**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

MICHAEL NOLIN

("Nolin")

-and-

DERYK KENDALL, RANDY KATZMAN, ROGER ARNOLD, JAY WATSON, GREG KUSE, AND RICK CARLSON DBA CUELENAERE, KENDALL, KATZMAN & WATSON

(the "Law Firm")

-and-

SUSAN MACLEOD and DENAE FELLERS

("MacLeod" and "Fellers", together, the "Certain Employees")

-and-

GRANT FRANCIS

("Francis")

-and-

WAL-MART CANADA CORP.

("Wal-Mart")

-and-

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1518

(the "Union")

| | |
|---|---|
| PANEL: | Jan O'Brien, Vice-Chair |
| APPEARANCES: | Michael Hunter, Q.C., for Nolin and the Law Firm<br>Keith Murray, for MacLeod, Fellers and Francis<br>Peter M. Archibald, Q.C., for Wal-Mart<br>Chris Buchanan and Brandon Quinn, for the Union |
| CASE NOS.: | 52968 and 53378 |
| DATES OF HEARING: | January 17, 18 and 19, and March 6 and 7, 2006 |
| DATE OF DECISION: | May 30, 2006 |

## DECISION OF THE BOARD

### I. NATURE OF THE APPLICATION

1 The Union alleges that Nolin and the Law Firm violated Section 9 of the *Labour Relations Code* (the "Code") by publishing and distributing a letter to employees of the Wal-Mart store in Dawson Creek that contains statements about the Union and BC labour law which are threatening, intimidating and coercive.

2 The Union alleges that the Certain Employees violated Section 9 of the Code by distributing the same letter to employees of the Wal-Mart store in Dawson Creek.

3 Finally, the Union alleges that contrary to Section 6(1) of the Code, Wal-Mart interfered in the formation of a union by assisting the Certain Employees in their anti-union campaign and by telling Nolin's father about the Certain Employees.

4 MacLeod, Fellers and Francis apply for a declaration that the Union violated Sections 5(1)(b) and (d) of the Code by filing an unfair labour practice complaint against them and seeking remedies against them for the purpose of threatening, intimidating and coercing them from exercising their lawful rights under the Code. (The Union initially included Francis in its unfair labour practice complaint against the Certain Employees. However, the Union withdrew its complaint against him during the submission process and before the matter went to hearing.)

## II. PRELIMINARY ISSUES

5 At the outset of the hearing, I issued oral rulings on two preliminary matters raised by the Union. At the request of the parties, I include those rulings in this written decision.

6 In accordance with Rule 20(1), the Union served a summons on Nolin, an adverse party, and provided Nolin's counsel with seven days notice of its intention to call Nolin as a witness. Nolin refuses to attend the hearing. The Union sought a ruling from the Board on the consequences of Nolin not attending at the hearing to testify.

7 Nolin resides in Saskatchewan. Nolin does not dispute the Board's jurisdiction to name him as a party. However, Nolin disputes the Board's authority to compel an extra-provincial party to appear as a witness under summons or under Rule 20.

8 The Rules set out the Board's procedure for among other things calling an adverse party as a witness. The Board's power to summons is found under Section 140 (a) of the Code.

> 140. The board, in relation to a proceeding or matter before it, has power to
>
> (a) summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce the documents and things the board considers necessary to a full investigation and consideration of a matter within its jurisdiction that is before it in the proceeding,

9 In *Supercrete, a Division of Canfarge Ltd., et al.,* IRC C16/92 ("*Supercrete*"), the Council found that absent an application pursuant to Section 5(1) of the *Subpoena (Interprovincial) Act* a subpoena whether issued by the Council or the BC Supreme Court is of no force and effect outside of the jurisdiction of British Columbia.

10 The Union has not taken steps to certify the summons for Nolin under Section 5(1) of the *Subpoena (Interprovincial) Act* to enforce Nolin's attendance. The Union states that it prefers to rely on the Rules as to the consequences of Nolin not attending to testify rather than seeking to enforce the summons under the *Subpoena (Interprovincial) Act*. Under Rule 20(3) if a person required to testify under sub-rule (1) refuses to attend at the hearing, the Board may determine the matter in favour of the party calling that witness or may adjourn the proceeding.

11 The Union requests that the Board find against Nolin and the Law Firm and not allow them to participate in the hearing by making opening remarks, cross-examination or argument. The Union asserts that Nolin's refusal to attend and testify will result in the Union being denied a fair hearing. The Union states that it has decided that Nolin is a necessary element to its case and he is denying the Union its right to get at facts not in the Union's possession. By refusing to attend and testify, the Union argues that Nolin is achieving a strategic advantage.

12 I find that the Union's reliance on the Rules is misplaced.

13 I am satisfied that I cannot require Nolin to comply with the rules when the Union has not gone through the proper procedures found in the *Subpoena (Interprovincial) Act* because to do so would remove Nolin's rights provided under Sections 5 and 6 of the *Act*.

14 Further, in my view, the seven-day notice under Rule 20(1) falls under the definition of subpoena in the *Subpoena (Interprovincial) Act* in the same way as a summons does under Rule 20(1). Under the *Subpoena (Interprovincial) Act*, subpoena means a subpoena or other document requiring a person in a province, other than the province where the subpoena originates, to attend as a witness, to produce documents or other articles or to testify before that court. I conclude that the seven-day notice is a document requiring a person in another province to attend as a witness.

15 Even if I am wrong about the foregoing, I would not exercise my discretion under Rule 20(3). When I asked the Union why it requires Nolin to testify, the Union, in essence, stated that it needed Nolin to testify to issues related to remedy. I am not persuaded that the Union would be denied a fair hearing since Nolin's testimony is not necessary to prove the merits of the Union's complaint.

16 Following my ruling dismissing the Union's application to not allow Nolin and the Law Firm to participate in the hearing, the Union applied for an adjournment so that it could apply to the Courts for an interprovincial subpoena and apply for reconsideration of my ruling.

