] Mr. Vandale testified that on one occasion, at the unusual start-of-shift meeting with the night assistant manager, "Shannon", she advised the employees that the Union had applied for certification and that if they had any questions they could speak to her or "Dave", the day assistant manager. The store manager, Bev Ginter, made a similar statement at about this time. What they said was similar to what was

contained in a written "Communication for Weyburn Associates" document dated 21 April 2004.

[46] Mr. Vandale testified that he did not know the Interested Party, Barbara Woloschuk, but did know the Interested Party, Trena Telenga, who worked in the photo department. The Interested party, Holly Vandale, is his sister-in-law.

[47] In cross-examination by Mr. Beckman, Mr. Vandale agreed that he did not know exactly what department managers did, and that he was not aware that any of them had hired or disciplined anyone. He understood the personnel manager to deal with the payroll, but did not know what else they did.

[48] In cross-examination by Mr. Nolin, Mr. Vandale testified that he understood that signing a union support card meant that if enough cards were signed there would be a Union, and that one was authorizing the Union to represent one in collective bargaining.

Colleen Cowan

[49] Colleen Cowan has been the pharmacist at the pharmacy in the Employer's Weyburn store since it opened in November 2003. She came to Weyburn from the Employer's Yellowknife operation, where she started in 2002. She testified in response to a subpoena *duces tecum* served by the Union. She said that she looked for relevant documents and found none, but was told by her superiors that she could not print, copy or take any documents out of the store.

[50] Ms. Cowan testified that she is a registered pharmacist and that, according to a store organizational chart, the pharmacy is a "specialty department". Her duties include the filling of prescriptions and supervising the over-the-counter area with her over-the-counter ("OTC") manager, Jeanine Hansen, who she said she considered to be the "department manager" in the pharmacy. In fact, she said she hired Ms. Hansen who was previously a department manager in a store department, and before that, a cashier. Other persons working in the pharmacy include a pharmacy student and the over-the-counter associate, each of whom she hired.

[51] While Ms. Cowan has overall responsibility for the stocking, display, promotion and advertising of the items for sale, the OTC manager does the ordering. Ms. Cowan does the shift scheduling of the persons in the pharmacy. The OTC associate works only in the pharmacy and not in any other store department with some small exception. While the Employer sets the initial prices for what is stocked, both she and the over-the-counter manager have the authority to lower prices to be competitive, without having to account to anyone else. Ms. Cowan also receives a S.W.A.S. report for the area which includes third-party billing information and the pharmacy job descriptions.

[52] Ms. Cowan reports to the store manager, Bev Ginter, but said she also works as a team with the assistant manager to solve problems. She is a director of Wal-Mart Pharmacy (Sask.) Limited, as are the other pharmacists in Wal-Mart's stores in Saskatchewan. She did not know who owned the company. Referring to her letter of offer of employment from Wal-Mart as a "Full-time Pharmacist Manager", Ms. Cowan confirmed that it contained a non-compete clause. She identified the Pharmacy Permit issued by the Saskatchewan Pharmaceutical Association to "the Proprietor Wal-Mart Pharmacy (Sask.) Limited and its Manager C.A. Cowan". She signed the application for the permit as well as for any renewals.

[53] With respect to the OTC associate who works in the pharmacy under the direct direction of the OTC manager, Ms. Cowan said that she came from a Wal-Mart pharmacy in Alberta. After being screened by Ms. Ginter and the assistant managers, Ms. Cowan was given the responsibility of final approval for her hiring from among the other applicants. Ms. Cowan also hired the OTC manager. She has not had occasion to fire anyone, and felt that she would take such a matter to the store manager for final decision. She said that she "basically decided" any promotion in the department. She performs annual performance evaluations of the staff in the pharmacy.

[54] Based on her responsibilities, Ms. Cowan said she considers herself to be the equivalent of the store assistant managers. She works 10 hours per day and does not take breaks. She uses a relief pharmacist to cover the additional open hours. In part, her compensation is based on the performance of the pharmacy, and only she, among all the persons that work in the pharmacy, is party to a bonus system. She

agreed that the pharmacy is "run as her own drug store" and the OTC manager is "part of her team". Ms. Cowan does not attend meetings with the other managers in the store, although she did attend meetings with the store manager and the assistant managers while the store was preparing to open. She described herself as "out of the loop" with the operation of the rest of the store. The OTC manager attends weekly meetings with the department managers, assistant managers and the store manager, reporting back to Ms. Cowan. Ms. Cowan said she considers herself to be "part of management, and management is not usually part of unions".

[55] In cross-examination by Mr. Beckman, Ms. Cowan said the OTC manager may work with the department manager in the adjacent health and beauty department to display pharmacy items if extra space is required. If it is especially busy in that department, she may also assist customers, as may the OTC associate, whose main task is to work with the OTC manager.

George Prescott

[56] George Prescott is employed at the Weyburn store as a night shift maintenance person. He usually works with three other persons in that area on that shift. He previously worked for the Employer in a similar capacity in both its North and South Regina stores. He was called to testify on behalf of the Union. He reports to the assistant or "junior" (his term) night manager. He said there was also what he called a "support manager" on the night shift.

[57] Mr. Prescott said that when he was hired he asked about becoming an assistant manager, he said he was told that he would first have to be trained as a department manager. Department manager positions are posted in the workplace and store "associates" can apply. Open assistant manager positions are also posted. When asked about the perceived role of department managers, Mr. Prescott replied that being in charge of their departments, they were between upper management and associates. While he thought that they had to work with management, he did not think that they disciplined anyone. Mr. Prescott said he would not be comfortable if department managers were included in the bargaining unit, "because any person or title that is classified as management would not join a union." He said he must obtain permission from the assistant night manager or support manager in order to access the Employer's

internal system to find information on other jobs and store news, but he did not think they were involved in imposing discipline.

Cheryl Ginter

[58] Cheryl Ginter (no relation to the Weyburn store manager, Bev Ginter) had been employed by the Employer as a part-time courtesy desk associate, then as a department manager for a short time, then as an assistant manager in stores in Saskatchewan, Alberta, then as a store manager at stores in Manitoba and Ontario, then as western Canada regional personnel manager, and, finally, as the current district manager for southern Saskatchewan, including the Weyburn store, and some stores in Manitoba. She was called to testify on behalf of the Employer in response to the Board's order for document production of 24 May 2004, bringing with her many documents received by her from her superiors.

[59] Ms. Ginter confirmed that the Weyburn store does not have a portrait studio, optical department or "tire and lube express" department, as do some of the other stores. She testified that there are 4 S.W.A.S.'s in the Weyburn store, each with an assistant manager: (1) hardlines, including general merchandise and the front-end (i.e., cashiers); (2) homelines, including small appliances, furniture, bedding, garden centre and crafts; (3) softlines, operations and specialty, including apparel, specialty departments, the cash office, UPC coding, maintenance and sales and receiving associates; and, (4) overnight. The shoe "division" co-ordinates and reports with the softlines S.W.A.S. For accounting and financial reporting purposes, the photo and pharmacy areas are included in the hardlines S.W.A.S. There are 19 department managers that "participate" within the 4 S.W.A.S.'s. (It is not clear whether this number includes the "shoe division manager", which position has a description separate from that of "department manager".)

[60] Ms. Ginter referred to the written position description for "department manager". The general summary states that, "a Department Manager supervises and co-ordinates activities of Associates in department(s) of a Wal-Mart store ...". The document then lists the "primary responsibilities", including the main topics: "provides excellent customer service"; "practices safe work habits"; "maintains departmental operational standards"; "maintains department merchandising standards", and

"additional responsibilities"; each of which is broken down into more specific items. Ms. Ginter testified that department managers often assist each other to complete price changes and change modular displays.

[61] Ms. Ginter testified that department managers do not play a part in final decisions on hiring. Stores usually have a "recruiting committee" that makes recommendations on hiring. The committee may include associates "that exemplify the company's culture and have good work attitudes". The store manager has the final decision on hiring.

[62] Ms. Ginter also said that department managers have no part in the demotion, promotion, discipline, discharge, shift scheduling, salary increases, performance appraisals or "coaching" of associates. However, it must be noted that the job description states that the department manager, "assist[s] the Management Team with the Stocker's performance appraisals, coaching and commendations". Ms. Ginter maintained that they were called "managers" because they manage product, not people. She said that a problem arises for the Employer if the department managers are excluded from the bargaining unit, because the work in that department would be disrupted if the manager went on vacation – it would affect the "cohesiveness" of the department. It is necessary for the department managers and the associates to be a "team". However, in cross-examination she acknowledged that temporary performance of their duties by bargaining unit members can be a matter dealt with in collective bargaining.

[63] Ms. Ginter confirmed that certain documents specific to department manager functions refer to "your business", and she agreed that a department manager should look at the department as "their business" which, she said, is "the department manager's philosophy". Like the assistant managers, it is among their duties to perform "comparative pricing".

[64] The department managers are in a different pay grid, called "Group 4", from that of the associates, who are in pay grids Group 1, 2 or 3.

[65] Ms. Ginter also referred to the job descriptions for pharmacy manager, pharmacist, pharmacy OTC manager, pharmacy OTC associate, shoe division manager, photo lab manager, invoice associate, UPC associate, claims associate, accounting associate and personnel manager.

[66] The formal position description for "shoe division manager" is different from that of "department manager". It includes, *inter alia*, the requirements that the incumbent "have complete knowledge of competition at all times", including "check the competition for comparative pricing", "make sure all associates are properly trained", "(C.B.W.A.) Coach by walking around", "correct unsafe conditions/behavior", "assign duties to sales floor associates", "complet[ion] of monthly sales floor associate's evaluation forms", attendance at S.W.A.S. meetings, and some direct reporting requirements to the store manager and district manager. In addition, Ms. Ginter stated, the incumbent is involved in the performance evaluation, hiring and promotion processes. The incumbent is also paid a salary, as opposed to an hourly wage.

[67] With respect to the position of "photo lab manager", Ms. Ginter testified that the position has much the same authority as the pharmacy manager and the shoe division manager. Mobility of the incumbent outside the department is restricted. The incumbent performs secondary hiring functions for the department, and is involved in the performance evaluation, discipline and discharge processes. It is also a salaried as opposed to an hourly wage position. The position description also requires the incumbent to "maximize profit" in the department, perform "regular competition checking", "order and maintain...inventory", train associates, "develop action plans for correction" of profit and loss discrepancies. The reporting line is to the assistant manager.

[68] With respect to the position of "pharmacy sales associate", referred to by other witnesses as "over-the-counter associate", Ms. Ginter testified that the position has no managerial responsibilities. She said that while the incumbent's primary duties are in the pharmacy area, they may assist in the adjacent health and beauty and stationary areas. They may operate the pharmacy register, and must be knowledgeable with respect to the products in the area.

[69] Ms. Ginter testified that the store manager and assistant managers share the general office with the invoice associates and UPC associates. The cash office where the accounting associates work is a separate secure office.

[70] With respect to the position of "invoice associate", Ms. Ginter testified that persons in the position obtain the invoices, match them to the products and make payment to the suppliers. Their work location is in the office with other operations staff. She said that they "could" assist in the receiving or claims areas if required. Their general job summary requires them to "maintain store finances, financial integrity and profitability" by performing their specific duties. They have no supervisory responsibilities and are paid an hourly wage.

[71] With respect to the position of "UPC associate", Ms. Ginter testified that the position is responsible for ensuring that all bar codes are able to scan, and are set to the correct prices. They work with the department managers and interact with the cashiers as required. Their general job summary requires that they "maintain pricing integrity and financial accuracy and ensure store systems are operable at all times" by performing their specific duties. They have no supervisory responsibilities, and are paid an hourly wage.

[72] With respect to the position of "claims associate", Ms. Ginter testified that they are responsible for product returns to the store by customers. In this regard, they are involved with the customer service staff. They are also responsible for handling product returns from the store to suppliers and associated claims. They provide the "return authorization numbers" to the department managers. She described them as "office-type" staff. Their general job summary requires them to "obtain proper credit from all vendor partners and control inventory" by performing their specific duties. They have no supervisory responsibilities.

[73] With respect to the position of "accounting associate", Ms. Ginter testified that the position processes the cash from the registers, and makes it into a deposit for signature by management. The two employees assist with the physical transfer of money from the cash registers to the locked office in which they work. More specifically, they must balance the cash office and the registers daily, research overages and

shortages, prepare the cash drawers and floats for refunds, balance monthly consolidated cash reports. They have no supervisory responsibilities.

[74] With respect to the position of "personnel manager", Ms. Ginter testified that the position assists with co-ordinating job applicant interviews and assists with hiring. She said the incumbent is not involved in the promotion or demotion processes, but is involved in the pay increase process. The incumbent also prepares the paperwork for the discipline and discharge processes and has custody of all confidential employee files. The incumbent also prepares the employee shift schedules using availability information. Primary responsibilities also include, "work[ing] with the management team to ensure all company policy and procedures are followed with respect to the recruitment and selection of associates", "co-ordinates all training for recruiting and selection committee members", "review[s] [employment] applications with the recruiting and selection committee", "assists in the review of potential associate's references", maintains the training room, "maintain[s] personnel files with the proper information", "coordinate[s] the training of new and experienced associates with the management team". The incumbent also attends management team meetings to review the needs for new hires and other personnel matters.

[75] Ms. Ginter confirmed that Wal-Mart Canada Corp. is a wholly-owned subsidiary of Wal-Mart Stores Inc. with its international head office located in Bentonville, Arkansas. The directors and shareholders of the Employer are all located in the U.S. Senior officers of the U.S. parent company are among the directors of the Employer. The Employer's financials are included in those of the U.S. parent, and shares are traded without differentiation on the New York Stock Exchange. A person from each of the Employer's stores in Canada including Weyburn participates in the annual meeting of shareholders in Bentonville. In cross-examination by Mr. Plaxton, she agreed to the effect that "in reality it is one big enterprise" and ultimate control lies with the U.S. parent company.

[76] Ms. Ginter testified that one or two employees approached her with questions during the Union's organizing drive, but she could not recall who they were. She spoke to assistant manager Jodi-Lynn Chartrand (phon.) who had been contacted by Interested Party, Holly Vandale.

Bev Ginter

[77] Bev Ginter has been the manager of the Weyburn store since it opened. She started with the Employer in 1994 as an associate, then department manager, then assistant manager, then a co-manager, and currently store manager. She testified on behalf of the Employer.

[78] Ms. Ginter added some information and opinion in her testimony regarding certain of the disputed positions. She testified that the "department managers" have no personnel functions and do not manage people, but "give guidance and direction" to associates. They essentially control the movement of merchandise into and out of the store. It is their job to ensure that their department is profitable. They are accountable to an assistant manager. Along with the store manager and assistant managers they are responsible for comparison pricing, i.e., with respect to the Employer's competitors.

[79] Ms. Ginter said it would be a problem if the department managers were not in the bargaining unit "because all of us work together as one big team". Indeed, when asked in cross-examination by Mr. Plaxton if that meant that the store manager and assistant managers should be in the Union as well, she replied, "yes", and said the store could not function if everyone was not in the Union. But when later asked again how it would be a problem if the department managers were not in the bargaining unit, she said she did not know.

[80] Ms. Ginter said the "pharmacy OTC manager" is like any other department manager, except that they alone are allowed behind the pharmacy counter. The "shoe division manager" is a specialist in that kind of merchandise. She said they have no personnel functions, but said they have "input" into performance evaluation of associates. All of the clerical-type associates work in the office, but may help elsewhere in special circumstances.

[81] Ms. Ginter said she learned of the Union's organizing drive from an assistant manager. She then contacted Cheryl Ginter who told her to call the Employers "Morale Hotline", a special telephone number for managers and assistant managers to

the Employer's operational offices in Mississauga, Ontario, when, *inter alia*, union activity is detected. The Employer dispatched a Ms. Wirta (phon.) from that office to the Weyburn store along with a lawyer.

[82] Ms. Ginter said she could not recall how many associates spoke to her about the Union, but it was close to 90 per cent of them. She said she told them to call the Board or go to an internet website called labourwatch.com. She admitted that she drafted the document entitled "Communication for Weyburn Associates" that advised them they could speak to her about the Unions certification effort, but does not mention contacting the Board for information. She said she was contacted by some of the Interested parties or individual applicants, among them, Trena Telenga, Kyla Gibbs, Angela Fodor, Charmaine Spencer, Michael Siourounis and possibly Elaine Moore. Ms. Ginter said that perhaps 15 to 20 employees asked her questions during the signing of the statement of employment at the store, including whether it was a vote in favour of the Union. She said she referred some of them to Mr. Elson, who was in attendance on behalf of the solicitors for the Employer.

Barbara Woloschuk

[83] Barbara Woloschuk is one of the Interested parties. She was called to testify by Mr. Nolin. At the time the certification application was filed she was a store associate; at the time she testified in November 2005, she had been promoted to department manager in February 2005. She said no one from the Union ever talked to her about joining the Union, but she was nonetheless upset by the organizing attempt and determined to do something about it. She talked to co-workers (eventually 70 or 80 of them) about her concerns about a union. She said that the primary concern of the employees that she spoke to was that "they were scared". When asked in cross-examination what the employees were scared of, she replied "of paying union dues", and, she said, that when the Employer closed its store in Jonquiere, Quebec, "it scared us".⁴ (Other matters that persons advised her they were afraid of were hearsay, which we have determined will not be given any weight.)

⁴ The Employer closed the store in Jonquiere, Quebec, shortly after a successful certification application by the Union. Issues regarding the closure are pending hearing by the Supreme Court of Canada. The Union

[84] Ms. Woloschuk contacted Mr. Nolin within a month after the certification application was filed. She had seen his father's name in a newspaper report in connection with a dissident employees group in an organizing attempt at the Employer's North Battleford store. She contacted Mr. Nolin through his father.

[85] After the certification application was filed, Ms. Woloschuk circulated a petition for employees to sign indicating that they did not want the Union. In cross-examination by Mr. Plaxton she acknowledged that Mr. Nolin's father had sent her the form for the petition by fax from the Wal-Mart store office in North Battleford to the Wal-Mart store office in Weyburn. One Kelly (last name unknown), a UPC associate in the office, gave her the document. She attached the petition to the reply she filed with the Board. She said she might have used the store's photocopier. Ms. Woloschuk testified that she did not have anyone sign the petition in the workplace.

[86] Mr. Nolin came to Weyburn once to meet with Ms. Woloschuk, but she could not remember when. She arranged for several other employees to attend the meeting as well. That was the only time Mr. Nolin came to see them. She was later involved in the declaration of the reply and the individual unfair labour practices against the Union by those applicants in attendance at the offices of a different lawyer in Weyburn.

[87] When asked what she and the other Interested Parties were asking the Board for, Ms. Woloschuk replied, "to recognize that we do not want a union", but said that she did not really know what the filed reply was.

Elaine Moore

[88] Elaine Moore is one of the Interested Parties and the applicant in LRB File No. 128-04. She has been employed at the Weyburn store since it opened. She is a "day processor" in the fashions department. She was called to testify by Mr. Nolin.

[89] Ms. Moore testified that one evening two Union representatives called at her home "late at night" (in cross-examination she said it was about 7 p.m.). They had

has filed an unfair labour application in Saskatchewan in connection with the alleged effect of the closure on the exercise of employee rights under *The Trade Union Act* by the employees in Weyburn.

her name, address and telephone number. She said she felt intimidated "because [she] thought the Employer had given it to them". She said they gave her some written material including "the compensation for Wal-Mart's chief executive. She did not think that information would be available to anyone so she again thought they might be working for the Employer. She signed a Union support card, but said the individuals told her it was just a record to verify that they had visited her. She said she thought it was "unfair" how she was approached, and she was "intimidated and scared" because her "privacy was broken". She said she did not find out the significance of what she had signed until the next day – that she was "voting" for the Union. When asked in-chief whether she would have signed the card otherwise, Ms. Moore replied that she "probably wouldn't". Ms. Moore wrote a letter to the Board about the matter after the application for certification was filed. She seeks to have her card revoked.

[90] Ms. Moore acknowledged that the card she signed was headed "Membership Application" in comparatively large type, and that she read the entire card and filled it out before signing it. She said she did not understand the card, but agreed that she did not tell that to the individuals at the door "because [she] was in a rush". When asked in cross-examination whether she signed the card because she was in a rush, she replied, "No ... not ... sort of ... probably". She said she signed it because she thought they were working for the Employer, but she agreed that they did not tell her anything to that effect. Ms. Moore reiterated that she thought so because they had her contact information and she thought it must have come from the Employer; however, she agreed that her name, address and telephone number were in the telephone directory. She also agreed that the way in which the individuals called at her home was no different than a canvasser.

[91] In cross-examination by Mr. Plaxton, Ms. Moore was asked what her application was about. She replied to the effect that she "wanted the Board to understand how we have been treated". When asked whether Mr. Nolin was her lawyer, she replied, "No, I have nothing to do with him – my spokesman Barb Woloschuk does." When asked whether she authorized Mr. Nolin to commence an unfair labour practice application on her behalf, she replied, "No, I did not tell him to".

[92] Ms. Moore paid \$5.00 to Ms. Woloschuk for Mr. Nolin's assistance. When asked in cross-examination if she thought that such a small sum was unusual for legal advice, she replied to the effect that, "No. I thought it was all coming out of Wal-Mart – I thought Wal-Mart was paying for him, so I don't need to worry about it."

Charmaine Spencer

[93] Charmaine Spencer is one of the Interested Parties and the individual applicants in LRB File No. 130-04. She has been employed at the store since it opened as a dairy and frozen food retail associate. She was called to testify by Mr. Nolin.

[94] Ms. Spencer testified that she was visited by two women in mid-April 2004 at about 8 a.m. They said they were from the Union, that some associates from the store had called the Union, and that they were there "to represent the people who wanted the Union in". They provided her with some written material about "what the Union could do for you". Ms. Spencer said they also told her that over 60 per cent of associates had "voted" for the Union. They gave her a card to sign. She said she asked them what it was for, and they told her it was so "their boss would know they had come to visit me." She identified the Application for Membership card as similar to the one she then signed.

[95] Ms. Spencer testified that she asked the individuals how they had her name and address, and was told they got the information from some of her co-associates at the store. She said she was concerned that they had that information. A few days later, Ms. Spencer said, she learned from her co-workers that what she had signed was "a union card or a vote for the union". She said she was scared. She raised her concerns with the store manager, Bev Ginter, mainly about how the Union obtained her contact information.

[96] Ms. Spencer met with Mr. Nolin when he came to Weyburn. She said she felt she had been coerced into signing a union support card and wanted to revoke it "based on the lies I was told". She asked Mr. Nolin to file an unfair labour practice against the Union. When asked in-chief what she hoped the Board would do, she replied to the effect that, "Hope it will decide the union should not be able to come to see people and use all kinds of vulgar means of lying and cheating to get someone to sign a

card ... and deceiving ... and dishonest". When asked in-chief if she would have signed a card if she knew that the Board could certify the union if a majority of employees signed support cards, she replied, "Probably not".

[97] In cross-examination by Mr. Plaxton, Ms. Spencer acknowledged that, in fact, the two Union representatives visited her a second time that same day. She and her husband sat down with the Union representatives and she and her husband provided them with information about other co-workers on a list they were shown; however, later in her cross-examination, she denied that she gave them any information.

[98] With respect to the signing of the Union card, Ms. Spencer admitted that she read it before signing it, and that she knew that it was an application for membership in the Union, answering in response to counsel's question, "Yes. That is what I understood". She said that she signed because she "was in a hurry and was busy". However, later in her cross-examination, she denied that she knew what the document was, and that she signed it, "Because [she] was told to".

[99] Ms. Spencer acknowledged that the Union representatives advised her to the effect that, they represented a trade union, the Employer did not know they were meeting with her, and the Union would try to get her better benefits and higher wages. When asked why she thought they were there if not to get her support, she replied that she did not know. She did not attempt to get back the card she had signed.

[100] Ms. Spencer admitted that she signed the petition prepared by Ms. Woloschuk in the store during her lunch break. She admitted that she has received two wage raises since she filed her application, but the other employees did as well.