17 The Union has known since July 2005 that Nolin takes the position that he is not compelled to attend the hearing under Rule 20. I find that my ruling with respect to the *Subpoena (Interprovincial) Act* does not fall into the category of reasonably unanticipated events. For these reasons, I am dismissing the Union's application for an adjournment.

## III. BACKGROUND

18 Nolin, the Certain Employees, and Wal-Mart did not call any witnesses. The following background information is drawn from the testimony of Union witnesses, documents entered as exhibits, and uncontested factual information provided in the parties' written submissions.

19 Nolin is a lawyer from Saskatchewan. His father Don Nolin ("Nolin Sr.") works for Wal-Mart in North Battleford, Saskatchewan. Nolin has been representing certain employees at Wal-Mart stores in North Battleford and Weyburn, Saskatchewan in their legal challenge of the organizing tactics of the United Food and Commercial Workers International Union, Local 1400 ("UFCW Local 1400").

20 In late January 2005, the Union began an organizing campaign to unionize the employees of the Wal-Mart store in Dawson Creek (the "Dawson Creek Wal-Mart").

21 On January 31, 2005, Fellers, an employee of the Dawson Creek Wal-Mart, told the Dawson Creek store manager Kevin Quist that Union representatives tried to run her off the road. (In a separate proceeding, the Union and Fellers settled the unfair labour practice complaints filed by the Union regarding these allegations.)

22 On February 1 or 2, 2005, a regional manager, Don Toy, who has interaction with Quist, told Binns, the manager of the North Battleford store about Fellers' allegations. Binns told Nolin Sr. who then phoned the Dawson Creek Wal-Mart and spoke to Fellers. He told Fellers about his son, the lawyer Nolin. Fellers told MacLeod about Nolin.

23 MacLeod sent Nolin an e-mail on February 2, 2005 stating that she was given his name by a fellow employee at the Dawson Creek Wal-Mart. She told Nolin that she had been told that he might be able to give her some tips on how to stop the Union from getting enough cards signed to apply for certification. She said she had been told that the Union was offering some employees $1000 to be paid if the Union "gets in". Nolin replied on February 3, 2005 that he had some information about UFCW that she might find enlightening and helpful. He said he would also provide "some tips and strategies to combat the threat of unionism".

24 Nolin wrote a letter, dated February 4, 2005, which was addressed to employees of the Dawson Creek Wal-Mart (the "February 4 Letter") and sent it along with some other documents to MacLeod via e-mail. He urged MacLeod to "make as many copies as you can and speak to as many employees as you can. Ask other employees to help you – do not have department managers help you. Use regular employees. Do not ignore the night shift either".

25 The February 4 Letter is on the letterhead of the Law Firm. As Nolin agrees that he was acting for the Law Firm when he wrote the February 4 Letter, I will not refer to the Law Firm as a separate entity. It can be taken that when I refer to Nolin, I am also referring to the Law Firm.

26 Nolin began the letter by stating that he was a lawyer from Saskatchewan involved in labour relations litigation involving Wal-Mart and the UFCW Local 1400. Nolin stated that he was not employed or paid by Wal-Mart, did not consult or report to any Wal-Mart managers, and did not consult or report to any lawyers representing Wal-Mart.

27 In the February 4 Letter, Nolin said MacLeod knew about him from news reports and she then searched on the internet to locate him. Nolin told the employees how to go about revoking their membership in the Union. Nolin now concedes that some of the advice he provided about the Code was inaccurate.

28 In the February 4 Letter, he stated:

> I have been advised that UFCW representatives have been offering employees $1,000.00 to sign membership cards. I have also been advised that UFCW representatives have been providing employees with misinformation and false information. You should

> know your rights. If you sign a membership card there may not be a vote. Most labour legislation allows a union to apply for certification as a Union for a particular store like yours, after receiving 50 + 1% of support by virtue of signed membership cards. For example, if your store has 100 employees and if 51 people sign cards, your store could end up becoming unionized with **no vote**!!!
>
> * * *
>
> You should be aware that it is my opinion that a Union cannot offer to buy your membership/support. It is my opinion that such conduct is an unfair labour practice. Secondly, if a current employee or former employee from Wal-Mart Canada gave the Union representatives private personal information about you such as your address or telephone number then it is my opinion that person or persons violated applicable provincial and federal privacy legislation.
>
> Ask yourself the following questions: have Union representatives told you that "signing the card only means we have a way to prove to our boss that we visited you today"? or something similar; have they promised you there will be a vote even if you sign?; have they told you that they can get you better wages, hours or benefits if you sign a card?; have they promised you money for signing a card, but only if they are successful in their drive? If you have heard anything like the foregoing **you have been lied to**. Ask yourself - do you want a Union representing you that will deceive you to get you to join the Union?
>
> You may be wondering why won't Wal-Mart Canada/ managers speak to us about the Union or other issues about unionization you have? The answer is short and simple - managers and/or Wal-Mart Canada cannot talk to you about the certification process. Labour Relations laws prevent them from providing you with basic information. In short you are on your own. I am the only one who will tell you and can tell you that if your store goes Union there is a chance your store will close. Management cannot tell you that nor can they interfere with employees during the certification process. In most cases, management cannot negotiate yearly raises or conduct performance reviews. If your store participates in profit sharing, dividends will be suspended for the certification period and may never return. If your store becomes Unionized you will lose all flexibility in scheduling shifts, bonuses, time-off and benefits. All of these items will be negotiated by the Union based on the Union's agenda. (emphasis in the original)

The balance of the letter repeated information found on two websites and urged employees to visit the two websites.

29 Certain Employees distributed the February 4 Letter to other employees that evening at a party held at the home of Shana Lavallee, a Dawson Creek Wal-Mart employee.