[101] With respect to her unfair labour practice application, Ms. Spencer said that Barb Woloschuk approached her in the store about making the application. She contributed \$5.00 for Mr. Nolin's expenses in representing her. She does not expect to be billed for his services. She admitted that Wal-Mart had paid for her lost time and wages to meet with Mr. Nolin about her application and was also paying her for her lost wages for the time to attend to testify at the Board. Her time off and recompense for lost pay were authorized in a meeting she had with the personnel manager, whom she had

specifically advised that she was to meet with Mr. Nolin about the Union application. In addition, she said there were a "few others" who met with the personnel manager at the time for the same purpose.

Nora Butz

[102] Nora Butz has been a member of the Union for more than 30 years, and a member of its executive board for 12 years. She is presently an employee and representative of Local 247. She has been the national chair of the Union's Human Rights Committee for 7 years, and was previously appointed by order-in-council as chairperson of the British Columbia Human Rights Advisory Council. She has long experience in organizing in the retail, food, hotels, manufacturing and meat packing sectors. She was called to testify on behalf of the Union.

[103] Ms. Butz testified that she was involved in the organizing drives at the Wal-Mart stores in both North Battleford and Weyburn as a senior organizer. It is the responsibility of a senior organizer to demonstrate and instruct more junior organizers in the correct manner in which to approach prospective Union members, including what can and cannot be said. She described in detail what she typically does and says when making an in-person house call. This includes, briefly: identifying oneself and one's affiliation; the reason for the visit; why the union is trying to organize the workplace; the steps involved in the certification application, including that if a majority of employees give their support for the union it can be certified to represent the employees; that confidentiality is ensured; that after certification the union and employer negotiate an agreement; the employees have the opportunity to accept or reject the agreement; the person is provided with any written materials; they are asked if they have any questions. The person is asked to fill out the union card themselves. She said that the only actual promise that is made is that the person's identity as far as support for the union is kept confidential from both co-workers and the employer. She was adamant that, in Saskatchewan, a person would not be told that the union card means nothing and there would still be a vote on the certification issue. She did say that people are often fearful of repercussions if they sign, and they are assured that it will remain confidential.

[104] Ms. Butz contacted approximately 25 persons during her three days' involvement in the organizing drive in Weyburn. There were approximately 12

organizers involved plus some rank-and-file Union members paired with more experienced organizers so they could obtain organizing experience. She testified that she and a rank-and-file Union member from Saskatoon called upon each of Elaine Moore and Charmaine Spencer. Ms. Butz described her recollection of her meetings with each of them.

[105] With respect to Ms. Moore, Ms. Butz testified that she and her associate did not say or do anything that would lead one to think they were associated with the Employer. She said that Ms. Moore was concerned about whether she could get into trouble with the Employer for signing a Union card. With respect to the Union card, Ms. Butz said that she explained that it was a union card that was necessary in order for the Union to be certified. Ms. Moore read the card over, filled it out and signed it; she asked no questions about it. She did not indicate that she was in a rush. While she may have asked how the Union had her name and address, Ms. Butz said that she did not appear to be upset by it. She did not ask Ms. Butz to leave. Ms. Butz was there for 15 or 20 minutes. Ms. Butz gave Ms. Moore the telephone number for the Union. Ms. Butz said that the document she had regarding the Wal-Mart CEO's compensation came from the Employer's annual report. Ms. Butz identified the card that Ms. Moore signed and her own initials that were on it.

[106] With respect to Charmaine Spencer, Ms. Butz testified that when she and her associate first attended at her house, her husband told them she was still in bed and asked them to come back at 9 a.m. When they called back, her husband again answered the door and invited them in to sit in the living room. Ms. Butz said she went through her standard presentation. Both Ms. Spencer and her husband, who was there throughout the meeting, asked some questions. Ms. Butz asked Ms. Spencer to sign a Union card and told her that the Union needed 50 percent plus one of the employees to sign in order to get a certification and bargain a contract. She denied that she told Ms. Spencer anything to the effect that signing the card was only to show that they had visited her. Ms. Spencer read the card over, filled it out and signed it. She did not express any concern about her privacy being invaded. Indeed, she said, Ms. Spencer and her husband suggested Ms. Butz meet with some other employees, and gave her names and addresses of some people that the Union did not know about at the time.

Ms. Butz described the meeting as "friendly", and said that Ms. Spencer did not indicate that she was in a rush. She spent about 20 minutes at the home.

[107] In cross-examination by Mr. Nolin, Ms. Butz acknowledged that she did not advise Ms. Moore about how to revoke the Union card if she changed her mind, or that she should seek legal counsel. With respect to Ms. Moore's concern about her privacy, Ms. Butz said she expressed concern should the Employer find out, but not that Ms. Butz had her name and address. With respect to Ms. Spencer, she said the questions that she asked were about how the application for certification was made and when it would occur. Ms. Butz testified that she did not advise Ms. Spencer that the Board could order a vote, only that there would be a vote on a potential contract.

[108] Mr. Nolin called none of the other Interested Parties or individual unfair labour practice applicants to testify, nor did he call any evidence in rebuttal.

Relevant Statutory Provisions:

[109] Relevant Provisions of the Act include the following:

2 In this Act:

(a) "appropriate unit" means a unit of employees appropriate for the purpose of bargaining collectively;

(e) "company dominated organization" means a labour organization, the formation or administration of which an employer or employer's agent has dominated or interfered with or to which an employer or employer's agent has contributed financial or other support, except as permitted by this Act;

3. *Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*

5 The board may make orders:

- (a) *determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
- (b) *determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;*
- (c) *requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;*
- 9 *The 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 influence of or interference or intimidation by, the employer or employer's agent.*
- 11(1) *It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
- (k) to bargain collectively with a company dominated organization;*
- 11(2) *It shall be an unfair labour practice for any employee, trade union or any other person:*
- (a) to interfere with, restrain, intimidate, threaten or coerce an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization, but nothing in this Act precludes a person acting on behalf of a trade union from attempting to persuade an employer to make an agreement with that trade union to require as a condition of employment membership or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if such trade union has been designated or selected by a majority of employees in an appropriate unit as their representative for the purpose of bargaining collectively;*
18. *The board has, for any matter before it, the power:*

- (a) *to require any party to provide particulars before or during a hearing;*
- (b) *to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing;*
- (c) *that is vested in the Court of Queen's Bench for the trial of civil actions to:*
 - (i) *summon and enforce the attendance of witnesses;*
 - (ii) *compel witnesses to give evidence on oath or otherwise; and*
 - (iii) *compel witnesses to produce documents or things;*
- (d) *to administer oaths and solemn affirmations;*
- (e) *to receive and accept any evidence and information on oath, affidavit or otherwise that the board in its decision sees fit, whether admissible in a court of law or not;*
- (f) *to determine the form in which evidence of membership in a trade union or communication from employees that they no longer wish to be represented by a trade union is to be filed with the board on an application for certification or for recession, and to refuse to accept any evidence that is not filed in that form;*
- (g) *to determine the form in which and the time within which any party to a proceeding before the court must file or present any thing, document or information and to refuse to accept any thing, document or information that is not filed or presented in that form or by that time;*
- (h) *to order preliminary procedures, including pre-hearing settlement conferences;*
- (i) *to determine who may attend and the time, date and place of any preliminary procedure or conference mentioned in clause (h);*
- (j) *to conduct any hearing using a means of telecommunications that permits the parties and the board to communicate with each other simultaneously;*
- (k) *to adjourn or postpone the proceeding;*
- (l) *to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative*

method of resolution;

- (m) *to bar from making a similar application for any period not exceeding one year from the date an unsuccessful application is dismissed:*
 - (i) *an unsuccessful applicant;*
 - (ii) *any of the employees affected by an unsuccessful application;*
 - (iii) *any person or trade union representing the employees affected by an unsuccessful application;*
or
 - (iv) *any person or organization representing the employer affected by an unsuccessful application;*
- (n) *to refuse to entertain a similar application for any period not exceeding one year from the date an unsuccessful application is dismissed from anyone mentioned in subclauses (m)(i) to (iv);*
- (o) *to summarily refuse to hear a matter that is not within the jurisdiction of the board;*
- (p) *to summarily dismiss a matter if there is a lack of evidence or no arguable case;*
- (q) *to decide any matter before it without holding an oral hearing;*
- (r) *to decide any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether:*
 - (i) *a person is a member of a trade union;*
 - (ii) *a collective agreement has been entered into or is in operation; or*
 - (iii) *any person or organization is a party to or bound by a collective agreement;*
- (s) *to require any person, trade union or employer to post and keep posted in a place determined by the board, or to send by any means that the board determines, any notice that the board considers necessary to bring to the attention of any employees;*
- (t) *to enter any premises of an employer where work is being*

or has been done by employees, or in which the employer carries on business, whether or not the premises are those of the employer, and to inspect and view any work, material, machinery, appliances, articles, records or documents and question any person;

- (u) to enter any premises of a trade union and to inspect and view any work, materials, articles, records or documents and question any person;*
- (v) to order, at any time before the proceedings has been finally disposed of by the board, that:
 - (i) a vote or an additional vote be taken among employees affected by the proceeding if the board considers that the taking of such a vote would assist the board to decide any question that has arisen or is likely to arise in the proceeding, whether or not such a vote is provided for elsewhere; and*
 - (ii) the ballots cast in any vote ordered by the board pursuant to subclause (i) be sealed in ballot boxes and not counted except as directed by the board;**
- (w) to enter on the premises of an employer for the purpose of conducting a vote during working hours, and to give any directions in connection with the vote that it considers necessary;*
- (x) to authorize any person to do anything that the board may do pursuant to clauses (a), (b), (d), (e), (i), (j), (s), (t), (u), and (w), on any terms and conditions the board considers appropriate, and to require that person to report to the board on anything done.*

18.1 *The members of the board shall have the same privileges and immunities as a judge of the Court of Queen's Bench.*

Arguments:

[110] Arguments in the case were extensive. Counsel on behalf of each party and the Attorney General for the Province of Saskatchewan filed written briefs of argument on nearly all of the issues and presented oral argument. Following are brief summaries of the arguments by issue.

(a) The Appropriateness of the Proposed Bargaining Unit

[111] The Employer disputes that the proposed bargaining unit, which, in addition to the store manager and assistant managers, excludes department managers, employees in the pharmacy and office staff, is "an appropriate unit for the purposes of collective bargaining". The Employer also disputes that the Union enjoys the support of a majority of employees in the proposed unit. The unit proposed by the Union comprises 91 persons; that proposed by the Employer comprises 120 persons.

The Union

[112] Mr. Plaxton, counsel on behalf of the Union, submitted that the reason why the Employer seeks to have the department managers included in the bargaining unit is in order to dilute it from the outset by including persons who, as a group, are part of management or are management sympathizers. This intent is borne out by the fact that the Employer has not asked that even the personnel manager and confidential secretary be excluded. Furthermore, the store manager, Bev Ginter, testified that she thought that even she and the assistant managers ought properly to be included in the bargaining unit.

[113] Mr. Plaxton argued that the unit proposed by the Union is rational, viable and "appropriate" for the purposes of collective bargaining. While it is required for certification that a proposed unit be "an appropriate unit" for the purpose of collective bargaining, it is not required that it be "the most appropriate unit" for such purpose. Section 5(a) of the Act provides that the Board may determine whether the appropriate unit shall be "an employee unit, craft unit, plant unit, or a subdivision thereof or some other unit".

[114] Mr. Plaxton cited several Board decisions as demonstrative of the applicable principles in the modern era where the Board has certified a less than all employee unit as an appropriate unit. For example, in *International Woodworkers of America v. Beaver Lumber Company Limited*, [1977] May Sask. Labour Rep. 30, the union sought to certify a bargaining unit comprising just 35 of approximately 115 employees. The proposed unit included essentially lumberyard and warehouse personnel and excluded retail clerks, office and sales personnel. The Board held that

while an all-employee unit might be the "most appropriate unit", it was not required to certify only the most appropriate unit. The Board determined that the unit proposed by union was "an appropriate unit" and granted certification of same.

[115] Counsel referred to the Board's decisions in *Canadian Union of Public Employees, Local 1975 v. University of Regina* (18 April 1978, unreported), *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canadian Pioneer Management Group*, [1978] May Sask. Labour Rep. 37, LRB File No. 661-77, and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd.*, [1992] 4th Quarter Sask. Labour Rep. 75, LRB File No. 182-92, as only a few examples of many that stand for the proposition that the Board's practice has been to certify an appropriate unit rather than the most appropriate unit, if the proposed unit is viable for the purposes of collective bargaining.

[116] Mr. Plaxton argued that unions have not had a great deal of success in organizing in the retail sector, where there tends to be a high proportion of part-time staff, student workers, high turnover, and workers on different shifts. Counsel submitted that the Board has recognized difficulty in organizing a particular industrial sector or a particular employer as a factor in determining whether a less than all-employee unit is appropriate, referring to the following decisions regarding the hotel and newspaper industries: *Hotel Employees and Restaurant Employees Union, Local 767 v. Regina Exhibition Association Ltd.*, [1986] October Sask. Labour Rep. 43, LRB File No. 015-86; *Graphic Communications International Union, Local 75M v. Sterling Newspapers Group, a Division of Hollinger Inc.*, [1998] Sask. L.R.B.R. 770, LRB File No. 174-98; *The Newspaper Guild Canada/Communication Workers of America, CLC, AFL-CIO, IFJ v. Sterling Newspapers Group, a Division of Hollinger Inc.*, [1999] Sask. L.R.B.R. 5, LRB File No. 187-98; *Communications, Energy and Paperworkers' Union of Canada v. Hollinger Canadian Newspapers, LP o/a The Saskatoon Star-Phoenix Newspaper*, [2000] Sask. L.R.B.R. 760, LRB File No. 276-99; *Hotel Employees and Restaurant Employees Union v. Courtyard Inns Ltd.*, [1988] Winter Sask. Labour Rep. 51, LRB File No. 116-88.

[117] Counsel also cited the decision in *Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority*, LRB File No. 037-95,

and *Saskatchewan Liquor Store Managers Association v. Saskatchewan Liquor and Gaming Authority*, [1998] Sask. L.R.B.R. 512, as an example where the Board has recognized a distinction between newly organized industries and highly organized industries, in terms of its willingness to certify less than all-employee units in the former situation. Counsel characterized the retail sector as one that is not highly organized.

[118] Counsel referred to the following decisions as representative of the fact that the Board has often recognized as appropriate units that comprise service or production staff and exclude office and clerical employees: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1994] 3rd Quarter Sask. Labour Rep. 87, LRB File No. 088-94; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd., et al.*, [1995] 2nd Quarter Sask. Labour Rep. 71, LRB File Nos. 010-95 and 012-95; *United Food and Commercial Workers, Local 1400 v. Peak Manufacturing Inc.*, [1996] Sask. L.R.B.R. 234, LRB File No. 011-96; *United Steelworkers of America v. Wheat City Steel, a Division of Sametco Auto Inc.*, [1996] Sask. L.R.B.R. 532, LRB File No. 102-96; *Public Service Alliance of Canada v. Casino Regina – Saskatchewan Gaming Corporation*, [1996] Sask. L.R.B.R. 454, LRB File No 068-96.

[119] In the present case, counsel argued that the more formal workplace hierarchies of the past made it relatively easy to draw the delineation between management and non-management personnel, but more recently, the corporate pyramid has been flattened pushing down a number of management and near-management functions to lower levels. In the particular case of Wal-Mart, its espoused "one big happy family" approach poses unique problems in that it seeks to give the impression of the involvement of floor workers in traditionally management activities, and of the lack of traditional management authority in those who nonetheless bear the title of manager.

[120] With respect to department managers, counsel argued that the "Store-Within-a-Store" ("S.W.A.S.") concept in fact takes the department managers out of the community of interest of the general worker associates. Department managers are encouraged to consider their respective departments as their own store, with responsibility for profitability. S.W.A.S. meetings are essentially management meetings. Their identification is with management, the more upper levels of which they are being

groomed to aspire to. Two associate witnesses testified that they perceive department managers as part of management. Counsel referred to the Employer's "Associate Handbook", entered in evidence, where it states at 10:

We call it a "Store Within A Store", and it's the simplest idea in the world. ...This is one of the greatest examples of true empowerment. Wal-Mart is a huge company. A company of this size could not run efficiently or effectively if the authority to make decisions rested only with the upper levels of management. The "Store Within a store" concept helps shrink Wal-Mart down to size – we can concentrate on running the Company one department at a time.

In "Store Within a Store", department managers are responsible for their own business, as if it were their own store. ... They see how their store ranks with every other store in their Division. ...

[121] Counsel referred to a store program document that provides that the program is a tool for assistant managers and department managers to improve merchandising and other skills, and is useful for promoting assistant managers to store managers and department managers to assistant managers. Counsel also referred to other specific duties and responsibilities which he said distanced department managers from the interests of the general workers, which are outlined in detail in the evidence of the witnesses and the formal job descriptions. Some of the more significant of these include that, the department manager is to use the S.W.A.S. recap report in "planning [their] business"; daily tasks that include assigning duties to associates; training; correcting unsafe behavior; shared responsibility with the store manager and assistant managers for comparative pricing; assisting the management team with stockers' performance appraisals, coaching and accommodations.

[122] In summary, counsel submitted that the department manager position is a training ground for assistant manager and store manager. Their community of interest rests more closely with higher management than with lower general workers.

[123] With respect to the exclusions sought for pharmacy staff, Mr. Plaxton pointed out that it is a separately incorporated company from the Employer, of which the pharmacy manager and pharmacist, Colleen Cowan, was a director. Counsel referenced the fact that in Ontario, pharmacy employees were excluded as not being

employees of Zellers Inc. In any event, the pharmacy is run as a distinct department with little interaction or commonality with the rest of the store. The pharmacy manager (and photo lab manager) have authority over hiring and discipline that even store assistant managers do not have. Ms. Cowan has little association with other store management personnel. The OTC manager is the only employee allowed behind the pharmacy counter. She and the pharmacy associate are the only employees allowed to run the pharmacy cash register. They are required to have special knowledge of the products in the pharmacy area. They only occasionally assist in adjacent departments when required.

[124] With respect to the office staff, Mr. Plaxton argued that it is not uncommon to exclude office workers from bargaining units of the general pool of workers. In the present case, they work in the same office as management. They secondarily provide assistance on the floor, but that does not mean that they are integrated with floor staff; most conceivably their loyalties lie more with management than the general workers.

[125] Mr. Plaxton argued that there are many examples of departmental supervisors being excluded from units of general workers in the retail sector. Counsel referenced the examples already referred to with respect to the Real Canadian Wholesale Clubs and Real Canadian Superstores in Saskatchewan. Counsel argued that the viability of these units has been demonstrated over a period of nearly 20 years. In-scope employees in these units do relieve out-of-scope supervisors without apparent disruption of business. Provision is made in collective bargaining for the temporary performance of higher duties. Experience shows that the inclusion of departmental managers in such units does not enhance the viability or cohesiveness of the bargaining unit, and may have quite the opposite effect, as demonstrated at Peak Manufacturing.

The Employer

[126] Mr. Beckman, counsel on behalf of the Employer, submitted that the 24 department managers, the two pharmacy employees, and the 5 office staff, ought to be included in the bargaining unit.

[127] Referring to the Board's decisions in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. OK Economy Stores Limited*, a Division of Westfair Foods Ltd., [1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89, and *Chauffeurs, Teamsters and Helpers Union, Local 395 v. Inconvenience Productions Inc.*, [2001] Sask. L.R.B.R. 260, LRB File No. 144-98, counsel submitted that the Board looks at various factors in determining the appropriateness of a unit, and does not employ any single test, but does generally prefer more comprehensive bargaining units to those that are less inclusive. Counsel referred to the decision in *Sterling Newspapers Group (1998)*, *supra*, where the Board outlined the circumstances where under-inclusive bargaining units would not be considered appropriate. Counsel argued that the present case falls squarely within the Board's comments in that case regarding units that are not appropriate.

[128] Counsel referred to the decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Centre of the Arts*, [1995] 4th Quarter Sask. Labour Rep. 52, LRB File No. 175-95, where it declined to certify a bargaining unit that comprised four of seven departments, on the basis that no line could be drawn between departments that was not arbitrary, the employees "constitut[ing] a pool of casual labour which is used without regard to these divisions".

[129] With respect to the exclusions sought by the Union in general, Mr. Beckman submitted that it was necessary to take into consideration the unique Wal-Mart philosophy that "it is our store" and "we all work together". He referred to the Associate Handbook that states the company, "... is people working together to serve the customer and each other"; and to the S.W.A.S. policy document that states, *inter alia*, "In a successful store, all of the associates work as a team. ... The Assistant Manager serves as the team leader." Counsel referred to the fact that the Employer has a "recruitment and selection committee" that includes an associate in conducting the first of three interviews of prospective employees.

[130] Counsel submitted that all of the employees in the store function as an integrated group with regularly overlapping duties, and the unit proposed by the Union would result in inappropriate duties or bargaining unit work that could not be defined or segregated, and which cannot form the basis of viable collective bargaining.

[131] With respect to the department managers, Mr. Beckman submitted that they are merchandising managers and do not manage employees in a labour relations sense. They are primarily responsible for ensuring that there is a good stock of merchandise on the floor. The department managers in the specialty divisions of shoes and One Hour Photo have duties and responsibilities identical to the other department managers. All department managers help out in other departments and units as may be required – when their own department is not busy, they move to neighbouring departments if they require assistance. In his brief of argument, counsel argued that their exclusion would "unduly fragment the workplace, lead to workplace instability, and make a very unique store structure and operations unmanageable", and called it "a request to have Wal-Mart change it's (sic) core beliefs and business practices".

[132] In argument, counsel referred to certain decisions of some labour relations tribunals in other Canadian jurisdictions that have included department managers in a Wal-Mart bargaining unit.

[133] With respect to office staff (including invoice associates, UPC associates, claims associates, accounting associates and the personnel manager), Mr. Beckman argued that they all regularly participate and assist in the work of other departments in the store. He pointed to the fact that they were included in the bargaining unit in *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 v. La Compagnie Wal-Mart du Canada St-Hyacinthe Establishment*, [2005] QCCRT 0017. Counsel submitted that their exclusion would unduly fragment the workplace, lead to workplace instability and make the unique store structure and operations unmanageable.

[134] With respect to pharmacy staff (pharmacy manager, pharmacist, OTC manager, pharmacy associate), Mr. Beckman made arguments similar to those with respect to the office staff.

[135] With respect to the argument made on behalf of the Union with respect to the factor of the difficulty in organizing certain sectors or workplaces, Mr. Beckman suggested the Board should follow the obiter comments of the British Columbia Board in *United Food and Commercial Workers, Local 1518 v. Wal-Mart Canada Corp.*, [2005]

Case No. 52452/04C, which opined, but did not decide the issue, that evidence relevant to the issue was that which disclosed a low union density in the particular industry or among a group of employees which reflects structural or systemic aspects of a workforce that have made it difficult to organize, pointing out, in contrast, that the Union represents workers in Saskatchewan at Saskatoon Co-op, Extra Foods, Real Canadian Superstore and Wholesale Club and some Sobeys stores.

The Union in Rebuttal

[136] In rebuttal argument, Mr. Plaxton pointed out that in the *St-Hyacinthe*, case, *supra*, it was a mixed result with respect to the department managers, in that some of them were placed in the bargaining unit and others were not. However, in the case of the Wal-Mart store in Jonquiere, Quebec (see, *supra*, at f.n. 4), the Quebec Board excluded the department managers from the bargaining unit. That is, there was no consensus in the conclusions arrived at by two different panels of the same tribunal as to the exclusion of department managers from the bargaining unit.

(b) The Constitutional Validity of s. 9 of *The Trade Union Act*

[137] The Union raised the issue of Employer interference and s. 9 of the *Act*, both in reply to the allegations of the Interested Parties on the certification application and as a defence to the individual unfair labour practice applications. The Employer raised the objection that s. 9 is in violation of *The Charter of Rights and Freedoms*. It filed a Notice of Constitutional Question. The Attorney General for Saskatchewan was provided notice and counsel on its behalf appeared to argue the issue.