30 Sampson testified that he heard about the party at Lavallee's house from Quist, the Dawson Creek Wal-Mart store manager. Sampson's wife Juanita worked at the Dawson Creek Wal-Mart as an inventory control specialist. Sampson went to the Dawson Creek Wal-Mart on February 4, 2005 after two Union organizers – Jim Podger and Ed Cabral – came to his house. Sampson was angry and suspicious about how the Union organizers knew where they lived. The Sampsons had moved a few days before the organizers' visit and they had only given their new address to Wal-Mart and one or two other persons.

31 Sampson testified that he asked Quist how Podger, a former employee of the Dawson Creek Wal-Mart, got their address. Quist told him that the Union organizers could have followed the Sampsons home or Podger's son, an employee of the Dawson Creek store, could have got the information off of something at the store. According to Sampson, Quist then mentioned that there was a meeting then corrected himself to say a party where some of the department managers and other staff from the Dawson Creek Wal-Mart were going to be. Quist did not say what the party was about but according to Sampson, he "highly suggested" that the Sampsons find out where it was. When Sampson asked him if he was going to attend, Quist said he could not be there. Under cross-examination, Sampson stuck to his testimony that Quist first told him about the party at Lavallee's house.

32 Sampson spoke with Juanita while he was at the Dawson Creek Wal-Mart. He told her that Podger had been to their home. After Sampson left, Juanita wanted to speak to Quist because she was upset about Podger visiting her home. She testified that Quist told her to speak to Fellers about a meeting that was going on that evening. Juanita denied that she knew about the meeting before she met with Quist. Juanita then clocked out and went to speak to Fellers who told her about a get-together at Lavallee's house. Fellers gave Juanita directions to get to the house. According to Juanita, Fellers "strongly suggested" that she attends the meeting. Juanita then left for home.

33 Quist asked Sampson to write down what had happened during his meeting with Podger. Sampson put together a handwritten version of the conversation with Podger. He took these notes with him to the meeting at Lavallee's house. Later Juanita typed it up for him on their computer. Sampson no longer has a copy of the handwritten version of his report. In the typed report, Sampson states that Podger told him that Juanita could not vote unless she signed a Union card. He added that Podger said if Juanita wanted to vote yes or no she had to sign a Union card and he hoped that she would vote. Sampson gave MacLeod and Quist each a copy of the typed notes of his conversation with Podger.

34 Juanita and Trevor Sampson went to Lavallee's house during the evening of February 4, 2005. Fellers was there and up to about 20 people attended the party. There were about half a dozen different leaflets including the February 4 Letter on the

kitchen table and counter. MacLeod told them they could take copies of the leaflets. After about 1-1/2 hours, the group gathered in the living room where MacLeod's brother answered questions about unions. The group discussed different issues related to the Union. An employee named Shannon told the group that the Union was promising employees who signed membership cards $1,000.

35 MacLeod and her brother handed out the February 4 Letter and it was discussed. MacLeod told the group that they could try to have Nolin come to Dawson Creek. Sampson agreed that MacLeod kept close control of the February 4 Letter. Sampson recalled seeing someone else pick up the letter and MacLeod going over and taking it from the person. Quite a few people had copies of the February 4 Letter. According to Sampson, at one point, they ran out of the February 4 Letter and it was suggested that on Monday there would be more at the Dawson Creek Wal-Mart store for people to pick up. On cross-examination, Sampson agreed there was a possibility that he was mistaken about that comment.

36 Juanita said she found it comforting to learn at the meeting at Lavallee's house that other people were in the same boat as her. She found the meeting relaxed and the information interesting.

37 Juanita recalled seeing a leaflet wrote by Wal-Mart about the Union organizing campaign in the Dawson Creek staff lounge. The leaflet, dated February 1, 2005, assures employees that Wal-Mart would not willingly divulge personal contact information without the employees' permission. The leaflet also advises employees that it would be "a mistake to sign a union card just so the organizers will stop bothering" them. The leaflet also sets out the process for revoking a Union card.

38 Juanita testified that in the fall of 2004 she heard Wal-Mart was closing a store in Jonquiere, Quebec after it was unionized. In the early winter of 2004, she heard that the store was closed. She testified that there was no announcement from the Dawson Creek Wal-Mart management about the Quebec store closing. Juanita was afraid of losing her job if the Union succeeded in organizing the Dawson Creek Wal-Mart. In November or December 2004, Juanita asked Diane, an employee in the personnel office, whether the Dawson Creek Wal-Mart employees would lose their jobs if the Union came in. Juanita testified that Diane told her that Wal-Mart has closed stores when the Union came in and they could do that to the Dawson Creek Wal-Mart because it was a new store and not yet making a profit.

39 Juanita was dismissed from her job at the Dawson Creek store on June 30, 2005. Juanita had already given the Dawson Creek Wal-Mart two-weeks notice that her last day of work would be July 1 when she was dismissed. Until Juanita was dismissed, Trevor Sampson was opposed to the Union. Juanita testified that her opinion about the Union changed several months before she left the Dawson Creek Wal-Mart. After Juanita was dismissed, Trevor and Juanita Sampson went to talk to Podger who put Juanita in touch with Union counsel. Sampson did not tell the Union about his conversation with Quist until July 2005. Juanita testified that she was upset with Quist following her dismissal from the Dawson Creek store.

40 Larry Turner was one of the Union organizers involved in the Dawson Creek Wal-Mart campaign. The Union had a team of five organizers working with a coordinator on the Dawson Creek Wal-Mart campaign. The organizers would generally go in teams of two to visit employees.

41 Turner testified that the Union would explain to employees that if more than 45 per cent of them signed Union cards within a three-month period there would be a secret ballot vote. Turner stated that he had never told an employee that they would have to sign a card in order to vote and he had never heard another organizer state that employees have to sign a card in order to vote. He said the organizers talked about the card signing as the first step in a process toward having a representation vote. Turner said he had never offered an employee $1000 to sign a Union card and he had never heard any other organizers offer employees $1000 to sign a Union card.