[138] However, because of the view that we have taken that in this case it is unnecessary to consider the issue of employer interference or apply s. 9, as explained in detail, *infra*, we do not propose to summarize the parties' arguments or that of the Attorney General for the Province of Saskatchewan with respect to the constitutional validity issue.

(c) Company Dominated Organization

[139] At the hearing on November 7, 2005, the Employer applied for leave to amend its reply to the certification application to include a defence that the Union is a

"company dominated organization" within the meaning of s. 2(e) of the Act – that is, as a defence to any order that the Board might make requiring the Employer to bargain collectively with the Union. The amendment sought was as follows:

(viii) Further, and/or in the alternative, Wal-Mart Canada Corp. says that the Applicant Union is a company dominated organization within the meaning of s. 2(e) of Trade Union Act, particulars of which include, inter alia:

(a) On a date unknown to Wal-Mart Canada Corp., Loblaw contributed financial support in the amount of \$1.35 million to three locals of the Applicant Union plus an additional \$1.5 million to the UFCW Canada in a manner not permitted by The Trade Union Act. This money was to be used to fund its "Education and Communication Initiatives" and efforts by the Union to harass Wal-Mart Canada Corp. and its employees for ulterior purposes. Management and/or administration of the Applicant Union was dominated or interfered with by Loblaw and the Applicant opened its contract negotiations early for , inter alia, Real Canadian Wholesale Club and Real Canadian Superstore. In those negotiations, because of the cash infusion, the Applicant gave large concessions to Loblaw in relation to rates of pay and other working conditions for its members.

(b) On a date unknown to Wal-Mart Canada Corp., Loblaw further contributed financial support in an unknown sum to the pension plan of the Applicant Union (the Canadian Commercial Workers Industry Pension Plan") in a manner not permitted by The Trade Union Act.

(c) National staff of the Applicant Union funded by the "Educational and Communication Initiatives" were utilized in the organizing drive in the within matter.

(ix) Further, Wal-Mart Canada Corp. says for the purposes of this application, that by virtue of s. 2(e) of The Trade Union Act, the Applicant Union is not a "trade union" within the meaning of s. 5(b) of The Trade Union Act.

(x) Further, Wal-Mart Canada Corp. says that under the circumstances, it is prohibited from bargaining collectively with the Applicant Union under s. 5(c) of The Trade Union Act by virtue of s. 11(1)(k) of The Trade Union Act.

[140] The Board heard the argument on the application for leave on November 7, 2005. Following is a summary of the arguments on behalf of the Employer and the Union.

[141] Ms. Sloan, of counsel on behalf of the Employer, argued that the issue was being raised as a defence to any order that might be made requiring the Employer to bargain collectively with the Union, pointing out that, pursuant to s. 11(1)(k) of the *Act*, it would be an unfair labour practice for an employer to bargain collectively with a company dominated organization. In support of her argument counsel referred to the decisions in *Nipawin District Staff Nurses' Association v. Nipawin Union Hospital and Service Employees' Local Union No. 333*, (1973), 3 Dec. Sask. L.R.B. 274, in which the Board found the Nipawin District Staff Nurses Association to be dominated by the Saskatchewan Registered Nurses Association and not to be a trade union within the meaning of s. 2(l) of the *Act*, and refused to grant certification. With respect to the objection based on timeliness, she argued that there was no prejudice to the Union notwithstanding that the application for leave to amend was made nearly a year and a half after the certification application was filed, after the Union had closed its case on the certification application, and after seven days of hearing.

[142] Mr. Plaxton, on behalf of the Union, argued: (1) that the application ought to be dismissed for undue delay, in that the events complained of were apparent at least by December 2003; (2) the Employer has no status to bring such an application – that it is a right of the employees or another union, pursuant to s. 9 of the Regulations under the *Act* to make such an application; (3) that, in any event, the facts do not support the allegation; (4) that the amendment is vexatious and an abuse of the Board's process intended to divert the Board's attention from the real issues; and, (5) in the alternative, that the issue should be severed from the main application. Counsel argued that the purpose of the provisions regarding company domination is to protect the employees' right to be represented by the union of their choosing and not of the choosing of the employer. He further submitted that the allegations are as against the UFCW national organization in Ontario and not against the Union Local 1400, the applicant in the present case. Among the authorities cited by counsel in support of the argument were: *Canadian Union of Public Employees v. University of Saskatchewan and Administrative and Supervisory Personnel Association*, [2001] Sask. L.R.B.R. 475, LRB File No. 154-

00; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investments Corp.*, [1997] Sask. L.R.B.R. 303, LRB File Nos. 014-97 & 019-97; *Ontario Hydro*, [1989] OLRB February 185.

[143] The Board initially reserved ruling on the issue. At the hearing on 22 November 2005, the Board orally delivered its ruling with respect to the application for amendment, dismissing the application and advising that written reasons would be provided in the omnibus reasons for decision on the entire case.

(d) The Objections by the Interested Parties and the Unfair Labour Applications

[144] By the time of argument, the only remaining unfair labour applications were LRB File No.128-04 (Applicant, Elaine Moore) and LRB File No. 130-04 (Applicant, Charmaine Spencer), the other such applications either having been withdrawn by their counsel, Mr. Nolin, or having been dismissed for want of any evidence. Mr. Nolin withdrew as counsel for all of the other applicants on November 22, 2005. Similarly, the only interested parties that Mr. Nolin continued to represent were Elaine Moore, Charmaine Spencer and Barbara Woloschuk. The other Interested Parties did not attend the hearing to present any evidence on their own behalf, Mr. Nolin having withdrawn as counsel on their behalf.

The Remaining Interested Parties and Individual Applicants

[145] Mr. Nolin, counsel on behalf of Elaine Moore, Charmaine Spencer and Barbara Woloschuk, filed a written brief of argument that we have reviewed. Counsel characterized the issue as whether the Union engaged in improper organizing tactics such that evidence of support is tainted and ought not to be considered, and further, such as to constitute an unfair labour practice in violation of s. 11(2)(a) of the Act.

[146] In argument, Mr. Nolin described the applicant, Elaine Moore, as a "confused individual", but maintained that she was honest and forthright. He also agreed that the evidence of the interested party, Barbara Woloschuk, was of "limited value." He also made a submission to the effect that the evidence probably does not constitute an unfair labour practice.

[147] With respect to Elaine Moore and Charmaine Spencer, Mr. Nolin argued that if one has no understanding of what the Union's membership application means when it is signed, it is of no value. He submitted that the Union has a "fiduciary-like duty" to be honest and act in the best interests of a prospective member when seeking their support. He further submitted that includes a requirement that they advise one on how to revoke their support card.

[148] Characterizing the present situation as "a skirmish in an all-out war between UFCW and Wal-Mart in North America", Mr. Nolin said these few employees are caught in the middle. He submitted that the Board should order a representation vote in all of the circumstances.

The Union

[149] Mr. Plaxton, counsel on behalf of the Union, submitted that Nora Butz was a much more credible witness than those called on behalf of the Interested Parties and unfair labour practice applicants with respect to what occurred during her visits with them. He further submitted that in the case of Barbara Woloschuk, the Board should not consider her evidence as it was all hearsay.

[150] With respect to the assertion that Ms. Moore and Ms. Spencer did not understand what they were signing, counsel argued that the test is an objective one: would an individual of ordinary intelligence who read the document know what they were signing.

(e) Employer Interference

[151] With respect to the assertion by the Union of employer interference in the making of the applications by his clients, Mr. Nolin argued that it was not supported by the evidence.

[152] Mr. Plaxton argued that the fact that the Employer authorized absences and paid for lost time so the individual unfair labour practice applicants could meet with Mr. Nolin for the purposes of making their applications was sufficient evidence of

interference by the employer that the Board should exercise its jurisdiction pursuant to s. 9 of the *Act* to dismiss the applications.

(f) Allegation of Bribery and the validity of Support Evidence

[153] Late in the proceedings, by letter dated November 28, 2005, after all of the evidence was in, Mr. Beckman gave notice that he intended to raise the objection that all of the evidence of support filed by the Union should be disregarded because a Union organizer had paid a person or person to sign a support card, which constituted unlawful bribery.

[154] The basis for the allegation was allegations made in the unfair labour practice application filed on behalf of Michael Siourounis, LRB File No. 129-04, and the reply thereto filed by the Union.

[155] However, no evidence at all was adduced, or argument presented, in relation to Mr. Siourounis' application, Mr. Nolin having withdrawn as counsel on November 22, 2005, and the applicant did not appear before the Board on his own behalf. On the motion of counsel for the Union, the application in LRB File No. 129-04 was dismissed for want of evidence. Furthermore, the Employer did not call any evidence with respect to the issue, nor did Employer's counsel cross-examine any witness(es) with respect to same.

Analysis and Decision:

[156] Our task in deciding this case has not been easy. The issues in the present matter essentially are not inordinately complicated, but the parties certainly tried their best to make them so. Long delays were mostly occasioned by stay of the Board's proceedings in two unsuccessful interim judicial review applications by the Employer that were taken to the stage of application for leave to appeal to the Supreme Court of Canada. The extension and cohesiveness of the case were occasioned by late and last-minute applications or attempts by the Employer to add issues of no small import: the constitutional validity of s. 9 of the *Act*, and allegations of company domination of the Union and bribery by Union representatives. Accordingly we have spent considerable

time reviewing and considering all of the evidence, argument and law in relation to what was a lengthy disjointed and interrupted proceeding.

[157] The parties appearing at the hearing of this matter were represented by counsel, and were provided with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. These reasons for decision are based on the whole of the evidence pertaining to the respective applications, the demeanor of the witnesses, and consideration for reasonable probability. Where witnesses have testified in contradiction to the findings we have made, we have discredited their testimony as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible or unworthy of belief.

(a) LRB File No. 069-04

(i) The Appropriateness of the Proposed Bargaining Unit

[158] As pointed out by counsel on behalf of both the Union and Employer, the Board does not rely upon any one particular factor or set of factors in determining whether a proposed bargaining unit is an appropriate unit. There is, in addition to such factors, certain guiding, but not immutable principles. It is the Board's job to find balance in the principles in the context of the particular circumstances of each case. That is certainly why the labour relations tribunals in several Canadian jurisdictions have come to diverging decisions on what is an appropriate unit in relation to the Employer's stores considering that they are based on what counsel for each side would suggest are substantially similar facts. The decisions are not susceptible to easy reconciliation, if at all, and are, therefore, of limited precedential value. Certainly there is nothing even close to a consensus on the issue. To our knowledge none of the decisions has been quashed on judicial review on the basis of the finding of appropriate unit that was made by the tribunal.

[159] In the present case, both parties agree that the *Act* mandates that for the purpose of certification a proposed bargaining unit need only be "an appropriate unit" for the purpose of collective bargaining, rather than "the most appropriate unit". Section 5(a) provides the discretion to the Board to determine whether any unit is an appropriate

unit based on the circumstances of each case – the Board is not bound to certify only by all-employee unit, plant unit or craft.

[160] In defining what bargaining unit is an appropriate one, the Board must keep in mind several important policy objectives. In *Regina Exhibition Association Ltd.* (1992), *supra*, the Board observed, at 77, that it is not sufficient to defeat an application for certification for an employer to simply argue that the unit applied for is less appropriate than another unit. On the other hand, the fact that the union has identified a group of employees that it wishes to represent, and in which a majority of employees apparently want such representation, does not in itself determine the issue either. At 76, the Board referred to, if not expressly approved of, the following observation by the Ontario Labour Relations Board in *Canadian General Electric Co. Ltd.*, [1979] OLRB March 169, at 171:

In assessing the suitability of a proposed unit, the Board is generally guided by two counter-balancing concerns. Firstly, having regard to the proposed unit itself, the Board looks to whether the employees involved share a sufficient community of interest to constitute a cohesive group which will be able to bargain effectively together. Secondly, looking to the employer's operation as a whole, the Board assesses whether a proposed unit is sufficiently broad to avoid excessive fragmentation of the collective bargaining framework. A proliferation of bargaining units is not normally conducive to collective bargaining stability. ...Under the umbrella of these two guiding principles, the Board seeks to give effect to an equally important concern: the freedom of association guaranteed to employees in section 3 of the [Ontario] Act.

[161] While the wisdom of this dictum is generally agreed, three observations must be made. Firstly, the "concerns" of "sufficient community of interest" and "avoidance of undue fragmentation" are, as the Ontario Board observed, "counter-balancing". Secondly, what is not stated because it was not necessary to the case, is that fragmentation is generally not a big concern in the instance of an initial certification – it takes on much greater significance in the case of the application for the certification of a second (or more) bargaining unit. On an initial certification, the real concern in this regard is whether other groups of employees may be disadvantaged in some way by the description of a unit. The counter-balancing of principles becomes one between community of interest and disadvantage to other groups of employees. Thirdly, it is the

Board's statutory duty to give effect to what the Ontario Board calls a third "equally important concern" – the fostering and protection of the fundamental object and purpose of the *Act* as set forth in section 3: the right of employees to organize and be represented in collective bargaining by the trade union of their choice.

[162] The parties also agree that the Board has generally preferred larger more inclusive units to smaller units. The overarching fundamental principle is the viability of the unit for the purpose of collective bargaining – larger units are often, but not always, more viable: more effective when it comes to industrial action, and lessening of fragmentation of the workforce.

[163] In any event, the Board has certainly not attempted to provide a concise formula by which the determination of what constitutes an appropriate bargaining unit might be undertaken. The fundamental fact remains that the Board has exclusive discretion to find any unit to be an appropriate unit if it is viable and appropriate for collective bargaining and serves the object and purpose of the *Act*: see, *Beaver Lumber Company Limited, University of Saskatchewan* (April 18, 1978), and *Canadian Pioneer Management Group*, all *supra*.

[164] In *University of Saskatchewan* (1978), *supra*, the Board observed:

The practice of the Board has been to certify in cases of an appropriate unit rather than the most appropriate unit, if the proposed unit is a viable one.

[165] It has been hinted at that the third concern referred to above is more than "equally important" with the other two concerns. In *Canadian Pioneer Management Group, supra*, in certifying an appropriate unit, rather than a larger more-inclusive more or most appropriate unit, the Board, referred, at 50, to the fact that the employees in the unit applied for,

... should not be deprived of the right to collective bargaining through the representative of their choice just because the unit does not include a few [other] employees ...". If the latter employees wish to be included in the unit, they can approach the union, apply for membership, and the order for certification can be amended during the open period, or the union could apply for a

separate certification for those employees and later consolidate the separate certifications.

[166] The Board has often recognized as appropriate units that comprise service or production staff and exclude office and clerical employees. We do not intend to review what is a voluminous body of decisions to that effect, many of which were cited in argument by counsel on behalf of the Union, *supra*. By the same token, the Board has made several decisions that deal with the guidelines often referred to in applications for certification of under-inclusive units, several of which were cited in argument by counsel on behalf of the Employer, *supra*. Obviously, the two situations are not mutually exclusive, the cases involving the former deal with a form of under-inclusive unit. The crux of the decisions lies in the balancing of the concerns referred to above while giving recognition to the notion that one must be able to draw a "defensible boundary" around the proposed unit. But it is not required that the boundary be seamless or non-porous or completely without anomaly in order to be "defensible". The concept is merely one tool in a panoply of factors that may be significant in any particular case. Again, it all comes back to the notions of viability and industrial stability balanced with employees rights under the Act.

[167] In the present case, the unit proposed by the Union excludes the pharmacy manager and the staff in the pharmacy. While the district manager, Cheryl Ginter, and the store manager, Bev Ginter, testified as to the duties and responsibilities of each of the pharmacy staff, we also heard the testimony of the pharmacy manager, Colleen Cowan. Where there is any divergence between the witnesses, we prefer the testimony of Ms. Cowan – she is in the pharmacy nearly exclusively and hands-on. Evidence from the person who actually works the job, and who directs and continuously observes the activities of those under them, is preferable to that of persons distanced from the situation.

[168] In our opinion, the evidence of Ms. Cowan establishes that she is "managerial". It also establishes that the pharmacy bears the hallmarks of a distinct operation from the rest of the store, legally and operationally.

[169] Ms. Cowan testified that she is a registered pharmacist. Her duties include the filling of prescriptions and supervising the over-the-counter area with her

over-the-counter ("OTC") manager, Jeanine Hansen. She said she considered the OTC manager to be the "department manager" in the pharmacy. In fact, she said she hired Ms. Hansen, who was previously a department manager in a store department, and before that, a cashier. Other persons working in the pharmacy include a pharmacy student and the over-the-counter associate, each of whom Ms. Cowan hired.

[170] While Ms. Cowan has overall responsibility for the stocking, display, promotion and advertising of the items for sale, the OTC manager does the ordering. Ms. Cowan does the shift scheduling of the persons in the pharmacy. According to Ms. Cowan, the OTC associate works only in the pharmacy and not in any other store department, with some small exception. While the Employer sets the initial prices for what is stocked, both she and the OTC manager have the authority to lower prices to be competitive, without having to account to anyone else. Ms. Cowan also receives the S.W.A.S. report for the area, which includes third-party billing information.

[171] Ms. Cowan reports to the store manager, Bev Ginter, but said she also works as a team with the assistant manager to solve problems. She is a director of Wal-Mart Pharmacy (Sask.) Limited, which is a separate company from the Employer that holds the operating license for the pharmacy. Ms. Cowan's primary and overarching responsibility is to the provincial pharmacy and professional pharmacist licensing body, and not to any operating requirements that might be established by the Employer. She identified the Pharmacy Permit issued by the Saskatchewan Pharmaceutical Association to "the Proprietor Wal-Mart Pharmacy (Sask.) Limited and its Manager C.A. Cowan". She signed the application for the permit as well as for any renewals. Ms. Cowan confirmed that employment contract contains a non-compete clause.

[172] With respect to the OTC associate in the pharmacy, Ms. Cowan said that, after being screened by Ms. Ginter and the assistant managers, Ms. Cowan was given the responsibility of final approval for her hiring from among the other applicants. Ms. Cowan said she also hired the OTC manager. She has not had occasion to fire anyone, and felt that she would take such a matter to the store manager for final decision. She said that she "basically decided" any promotion in the department. She performs annual performance evaluations of the people in the pharmacy.

[173] Based on her responsibilities, Ms. Cowan said she considered herself to be the equivalent of the store assistant managers. She works 10 hours per day and does not take breaks. She uses a relief pharmacist to cover the additional open hours. She said that part of her compensation is based on the performance of the pharmacy, and only she, among all the persons that work in the pharmacy, is party to that bonus system. She agreed that the pharmacy is "run as her own drug store" and the OTC manager is "part of her team". Ms. Cowan does not attend regular meetings with the other managers in the store. She described herself as "out of the loop" with the operation of the rest of the store. The OTC manager attends weekly meetings with the department managers, assistant managers and the store manager, reporting back to Ms. Cowan. Ms. Cowan said she considers herself to be, "part of management, and management is not usually part of unions".

[174] In our opinion, Ms. Cowan is a "manager" and not an employee. It is interesting that she considers herself to be a manager who is the equivalent of the assistant managers, and opined that "managers are not usually part of the union." It is also interesting that she views the OTC manager as the department manager in the pharmacy. It is relatively easy to draw a defensible boundary between the pharmacy and the rest of the store. The persons in the department do not share a sufficiently common community of interest with the rest of the store, that they should be included in the bargaining unit.

[175] None of the incumbent department managers was called to testify on behalf of the Employer. Ms. Cowan's own description of her activities, and her view of the nature and scope of her responsibilities and authority, differs somewhat, and not insignificantly, from that of the district manager, Cheryl Ginter, and store manager, Bev Ginter. So, we have some concern about how their testimony accords with the activities actually performed by the individual department managers and how they would view their responsibilities and authority. For example, Cheryl Ginter testified that department managers have no part in the demotion, promotion, discipline, discharge, salary increases, performance appraisals or "coaching" of associates. However, the position description states that the department manager, "assist[s] the Management Team with the Stocker's performance appraisals, coaching and commendations". Accordingly, it may be necessary that we give somewhat greater weight to the written materials

concerning the department managers' activities, duties, responsibilities and authority, recognizing that such materials, too, do not always accord with the position as it is actually performed or perceived. But this is what we have to work with.

[176] The position of "shoe division manager" also differs in some respects from that of the generic department manager position. The district manager, Cheryl Ginter, testified that the position has much the same authority as the pharmacy manager and the photo lab manager (which will be dealt with next). The position description includes, *inter alia*, the requirements that the shoe division manager "have complete knowledge of competition at all times", "check the competition for comparative pricing", "make sure all associates are properly trained", "(C.B.W.A.) Coach by walking around", "correct unsafe conditions/behavior", "assign duties to sales floor associates", "complete monthly sales floor associate's evaluation forms", attend S.W.A.S. meetings. The position also has some direct reporting requirements to the store manager and district manager. In addition, Ms. Ginter stated, the incumbent is involved in the performance evaluation, hiring and promotion processes. The shoe division manager is paid a salary, as opposed to an hourly wage, which is different from associates.

[177] The position description for "photo lab manager" is also quite different from that of the generic department manager. Bev Ginter testified that the position has much the same authority as the pharmacy manager and the shoe division manager. Mobility of the photo lab manager outside the photo centre department is restricted. Ms. Ginter, referred to the nature and degree of the time spent by the photo lab manager outside of the department. The bulk of the position's time is spent in the photo centre; the time spent outside of the department, is largely, if not exclusively, spent servicing the battery and photographic supplies sales displays throughout the store, rather than assisting in other departments. The photo lab manager is largely "tied" to the department.

[178] The photo lab manager position performs secondary hiring functions for the department, and is involved in the performance evaluation, discipline and discharge processes. It is a salaried as opposed to an hourly wage position, which is different from ordinary associates. The position description requires the incumbent to "maximize profit" in the department, perform "regular competition checking", "order and

maintain...inventory", train associates, "develop action plans for correction" of profit and loss discrepancies. The reporting line is to the assistant manager.

[179] The "general summary" portion of the position description for (generic) "department manager" states that, "a Department Manager supervises and co-ordinates activities of Associates in department(s) of a Wal-Mart store ...".

[180] Cheryl Ginter testified that department managers do not play a part in final decisions on hiring of associates in their departments. The position description states that the department manager, "assist[s] the Management Team with the Stocker's performance appraisals, coaching and commendations". She maintained that they were called "managers" because they manage product, not people. Along with the store manager and assistant managers they are responsible for daily comparison price checking of competitors. They assist each other to complete price changes and change modular displays if their own department is not busy. The department managers attend weekly "Department Manager Priority Meetings" and "Department Manager Information Sessions".

[181] Bev Ginter, the store manager, testified that it would be a problem for the Employer if the department managers are excluded from the bargaining unit, because the work in that department would be disrupted if the manager went on vacation, and it would affect the "cohesiveness" of the department. It is necessary for the department managers and the associates to be a "team". However, in cross-examination she acknowledged that temporary performance of their duties by bargaining unit members is a matter that can be dealt with in collective bargaining. Later in her cross-examination she also said that she did not know why the exclusion of department managers would be a problem. She even opined that she and the assistant managers should be in the union.

[182] Ms. Ginter agreed that a department manager should look at their department as "their business" which, she said, is "the department manager's philosophy". Indeed, the Employer's "Associate Handbook", states, at 10:

In "Store Within a Store", department managers are responsible for their own business, as if it were their own store. ... They see how their store ranks with every other store in their Division. ...

[183] Two associate witnesses testified that they perceive department managers to be part of management.