42 The Union organizers would usually give the employees a leaflet entitled How to Join UFCW Local 1518. This leaflet included the following information:

> **STEP ONE**
>
> Simply sign a UFCW Local 1518 membership application card. Once that card is signed, the law protects you from any unfair actions that your employer may take.
>
> When a majority of your co-workers have also signed membership application cards UFCW Local 1518 will make an application to the BC Labour Relations Board to become the bargaining agent in your workplace.
>
> **STEP TWO**
>
> The BC Labour Relations Board will check the validity of all the cards signed by the employees and submitted by the Union against the employer's payroll records.
>
> * * *
>
> The Labour Relations Board will then order and conduct a vote of all eligible employees at your workplace. The purpose of this vote is to confirm that a majority of the employees want UFCW Local 1518 to represent them.
>
> When the majority of the employees vote in favour of Local 1518 representation the Labour Board issues a certificate to the Union to represent all the workers.

43 According to Turner, the Dawson Creek Wal-Mart organizing campaign got off to an excellent start. Turner knew that there were more than 100 employees at the Dawson Creek Wal-Mart. The organizers obtained 18 signed Union cards in the first week of the campaign. Although the organizing campaign continued until early March

no further cards were signed after February 1, 2005. The Union provided the following information about the dates that cards were signed:

| Date | Cards |
|---|---|
| January 25 | 4 |
| January 26 | 3 |
| January 27 | 5 |
| January 28 | 0 |
| January 29 | 0 |
| January 30 | 3 |
| January 31 | 1 |
| February 1 | 2 |
| February 2 | 0 |
| February 3 | 0 |
| February 4 | 0 |

44 Turner testified that four people, who before February 4 agreed to meet with the Union, refused to meet with the Union organizers when they called back. One told the organizers that she wanted nothing to do with them as they were liars. She also warned the organizers not to damage her vehicle. Turner agreed that his organizing notes show that some employees were still friendly and willing to discuss the Union with the organizers after February 4, 2005.

45 On February 1, 2005, Podger was arrested by the Dawson Creek RCMP for allegedly harassing Fellers. Turner agreed that Podger's arrest had a tremendous impact on the organizing campaign. He said the Union stopped organizing for two days. Turner was also aware that a Dawson Creek Wal-Mart employee was making allegations that the Union organizers were maliciously damaging vehicles by slashing tires and puncturing gas tanks. He also knew that a group of employees who were opposed to the Union picketed outside of the Dawson Creek Wal-Mart on February 3, 2005. Turner said the Union received the February 4 Letter within a day or two of it being distributed at Lavallee's house. Turner agreed that as a result of a combination of the February 4 Letter, the allegations about damage to vehicles, and Podger's arrest the card signing stopped.

46 The Union distributed a letter dated February 7, 2005 in which it denied "all of the malicious lies and rumours" being spread by the anti-union employees. The Union stated that no UFCW employees had slashed tires or threatened employees or paid anyone to sign a Union card. In the leaflet, the Union also announced that it had filed a suit in the BC Supreme Court alleging that Fellers had made libellous and slanderous comments about the Union and its employees. The Union's letter was written in Vancouver and then sent to Dawson Creek via Greyhound bus. It arrived in Dawson Creek on February 6, 2005. The Union's letter made no mention of the February 4 Letter.

47 Ed Cabral was also an organizer during the Union's Dawson Creek Wal-Mart campaign in January and February 2005. Initially, he was teamed up with Podger. He

testified that typically the Union organizers would tell prospective members that the Union needed 45 per cent of the employees to sign Union cards to take a representation vote and it needed 51 per cent to win a vote. He recalled going to Sampson's house with Podger. He said they began giving the regular presentation that they gave to everybody. At one point, Cabral returned to his car to get a pamphlet. He testified that it was hard to recall exactly what was said to Sampson but if they had talked about a vote it would be to explain that the Union needed 45 per cent of employees to sign Union cards to take a representation vote and 51 per cent to vote in favour to win. Cabral agreed that to the best of his recollection he and Podger made a standard presentation to Sampson. He agreed that he could not remember the specific presentation made to Sampson.

48 Cabral became aware of the February 4 Letter a day after the meeting at Lavallee's house. He met an employee who had been at the meeting at a parking lot. She was nervous and said she didn't know who to believe anymore when she passed the February 4 Letter to Cabral. He passed the letter onto Colin Trigwell, who was co-ordinating the Union's organizing campaign.

49 Within a day or two, Trigwell received a phone call from an employee demanding that the Union card he had signed be returned. Cabral went to see the employee to confirm that he wanted his Union card back. Cabral showed the employee a copy of the February 4 Letter and asked if he wanted his card back because of the letter. The employee said yes and told Cabral he would have "no more of your lies". The employee also told Cabral that he was a dear friend of Fellers.

50 Cabral testified that the campaign was completely different after the February 4 Letter was issued. People were not willing to listen to the Union organizers. Cabral testified that Podger's arrest on February 1 along with the February 4 Letter was a one-two punch that knocked the Union out. Cabral agreed that the Union did not get a single Union card signed after Podger's arrest. He recalled testifying at an earlier Board hearing that employees were afraid to talk to the Union after Podger was arrested.

## IV. POSITIONS OF THE PARTIES

51 The parties positions, briefly summarized here, are dealt with more fully in the analysis section of this decision.

52 The Union submits by publishing and distributing the February 4 Letter, Nolin and the Law Firm made statements about the Union and BC labour law which are threatening, intimidating and coercive. By setting himself up as a figure of authority in the February 4 Letter, Nolin ensured that his statements would be as effective as possible. The Union contends that the Certain Employees – MacLeod and Fellers – adopted Nolin's statements as their own communication. With respect to Wal-Mart, the Union submits that it provided assistance to the Certain Employees in their campaign against unionization.

53 Nolin argues that since he was not acting on behalf of Wal-Mart, a reasonable employee would not think that Nolin had the power to carry out what he was saying. Nolin submits that the February 4 Letter is the expression of views protected by Section 8 of the Code.

54 The Certain Employees submit that it is not a violation of Section 9 for employees to adopt and circulate the opinion of a third party where there is no connection to the employer. The Certain Employees and Francis seek a declaration that the Union has violated Section 5(1) of the Code by filing the unfair labour practice complaint against them. The Certain Employees and Francis seek an order that the Union pay their legal expenses.

55 Wal-Mart contends that there is no evidence against Wal-Mart that constitutes interference in the Union's organizing campaign.

## V. ANALYSIS AND DECISION

### A. Section 9

56 I begin by considering the Union's complaints against Nolin and the Certain Employees under Section 9 of the Code which provides the following:

> 9. A person must not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue or cease to be a member of a trade union.

57 The Board's policy regarding coercion or intimidation within the meaning of Section 9 was summarized in *Excell Agent Services Canada Co.*, BCLRB No. B172/2003, 96 CLRBR (2d) 161 ("*Excell*"):

> Intimidation and coercion as those terms are used in Section 9 have been defined as the use of force, threats, fear or compulsion for the purpose of controlling or influencing conduct. A threat, whether implied or actual, is a prerequisite for conduct to be characterized as coercion or intimidation. There has to be some sort of unfairly forceful pressure or threat of adverse consequences. The context of the statements, the relative power of the parties, and the ability to take action that would adversely affect the employees if they do not act in the desired manner are relevant factors to consider when deciding whether a threat has been communicated. The Board is more likely to find coercion and intimidation where the party exerting the pressure has the capacity to take action that would directly affect the employees concerned: *British Columbia Housing Management Commission*, BCLRB No. B3/93.
>
> The Board uses an objective test assessing the conduct against a standard of a reasonable employee. Characterizing statements as misrepresentation does not automatically make them

> coercion or intimidation. The focus instead is on the objective effect of a statement: *North Shore Association for the Mentally Handicapped,* BCLRB No. B474/99, para. 29. (paras. 69-70)

58 In this case, the Union does not allege that either Nolin or the Certain Employees were acting on behalf of the employer, Wal-Mart. In this instance, the Union's complaint is against a third party and employees. Nolin and the Certain Employees argue that because they are not in a position to carry out any threats, they cannot be guilty of using coercion and intimidation.

59 Since the Union does not allege that Nolin or the Certain Employees were acting on behalf Wal-Mart, the first issue to determine under Section 9 of the Code is whether Nolin's comments in the February 4 Letter placed undue or excessive pressure amounting to coercion or intimidation upon Dawson Creek Wal-Mart employees with respect to the issue of union representation. In making this determination, an objective test is applied. The test does not require direct evidence of the impact of the statements on particular employees. It is a question of whether a reasonable employee would view the statements as intimidation or coercion. If Nolin's comments amount to coercion or intimidation within the meaning of Section 9 of the Code, then the second issue is whether the Certain Employees' distribution of the February 4 Letter is an unfair labour practice.

60 The Union takes issue with the following comments in the February 4 Letter:

- That the Dawson Creek Wal-Mart might shutdown if it was unionized and that only Nolin could tell employees because Wal-Mart could not.
- That the Union lied to employees when it told them there would be a representation vote if it obtained a sufficient number of cards;
- That employees should not sign Union cards because there could be a certification without a representation vote; and
- That the Union violated the Code by offering employees $1,000 to sign Union cards.

While the Union frames its complaint by examining various statements made by Nolin, all these statements are contained in one communication, the February 4 Letter.

61 This is an unusual, perhaps even unique case, in that Nolin is not an employer, a union representative, or an employee. He is an outsider who has chosen to insert himself in the Dawson Creek Wal-Mart organizing drive, in an attempt to influence the employees' right to freely choose whether to be represented by a union. Employee choice is a principle and "fundamental premise of the Code": *Forano Limited.,* BCLRB No. 2/74, [1974] 1 Can LRBR 13, p. 17. Nolin argues that his comments are protected by Section 8 of the Code which allows individuals to express their views on any matter

relating to the representation of employees by a trade union provided that they do not use intimidation or coercion. I find the issue to be whether the comments in the February 4 Letter were coercive or intimidating.

62 In the February 4 Letter, Nolin establishes himself as an authority with expertise based on his position as a labour lawyer and his involvement in litigation dealing with Wal-Mart and the UFCW in Saskatchewan. Nolin further tells the Dawson Creek Wal-Mart employees that he is "the only one who will tell you and can tell you that if your store goes Union there is a chance your store will close. Management cannot tell you that nor can they interfere with employees during the certification process".

63 Nolin made these comments in the context of the Dawson Creek Wal-Mart employees being aware that another Wal-Mart store in Jonquiere, Quebec was closed after it was unionized. Juanita Sampson testified that two or three months before the February 4 Letter was issued employees discussed the Jonquiere closure. There was concern about the Dawson Creek store closing if it unionized because like the Jonquiere store it was a new store and unprofitable.

64 Nolin's statement that only he could tell the employees that there was a chance that the Dawson Creek Wal-Mart would close if it unionized contains a threat that goes to the heart of employees' vulnerability – their ability to earn a livelihood. Nolin was taking advantage of employees' susceptibility to threats about their economic well-being when he suggested that the store might close. While Nolin was unable to carry out this threat, I find that an employee could reasonably conclude that Nolin was passing on inside information.

65 This threat of store closure, coming from a third party who employees could reasonably suppose had some inside knowledge, could have the effect of compelling or inducing a person to refrain from becoming a member of a trade union. In these circumstances, I am persuaded that Nolin's comments about the possible closure of the Dawson Creek Wal-Mart if it unionized amount to coercion within the meaning of Section 9 of the Code.

66 There is no dispute that the Union was telling the employees the truth when it stated that there would be a representation vote before the Union was certified. Nolin was wrong when he stated otherwise. Under the Code, a workplace will not become unionized without a vote simply because a union obtains a majority of signed membership cards from employees in the proposed bargaining unit. Under Section 23 of the Code, a representation vote among the employees in the proposed bargaining unit is required before a union is certified as bargaining agent.