[184] In our opinion, overall, the duties, responsibilities, and authority of the photo lab manager, shoe division manager and the other department managers connote a nature and degree of personal responsibility and authority that is not entrusted to or required of associates. The department managers "are responsible for their own business, as if it were their own store". The sales associates do not have any such responsibility. This personal responsibility fundamentally philosophically and practically divides the department managers from the associates in terms of their community of interest. The department managers have a general and amorphous responsibility for the success and profitability of their department that is in addition to and goes beyond their specific "mechanical" duties – in essence, they are encouraged to do whatever it takes to ensure that success. In such a structure, the expectations and aspirations of the department managers cannot but be very different from those of ordinary associates, and it cannot be otherwise than that the department managers would most likely identify more closely with, and have their loyalty with, store and corporate management above them than with the associates performing solely assigned work – they must be personally concerned with and invested in the performance of their department for their own sake, but the associate need not.

[185] This can also be said of the personnel manager. Obviously the personnel manager does not bear the "manager" appellation because she manages merchandise rather than goods. While the personnel manager does not apparently "hire and fire", she is responsible for the operation of, and ensuring adherence to, the Employer's personnel policies and procedures, the establishment and maintenance of personnel and payroll records, and the custody of all confidential employee information. We also heard that the personnel manager approved leave and wage replacement for at least some of the individual unfair labour practice applicants to meet with their counsel. Obviously, they thought she was the person with the authority to do so, regardless of what the formal

position description provides. The incumbent was not called to testify to rebut the evidence.

[186] Much of the office staff (the term is used for convenience to denote the personnel manager, claims associates, invoice associates, accounting associates, UPC associates) spend the bulk of their time either in the store's office alongside upper management, or in the case of the accounting associates, in a separate adjacent secured office, or in their respective work locations. While they have varying degrees of contact with "general" associates or cashiers in the store proper, this is largely either because it is ancillary to their main duties, such as when the accounting associates deliver the cash floats to the cashiers or pick-up the cash received for accounting and deposit, or when the UPC associate must check a price or correct a code, or when the claims associate must pick up merchandise from the customer service desk for processing elsewhere, or because when the store is particularly busy they are required to leave their usual work stations and pitch in to lend a hand. And, while the various office staff to a greater or lesser degree have some form of incidental contact with ordinary floor associates or cashiers, there is no evidence of any cross-over in the other direction. Although the office staff may assist the ordinary associates with their jobs by performing the same work, it cannot be regular or of significant duration or they would not be able to do their own jobs. It is inconceivable, and simply not believable, that the Employer has the office staff perform ordinary associate duties to the detriment of, for example, its cash-handling, accounting, invoice processing, claims processing and merchandise coding requirements. To the extent that the Employer's witnesses would have us believe that these persons spend any significant amount of time engaged in floor associate activity in comparison to that spent doing their own jobs, we do not accept it.

[187] In our opinion, this limited contact, which seems to be in one direction, does not lead to a probable, let alone necessary, conclusion that the office staff has a sufficient community of interest with the general floor associates and cashiers that the unit will not be an appropriate unit without their inclusion. In our view, the situation between the office and the sales floor, has much in common with the Board's many decisions where units of service or production employees have been found to be appropriate units without the inclusion of office, clerical or administrative employees, or

vice versa. In such situations, while office or administrative staff may have contact with service or production staff that is incidental to their jobs, their inclusion in the proposed unit is not necessary to a finding that the unit is an appropriate unit.

[188] It should be noted that the situation in *Saskatchewan Centre of the Arts, supra*, relied on by counsel for the Employer, is very different from the present case. In that case, the Board found that a unit comprised of employees in only four of seven departments was not an appropriate unit. There was a very small number of full-time employees who generally performed supervisory duties, a limited number of permanent part-time employees, and the vast majority of employees were hired on a casual basis. In the words of the Board, the latter "constitute[d] a pool of casual labour which is used without strict regard to the [departmental] divisions". That is there was no sensible boundary that could be drawn between the employees in the four departments applied for and the three departments that were not, all coming from the same pool of labour. In the present case, floor and cashier associates are not interchangeable with the pharmacy or office associates.

[189] After considering all of the evidence and argument in this case, we agree with the following statement by the Board in *Regina Exhibition Association Ltd. (1992)*, *supra*, in which it certified a unit of casino wheeler and dealers that excluded a significant number of other casino workers in various non-management job classifications who remained non-union, that was the second (not the initial) bargaining unit in the workplace. The Board stated, at 78:

It is not necessary for the Board to decide this application on the basis of whether this unit, composed of those employed as wheelers and dealers, is the most appropriate unit. In some circumstances, the Board might be persuaded by an argument that there is a more appropriate unit than the one proposed. In this case, however, reference to the considerations of policy which give meaning to the idea of "appropriateness" has led the Board to the conclusion that the unit applied for is an appropriate one.

[190] We view these comments as applicable to the present case. Firstly, it is our view that a unit comprised of all employees excluding those in the pharmacy and office and the department managers, will constitute a viable entity for the purpose of collective bargaining. The employees in such group form a natural group, whose terms

and conditions of employment can be the subject of rational and sensible discussion. There is a marked similarity in the training, qualifications, duties, working conditions and expectations of each of the employees in such a group. A clear and rational boundary can be drawn around such group of employees. There is a clear distinction between such group and each of the groups of department managers, office staff and pharmacy staff. Those groups do not have a sufficient community of interest with the proposed unit group.

[191] Secondly, we are not convinced on the evidence that such a bargaining unit would create excessive inconvenience or complication in the Employer's industrial relations. Back-filling of manager or supervisor absence by bargaining unit members is a usual subject of collective bargaining. This being an initial certification, this is not a case where there is any significant danger of "balkanization" of the workplace.

[192] Finally, both of these issues must be seen in the context of the right of employees to have access to collective bargaining if that is their wish. As noted by the British Columbia Labour Relations Board in *B.C. Coal*, [1982] 3 Can. L.R.B.R. 177, it is legitimate for the Board to consider whether "a broad-based bargaining unit would deny collective bargaining rights to a smaller group of employees." We take notice that based on the Board's own records, historically there has been much more success in organizing the wholesale and retail grocery sector – e.g., Safeway, the Westfair Group stores, and some Sobey's (formerly IGA) stores – than in the hard and soft goods retail sector where large employers like Sears, The Bay and Zellers are not organized in Saskatchewan. We may also take notice that there has been very limited, sporadic or short-lived success in organizing Wal-Mart in Canada and the United States – the decisions recording such certification attempts are public record, and many were filed in this case. Given these apparent difficulties, we must give some thought to the implications for the employees in the proposed unit, a majority of whom have indicated their wish to engage in collective bargaining with the Employer through the Union as their representative. The result is not that they would be represented by some trade union other than the one they have chosen – they would not be represented by a trade union at all.

[193] Accordingly, we have determined that a unit comprised of all employees, excluding the assistant managers, the staff in the office and the staff in the pharmacy, is an appropriate unit for the purpose of collective bargaining.

Company Dominated Organization

[194] At the hearing on November 7, 2005, the Employer applied for leave to amend its reply to the certification application to include an allegation that the Union is a "company dominated organization" within the meaning of s. 2(e) of the Act. After hearing the submissions of counsel, the Board reserved its decision. At the hearing on 22 November the Board advised the parties orally that the application was denied, with written reasons to follow in the omnibus decision on all of the applications.

[195] For the purposes of our decision, we assumed that the allegations of particular fact were true, but not that, if proven, they lead to the conclusion of company domination in law.

[196] Firstly, the application is denied on the basis of timeliness. The application for certification was filed in April 2004. No explanation was proffered by counsel on behalf of the Employer for the gross delay in applying for leave to amend until what was some 18 months later and seven days into the hearing. While the draft amendments state that the alleged events occurred on a date or dates that is unknown to the Employer, counsel did not advise as to when the Employer became aware of same, which is a different issue – the draft amended reply is dated July 2004, which would indicate that the Employer was aware of the alleged facts that underlie the allegations at least by then if not well before; the alleged facts were publicized in the national media. We find that the mere extent of the delay is inherently prejudicial to the Union in the preparation of its witnesses and the conduct of its case – its evidence was already in, and counsel for the Employer had not sought to cross-examine the Union's witnesses with respect to the allegations when they testified earlier in the proceedings, nor did the Employer seek to adduce evidence of same when it called Cheryl Ginter, its most senior corporate witness, to testify in-chief.

[197] Secondly, if we are wrong to dismiss the application on the basis of timeliness, we would dismiss it on the basis that, even if the fundamental assertions are

accepted as true, there is no arguable case – that is, for the reasons that follow, the assertion is misconceived.

[198] In argument, Ms. Sloan of counsel on behalf of the Employer cited in support the decision in *Nipawin Staff Nurses Association, supra*. In that case, expressing "extreme regret" for not being able to grant the application for certification, the Board found that the members of the Council of the Saskatchewan Union of Nurses (SRNA) were largely nurses in management, and that the applicant "trade union", the Nipawin Staff Nurses Association, was under the domination of the council. The decision is instructive, but not for the reasons advanced by counsel. What the decision does do is point to the proper interpretation of the provisions of the *Act* relevant to the issue of company domination. The Board stated in that case:

. . . an organization under the domination, or control, of the SRNA Council would, or could, in effect be in control of the bargaining process by management or management personnel.

Under these circumstances the fitness of the applicant to represent employees for the purpose of collective bargaining is impaired.

[199] That is, the proscription against bargaining with a company dominated organization is to prevent the situation where the certified employer would be in control of the bargaining process with the so-called trade union representing its own employees. The critical issue is whether the fitness of the Union to represent the employees in the present case is impaired. Even if accepted as true, the relations between the Union and Loblaw would not mean that Wal-Mart would be in control of the bargaining with the Union in relation to its own employees.

[200] Read literally, the subject provisions could be interpreted as counsel on behalf of the Employer would prefer. But, the reason for the interpretation enunciated in *Nipawin Staff Nurses Association, supra*, is that any single provision of the *Act* must be interpreted in light of the *Act* as a whole, and particularly with respect to the purpose and object of the *Act* as set out in s. 3 – to foster and promote the exercise of employees' rights to be represented in collective bargaining by the trade union of their own choosing. That is, the proper interpretation of the *Act* is purposive and remedial rather than literal.

In this regard the Supreme Court of Canada stated as follows in *Re Rizzo and Rizzo Shoes*, 1998 1 S.C.R. 27, which dealt with the interpretation of the Ontario *Employment Standards Act*:

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. ...However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

....

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, supra, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, Construction of Statutes, supra, at p. 88).

[201] The purpose of the provisions regarding company dominated organizations in the Act is to prevent the subversion of the object of the Act in s. 3 as stated above to create a situation where the certified employer in fact chooses and controls the trade union with which it will bargain the terms and conditions of employment of its own employees.

[202] It is also significant that the Union has been in existence since long before the facts as alleged in the draft amended reply occurred. In *Canadian Union of Public Employees v. Bo-Peep Co-operative Day Care Centre*, [1979] Feb. Sask. Labour Rep. 44, LRB File No. 189-78, the Board considered an allegation that the trade union which had filed an application for certification was "company-dominated" because of the participation of a management representative in the organizing activities. The Board made the following comments, at 47:

The evidence before the Board is that Local 1902 of the Union is a composite local and was in existence long before this application came before the Board. The local represents employees in a number of other day care centres in the City of Regina. Since the local was in existence and already functioning, it cannot be said

that its formation was dominated or interfered with by Mrs. Carson.

There is no evidence of any kind that Mrs. Carson had anything to do, in any way, with the administration of Local 1902.

[203] A similar interpretation of company domination provisions has been espoused by other labour relations tribunals. The most cited decision by the Ontario Labour Relations Board is *Ontario Hydro, supra*, in interpreting provisions strikingly similar to those in the Saskatchewan legislation. In that case, the Society of Ontario Hydro Professional and Administrative Employees had "represented" certain employees of Ontario Hydro in their dealings with their employer, under the terms of a series of written agreements in which Ontario Hydro "recognized" the Society as the "representative body" for the group of employees. Ontario Hydro treated its relationship with the Society as a "voluntary" one falling outside the scope of the Ontario *Labour Relations Act*, a characterization which the Society had not challenged for 15 years when, in November 1986, it filed an application under the Ontario *Act* for certification as exclusive bargaining agent for the roughly 6600 employees it then "represented" in its existing relationship with Ontario Hydro. The problem was that a not insignificant number of the employees in the group could be characterized as exercising management functions. The decision dealt with two issues: whether the applicant Society was a "trade union" within the meaning of the Ontario *Act* and, if it was, whether section 13 of that *Act* prevented its certification because it was a "company dominated organization".