67 There is no evidence that the Union representatives promised $1,000 to employees if they signed membership cards. The uncontradicted evidence of the Union representatives is that they never promised employees money to sign membership cards. There is no evidence that Nolin took any steps to investigate the truth of the hearsay before he repeated it in the February 4 Letter.

68 Nolin argues that the February 4 Letter had little impact on the employees. I do not agree. Nolin's position as a lawyer with expertise in labour relations litigation involving Wal-Mart and the UFCW gave credibility to his statements in the February 4 Letter. When the cumulative effect of the statements in the February 4 Letter are considered, I find that an employee could reasonably conclude that the Union was paying a large sum of money to induce employees to sign membership cards, that signing a membership card could lead to the workplace being unionized without a vote, and that unionizing the workplace could result in Wal-Mart closing the Dawson Creek store. A reasonable employee considering all of these statements could feel compelled not to support union representation. In all of the circumstances, I am satisfied that the February 4 Letter was coercive. (As noted earlier when I refer to Nolin, I am also referring to the Law Firm.) Accordingly, I find Nolin and the Law Firm breached Section 9 of the Code by acting in a coercive manner that could reasonably have the effect of compelling or inducing a person to refrain from becoming a member of a union. As a result, the February 4 Letter is not a view protected by Section 8 of the Code.

69 I turn now to the Certain Employees' role in distributing the February 4 Letter. Although the Board is reluctant to scrutinize and limit exchanges among fellow employees during campaigns for union representation, there are some circumstances where limits arise. As the Board stated in *Sacpyr Investments Ltd. Doing Business as Best Western Cowichan Valley Inn*, BCLRB No. B237/96 ("*Sacpyr*")*:*

> Section 9 of the Code prohibits the exertion of improper and excessive pressure on employees. But, absent physical threats or threats to job security or the like, the Board does not place undue weight on a statement made by one employee to another on a subject upon which neither of them is an expert, particularly where the recipient of the statement has every opportunity to check the statement's accuracy. The Board does not inquire into whether employees are swayed by campaign propaganda unless the line from persuasion to coercive speech is crossed. (para. 126)

70 In *British Columbia Lottery Corp.,* BCLRB No. B289/2003 (Leave for Reconsideration of BCLRB No. B82/2003) 99 CLRBR (2d) 93 ("*BC Lottery*"), the Board dealt with the erroneous comments of an employee regarding job protection following union certification and commented as follows:

> The Board has noted that "[p]romises and puffery, and hyperbole and exaggeration are common features of representational campaigns" and that "[t]o the extent that a party has the opportunity of responding to allegations in a representational campaign, the less likely it is that a Section 9 complaint will succeed": *7-Eleven Canada Inc.*, BCLRB No. B91/2000 at paragraphs 240 and 254 ("*7-Eleven*"). While a misrepresentation may "cross the line" from being merely a persuasive statement to constituting coercion or intimidation, in order to do so the misrepresentation must be "so outrageous or inflammatory that it places undue or excessive pressure" upon employees with respect to the issue of union representation: *British*

> *Columbia Housing Management Commission*, BCLRB No. B3/93 ("*BC Housing*").
>
> > Communications by the employer to its employees about representation issues have traditionally been regulated more stringently under the Code than communications amongst employees. However, as we have noted, even with respect to employers, the Board, in response to recent legislative changes broadening speech rights, has concluded that it will not necessarily find "innocent" (i.e., not deliberate) misrepresentations by employers to be coercion or intimidation within the meaning of Section 9 (*Convergys*, paragraph 133). (paras. 46 -47)

71 The evidence shows that the February 4 Letter was circulated at a meeting of employees in another employee's home. Trevor Sampson testified that there was discussion that more copies of the February 4 Letter would be available at the Dawson Creek Wal-Mart on February 7. But on cross-examination, he agreed that he might have been mistaken. As a result, I find that there is no evidence that the February 4 Letter was circulated at the Dawson Creek Wal-Mart store or that the distribution of the February 4 Letter went beyond the meeting at Lavallee's house.

72 The Certain Employees were opposed to unionization and were trying to provide information to influence their co-workers. Organization campaigns commonly involve persistent peer pressure. The Board generally allows a fair amount of leeway when employees make negative comments about unions and their reputations. The same comments made by employees do not necessarily carry the same repercussions as they would if expressed by a person with authority. The Certain Employees were not in a position to reasonably know that Nolin was making erroneous statements of law and fact in the February 4 Letter. Given that Nolin purported to speak with authority as an expert in labour relations familiar with Wal-Mart and the UFCW, they would have every reason to expect that he was making informed and accurate comments.

73 When I consider that the distribution of the February 4 Letter was limited to the single meeting at Lavallee's home and that it was reasonable for the Certain Employees to expect Nolin's comments to be accurate, I am not persuaded that the Certain Employees acted in a coercive or intimidating manner. In these circumstances, I find that the Certain Employees did not contravene Section 9 of the Code.

B. Section 6(1)

74 Section 6(1) states:

> 6 (1) Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

75 There are two aspects to this part of the Union's complaint. First, that Wal-Mart unlawfully interfered in the Union's organizing drive by putting Nolin Sr. in touch with

Fellers. Second, that Wal-Mart unlawfully interfered in the Union's organizing drive when Quist told Juanita and Trevor Sampson about the anti-union meeting at Lavallee's home.

76 No witnesses testified with respect to the first part of the complaint. However, based on the undisputed submissions, Quist, the Dawson Creek Wal-Mart manager, told a regional manager, Toy, that Fellers alleged that the Union tried to run her off the road. Toy repeated the story to Binns, the manager of the Saskatoon Wal-Mart. Binns then told Nolin Sr., a known opponent of the UFCW, enough about the situation that Nolin Sr. was able to phone the Dawson Creek Wal-Mart and speak directly with Fellers. From Nolin Sr.'s phone call, MacLeod learned about the lawyer Nolin from Fellers. The end result was that the February 4 Letter was written.