[204] In determining that the Society was a trade union and was not a company dominated organization because of the participation of members of "managers" in its formation and administration, the Ontario Board stated:

74. We were referred to a number of Board decisions with respect to section 13, and we are aware of a number of others. We do not propose to review them all in this decision. The Board's decisions in this area generally explain their application of section 13 or its companion section 48 by reference to one of two concerns. One is that a "company dominated" trade union is unable to properly represent employees because, as a result of employer support, it "does not owe its sole allegiance to those whom it seeks to represent": CANADA CRUSHED STONE, [1977] OLRB Rep. Dec. 806; and see SEAFARERS TRAINING INSTITUTE, [1984] OLRB

Rep. Mar. 518. Sections 13 and 48 ensure that such "company dominated" trade unions cannot stand in the way of employees' selecting a trade union which is not beholden to their employer. The other concern to which section 13 is said to be responsive is described in EDWARDS & EDWARDS LIMITED (1952), 52 CLLC p.17,027:

... The section is clearly aimed at "company-dominated" trade unions which are not entitled to be certified, on the theory that a trade union fostered by an employer cannot be considered as having been freely chosen by employees. The section designates conduct by means of which an employer might seek to confine the broad right conferred by section 3 and is therefore to be called into play where that purpose appears. We consider it is intended to be applied where employer activities are of such a character or are of such proportions that it is reasonable to infer that the employees have not exercised a free choice in the matter of the selection of a bargaining agent, or where an employer has given material assistance to a trade union in connection with its organizational or other activities; where, in other words, the particular applicant is not truly the chosen bargaining agent of the employees concerned. It is argued that because of its explicit language, section (13) need only be literally construed and mechanically applied. We suggest that it can properly be interpreted only by reference to what is its obvious intent: to prohibit the certification of any trade union which, because of the nature of its relationship with an employer, is not qualified to act on behalf of employees in their relations with their employer.

The need to be cautious and purposive rather than literal in its interpretation and application of section 13 has been a regular theme in the Board's decisions. If it were otherwise, section 13 could be used by employers to accomplish the very thing it was intended to prevent: interference in their employees' right to be represented by the trade union they select on a majoritarian basis.

[205] In *Ontario Hydro, supra*, the Ontario Board also made it clear that a finding of managerial status in respect of persons who actively participate in the formation of a trade union does not in and of itself activate the company domination provisions. Rather a finding of managerial status in respect of such persons must be

coupled with evidence which establishes that they were acting on behalf of or in the interests of the employer.

[206] This does not mean that another individual or employer could set up a "puppet" organization in the guise of a trade union to apply to certify a different employer, for this would be caught by the definition of "employer's agent".

[207] In the present case it cannot be said that it is a logical extension of the facts as alleged that Wal-Mart has anything to do with the administration of the Union or can in any sense control bargaining with the Union to the potential detriment of its employees if the Union is certified to represent them. Wal-Mart has not alleged that Loblaw was acting on behalf or in the interests of Wal-Mart, or that Loblaw is its "agent" and has sought to control the Union on its behalf.

[208] Accordingly, in our opinion, the interpretation of the company domination provisions of the *Act* that is advanced on behalf of the Employer is quite simply wrong, and on the alleged facts leads to absurd and unintended consequences. Further in our opinion, the Union is a "trade union" within the meaning of s. 5(b) of the *Act*; the Union is not a "company dominated organization" within the meaning of s. 2(e); and, it would not be an unfair labour practice for the Employer to bargain collectively with the Union should it be ordered to do so under s. 5(c) of the *Act*.

[209] Given that the allegation is misconceived, if not absurd, to have embarked upon a hearing of the allegations as advanced by the Employer at that very late stage of what was an excessively delayed and protracted proceeding, it would have been an abuse of the Board's process in all of the circumstances. Accordingly leave to amend the reply as sought by the Employer was denied, and the application for same dismissed.

The Allegation of Bribery and the Validity of Support Evidence

[210] Mr. Beckman, counsel on behalf of the Employer, gave notice very late in the proceedings, by letter dated 28 November 2005, after all of the evidence was in, that he intended to raise the argument that all of the evidence of support filed by the Union should be disregarded because a Union organizer had allegedly paid a person or

persons to sign a support card, which constituted unlawful bribery or was against public policy.

[211] First of all, we find that there is no evidence to support the allegation. The basis for the allegation was allegations made in the unfair labour practice application filed on behalf of Michael Siourounis, LRB File No. 129-04, and the reply thereto filed by the Union. No evidence at all was adduced, or argument presented, in relation to Mr. Siourounis' application, Mr. Nolin having withdrawn as counsel on November 22, 2005, and the applicant did not appear before the Board on his own behalf. On the motion of counsel for the Union, the application in LRB File No. 129-04 was dismissed for want of evidence.

[212] Furthermore, the Employer did not call Mr. Siourounis to testify nor was any other evidence adduced with respect to the issue. No explanation was given for this failure. Employer's counsel did not cross-examine any witness(es) with respect to same.

[213] Accordingly, we find there is no sufficient evidence to support the allegation.

[214] Secondly, and furthermore, we would dismiss the objection on the basis of undue delay. Even if the application of Mr. Siourounis and the reply of the Union were "evidence" even though the application had been dismissed, it had been filed in May, 2004 and its contents were known to counsel for the Employer. No application was made to amend the Employer's reply to include the allegation. The issue was raised after all of the evidence was in. The Union would be severely prejudiced were we to have allowed the objection.

(b) LRB File Nos. 122-04 to 130-04, inclusive, and the Objections of the Interested Parties

[215] By the time of argument in this case, all of the unfair labour applications save those of Elaine Moore, LRB File No. 128-04, and Charmaine Spencer, LRB File No. 130-04, had been withdrawn by Mr. Nolin, or were dismissed for want of evidence. Mr. Nolin had also withdrawn as counsel on behalf of all of the Interested Parties, save

Barbara Woloschuk, Elaine Moore and Charmaine Spencer, and the remaining Interested Parties did not appear to seek to present evidence or address the Board. Accordingly, we strike the allegations made by Ms. Woloschuk in the reply filed on behalf all the Interested Parties, save herself and Ms. Moore and Ms. Spencer. However, of course, the allegations made by Ms. Woloschuk with respect to Ms. Moore and Ms. Spencer are superfluous to their unfair labour practice applications.

[216] With respect to Barbara Woloschuk, her evidence served to add very little if anything to the proceedings – her own counsel called it of "limited value". The allegations contained in her reply on behalf of the Interested Parties and her testimony in that regard, constituted hearsay that goes to the central or critical core of the issue of improper organizing tactics. The individual Interested parties were not called to testify save and except for Ms. Moore and Ms. Spencer. Accordingly, we have exercised our discretion to not afford her evidence in that regard any weight.

[217] Furthermore, we have exercised our discretion not to depart from the Board's long-standing policy of not accepting evidence filed after the application for certification. Accordingly, we have not accepted or considered either the petition of employees gathered by Ms. Woloschuk, or any purported revocation of support filed with the Board after that date. In particular, the petition is subject to be disregarded as susceptible to the application of the principle of apprehension of betrayal and the real problem of voluntariness, and we would further disregard it on that basis.

[218] Accordingly, the objections to the certification application and prayers for relief of the Interested Parties are dismissed. Those of Ms. Moore and Ms. Spencer similarly fall with the dismissal of their unfair labour practice applications, which we shall now deal with.

[219] Counsel for Ms. Moore called her a "confused individual". We could not agree more. Quite frankly, while we do not find that either Ms. Moore or Ms. Spencer was intentionally prevaricating or misleading, the Union representative, Nora Butz, was far and away more credible in her testimony as to what occurred during her visits with them than either of them, and where their evidence differs from hers, we prefer and accept the evidence of Ms. Butz. Furthermore, in the case of Ms. Spencer, her husband

was with her the entire time of Ms. Butz's visit, and he was not called to corroborate her testimony.

[220] The actions of each of Ms. Spencer and Ms. Moore are not consistent with any allegation that they were subject to intimidation or coercion. Indeed, Ms. Spencer and her husband provided Ms. Butz with information to assist her in contacting Ms. Spencer's co-workers. Ms. Moore said she was intimidated because Ms. Butz had her name and address, yet she admitted that that information is publicly available in the telephone book, and that Ms. Butz did not act any different than an ordinary canvasser. In all of the circumstances, we cannot conclude that an employee of ordinary fortitude would feel coerced by Ms. Butz. There simply is no sufficient evidence of an unfair labour practice in violation of s. 11(2)(a) of the Act.

[221] That being said, there is absolutely no evidence whatsoever of any objectionable conduct by the Union or Ms. Butz in relation to the garnering of evidence of support from either of Ms. Moore or Ms. Spencer. Certainly there is nothing to support a finding that the support evidence of either Ms. Moore or Ms. Spencer is tainted, let alone that all of the support evidence is tainted as a result.

[222] Furthermore, the evidence does not support any assertion that either Ms. Moore or Ms. Spencer did not understand what they were signing. Both admitted they read the document and filled it out themselves before signing. The document is short and is not worded in any kind of overly-sophisticated or arcane language.

[223] Accordingly, each of the unfair labour practice applications filed on behalf of Elaine Moore in LRB File No. 128-04 and Charmaine Spencer in LRB File No. 130-04 are dismissed in their entirety.

(c) Employer Interference and the Constitutional Validity of s. 9 of the Act

[224] The Union raised the objection of Employer Interference as a defence to the unfair labour practice applications, asking that the Board exercise its discretion under s. 9 of the Act to dismiss the applications. Late in the proceedings, the Employer gave

Notice of Constitutional Objection that it intended to raise the objection that s.9 violates the *Charter of Rights and Freedoms*.

[225] Leaving aside the fact that, in our opinion, the Employer has no status to raise the objection in the context of the unfair labour practice applications, given that it is not a party to those applications, we have dismissed the unfair labour practice applications on the merits on other grounds, and find it unnecessary to consider the allegations of employer interference. Hence, it is unnecessary to consider the constitutional question.

[226] However, for future guidance, we note the *obiter* comments of the Court of Appeal in interlocutory proceedings between the parties at [2004] S.J. No. 704, *supra*, that s. 9 is, in any event, most likely protected by s. 1 of the *Charter*. In the words of Southey, J. on behalf of the Ontario Divisional Court in *Chung v. A.C.T.W.U. – Toronto Joint Board and Ontario Labour Relations Board* (1986), 86 C.L.L.C. 14,036, "It would be a strange result indeed, if the freedom of expression under the Charter could be used to prevent a court or tribunal from hearing evidence as to what someone said in a particular situation, where that evidence was relevant to the determination of the matter in issue."

(d) Support for the Application for Certification

[227] The Union has filed support for the application of a majority of the employees in the appropriate unit of all employees, excluding the office staff, the pharmacy staff and department managers.

Summary and Conclusion:

Orders to the following effect shall issue:

1. Pursuant to sections 5(a), (b) and (c) of *The Trade Union Act*, the Board Orders:

(a) that all employees of Wal-Mart Canada Corp. in Weyburn, Saskatchewan, except department managers, those above the rank of department manager, and employees in the pharmacy,

and office staff, are an appropriate unit for the purpose of bargaining collectively;

(b) that United Food and Commercial Workers, Local 1400, a trade union within the meaning of *The Trade Union Act*, represents a majority of employees in the appropriate unit set out in paragraph (a);

(c) Wal-Mart Canada Corp., the employer, to bargain collectively with the trade union set forth in paragraph (b), with respect to the appropriate unit of employees set out in paragraph (a).

2. The application in each of LRB File Nos. 122-04, 125-04, 126-04, 127-04, 128-04, 129-04 & 130-04 is dismissed.

[228] Finally, the Board reminds the parties that the Orders of the Board are extant and in full force and effect unless and until they are stayed or quashed.

DATED at Regina, Saskatchewan this 4th day of December, 2008.

LABOUR RELATIONS BOARD



James Seibel,
Chairperson