77 There is no evidence about what was said as Feller's allegations were passed from one Wal-Mart manager to another and finally to Nolin Sr. All that is known is that as a result of a Wal-Mart manager speaking to a UFCW opponent in Saskatchewan, MacLeod learned of Nolin. In the absence of any evidence that Wal-Mart acted with the direct intent of bringing Union opponents together, I am not persuaded that a breach of Section 6(1) of the Code took place.

78 Regarding the second part of the Section 6(1) complaint, I do not find that Quist violated the Code when he spoke to either of the Sampsons. In the first instance, Trevor Sampson was not an employee of the Dawson Creek Wal-Mart. Later, when Juanita approached Quist with her concerns about the Union representatives coming to her home, Quist told her to speak to Fellers, a well-known opponent of the unionization campaign, about a meeting that evening. There is no evidence that Quist urged Juanita to attend the meeting. He simply told her to speak to another employee. In all of these circumstances, I am not persuaded that Section 6(1) of the Code was breached.

C. Section 5(1)

79 The relevant section of the Code is as follows:

> Prohibition against dismissals, etc., for exercising employee rights
>
> 5 (1) A person must not
>
> (b) threaten dismissal of or otherwise threaten a person,
>
> (d) intimidate or coerce or impose a pecuniary or other penalty on a person,
>
> because of a belief that the person may testify in a proceeding under this Code or because the person has made or is about to make a disclosure that may be required of the person in a proceeding under this Code or because the person has made an application, filed a complaint or otherwise exercised a right conferred by or under this Code or because the person has

> participated or is about to participate in a proceeding under this Code.

80 The Certain Employees and Francis complain that the Union violated Sections 5(1)(b) and (d) of the Code by filing the unfair labour practice complaint, considered earlier in this decision, and seeking "oppressive" remedies against them, some of which the Board has no jurisdiction to order. In addition to seeking a cease and desist order, the Union asks to be made whole including reimbursement of its organizing costs, aggravated and punitive damages, and payment of its legal costs. The Certain Employees and Francis submit that if the Union's intentions were proper it would not have sought remedies such as organizing costs and aggravated and punitive damages. The Certain Employees contend that the natural consequences of the Union proposing these sorts of remedies against ordinary employees is to intimidate them into silence.

81 The Certain Employees and Francis concede that there may have been a basis for a complaint against MacLeod because she distributed the February 4 Letter. The Certain Employees and Francis argue that there was no basis for the complaint against Fellers because all she did was attend the meeting at Lavallee's house. However, that statement tends to understate Fellers' role. The evidence shows that she was an organizer of the meeting at Lavallee's home.

82 (Although the Union withdrew its unfair labour practice against Francis during the submission process, he continues to press his complaint against the Union. I find that there is nothing improper about the Union withdrawing its complaint after it reviewed the Certain Employees' and Francis' submissions. The Board expects parties to withdraw complaints when they receive information that makes it clear they have no case.)

83 The Certain Employees and Francis rely on Section 4(1) of the Code which provides that every employee is free to be a member of a trade union to establish that they were exercising a right conferred by the Code. Wal-Mart endorses their position. In *Bigfoot Industries Inc.,* BCLRB No. B279/2000, 62 CLRBR (2d) 174 ("*Bigfoot*"), the Board commented:

> It may be argued that the freedom of association includes the freedom not to associate, and implicit in the scheme of the legislation is also the right to campaign against the Union in the context of a certification or decertification campaign. (para. 146)

The Certain Employees and Francis submit they were exercising a right conferred under Section 4(1) of the Code when they opposed the Union's organizing campaign. In addition, the Certain Employees note that the Board gives a broad interpretation to employee expression rights. In *Bigfoot,* the Board expressed concern about a union using Section 9 "to quench dissent".

84 However, the Board has expressly rejected the broad interpretation of Section 5(1) urged by the Certain Employees, Francis and Wal-Mart. The Board's approach to Section 5 of the Code was recently set out in *Construction Labour Relations Association*

*of British Columbia,* BCLRB No. B360/2004 (Leave for Reconsideration of BCLRB No. B301/2004) ("*CLRA*") as follows:

> The Board's established interpretation of Section 5(1) is that, in order to claim Section 5(1) protection, a person must establish that the treatment of which they complain arose from their invoking or being involved in a Board proceeding (or taking steps to invoke or be involved in a Board proceeding: *John Graham*). [BCLRB No. B302/98] They cannot merely rely on an argument that they were engaging in a "right" under the Code, such as the right under Section 4(1) …, if that right is not connected to invoking or being involved in a Board proceeding. (para. 14)

85 In other decisions including *Gibraltar Mines Ltd.,* IRC No. C275/88 (Reconsideration of IRC No. C203/88), *South Peace Home Support Association,* BCLRB No. B312/95 (Leave for Reconsideration of BCLRB No. B60/94), and *Scana Industries Ltd.,* BCLRB No. B97/96 ("*Scana*"), the Board has found that the phrase "or otherwise exercised a right conferred by or under this Code" was not intended to extend Section 5(1) protection beyond persons who invoke or become involved in Board proceedings. In *Scana,* the Board stated:

> The purpose of Section 5 is to ensure the integrity of the adjudicative system for resolution of labour disputes is not hampered by improper conduct: *Gibraltar Mines Ltd., supra,* at p. 7. Section 5 is directed at the adjudicative process under the Code, and not at the exercise of substantive rights that may be conferred by the Code. As a consequence, we conclude that it is the fact of testifying, and not the substance of the testimony, which is protected. Section 5 offers a remedy to an individual who is penalized for a prohibited reason – that is, participating in a proceeding under the Code. (para. 62)

86 In this case, there is no nexus between the opposition of the Certain Employees and Francis to the unionization campaign and a Board proceeding such as testifying at a hearing. Indeed, the Certain Employees and Francis do not claim there is such a nexus. Their complaint under Section 5(1) is based on their right under Section 4(1) of the Code to choose not to be Union members.

87 I find that the purpose of Section 5(1), i.e., preserving the integrity of Code proceedings, is not engaged in the application of Certain Employees and Francis. Accordingly, I dismiss the Certain Employees' application under Section 5(1).

88 Although there is no evidence before me that would lead to the conclusion that the Union filed its unfair labour practice complaint against the Certain Employees and Francis for improper purposes, I further note that the narrow interpretation of Section 5(1) does not mean that employees who claim to be intimidated or coerced by a union are without protection under the Code. Section 9 of the Code protects employees from abuses by either employers or unions. It provides that no person may use coercion or

intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or refrain from becoming a member of a trade union.

## VI. REMEDY

89 The purpose of a remedy is to put the aggrieved party in the position it would have been in but for the breach of the Code. The Union seeks a declaration that the Code has been breached, a cease and desist order, a remedial certification, lost organizing costs, damages, legal costs or, in the alternative, the distribution of a letter from the Union and an order that the Board's decision be distributed to employees.

90 In this case, the Union's organizing drive got off to a good start but quickly ground to a halt when it was beset by a number of difficulties. These problems included the allegations about the Union's misconduct and the arrest of one of the Union organizers. Another was the February 4 Letter. As one of the Union organizers testified these events were "a one-two punch" that brought the organizing campaign to an end.

91 Given the close proximity in time between the events, it is impossible to unravel one from another. I cannot conclude that without the February 4 Letter the organizing drive would likely have been successful. The evidence shows that the last Union membership cards were signed three days before the February 4 Letter was circulated. I am not prepared to exercise my discretion to order a remedial certification in these circumstances.

92 In crafting a remedy, I am taking into consideration that Nolin's comments were in writing. I find in these circumstances a remedy which corrects the record and allows the Union an opportunity to freely communicate with the Dawson Creek Wal-Mart employees will best achieve the goal of placing the Union in the position it would have been before the unfair labour practices.

1. Nolin and the Law Firm are to cease and desist from violations of Section 9 of the Code.

2. Nolin and the Law Firm are to pay for the mailing of this decision with the attached summary letter as the cover page, without any editing or commentary, to the home addresses of all Dawson Creek Wal-Mart employees. Nolin and the Law Firm are to pay for the Union to mail written material to the home addresses of all Dawson Creek Wal-Mart employees.

3. Wal-Mart is to provide a list of all employees with their home addresses. An Industrial Relations Officer ("IRO") will verify the employee mailing list from payroll records. Any reasonable costs Wal-Mart incurs in producing the employee mailing list may be charged to the Law Firm and Nolin.

4. Wal-Mart is to provide a third-party mail service, selected by the Union, with the employee mailing list verified by the IRO within two weeks of the publication of this decision. (The third-party mail service is to preserve the confidentiality of the

employee mailing list. The Union will not have access to the employees' names and addresses.)

5. The Board will provide the third-party mailing service with a copy of the decision and summary. Nolin and the Law Firm are to pay the third-party mail service to produce a copy of the decision and summary for each name on the Employee List. The mailing of this decision and summary is to be done within three weeks of the date this decision is published. Nolin and the Law Firm are responsible for all costs incurred by the third-party mail service in mailing this decision and summary.

6. The Union is to decide when its mailing will go out and will have sole control over the written material sent to employees provided that the mailing takes place within three months of the publication of this decision. The Union is to provide the mail service with the written material for the mailing. Any reasonable expenses incurred in providing the material to the third-party mail service may be charged to Nolin and the Law Firm. Nolin and the Law Firm are responsible for all costs incurred by the third-party mail service in mailing the Union's written material.

## VII. CONCLUSION

93 The Union's unfair labour practice complaint under Section 9 of the Code against the Certain Employers is dismissed. The Certain Employees' and Francis' complaint under Section 5 of the Code is dismissed. The Union's unfair labour practice complaint under Section 6 of the Code against Wal-Mart is dismissed.

94 Nolin and the Law Firm breached Section 9 of the Code by writing and distributing the February 4 Letter.

95 Should the parties experience difficulties in implementing this decision, I remain seized to deal with any questions arising from remedy.

LABOUR RELATIONS BOARD

***"JAN O'BRIEN"***

JAN O'BRIEN
VICE-CHAIR

**BRITISH COLUMBIA**

# LABOUR RELATIONS BOARD

May 30, 2006

## SUMMARY OF DECISION

The Labour Relations Board (the "Board") has found that Michael Nolin and the Law Firm that he is associated with contravened the *Labour Relations Code* (the "Code") as a result of statements made in a letter on February 4, 2005.

Under the Code each employee has the right to decide whether to reject or support trade union representation free of coercion or intimidation from anyone. The Board found that statements made by Nolin and the Law Firm in the February 4 Letter were coercive.

Nolin and the Law Firm have been ordered to cease and desist from violating the Code. They have also been ordered to have this decision mailed to you and to provide the United Food and Commercial Workers, Local 1518 (the "Union") with a separate opportunity to mail written material to your home. (Your home address has not been provided to the Union. The mailing of this decision and any written material from the Union is being done by a mail service that is obliged to keep your home addresses confidential.)

Nolin held himself out to be an authority on labour relations law based on his experience acting on behalf of employees involved in litigation dealing with Wal-Mart Canada Corp. and the United Food and Commercial Workers in Saskatchewan. Nolin made his comments while the Union was conducting a unionization campaign among the employees of the Dawson Creek Wal-Mart.

When Nolin stated that only he could tell the employees that there was a chance that the Dawson Creek Wal-Mart would close if it unionized, he was taking advantage of employees' susceptibility to threats about their economic well-being. An employee could reasonably conclude that Nolin was passing on inside information. The threat of store closure, coming from a third party who employees could reasonably conclude had inside information, could have the effect of compelling or inducing a person to refrain from becoming a member of a trade union. Nolin's comments about the possible closure of the Dawson Creek Wal-Mart if it unionized amounted to coercion within the meaning of Section 9 of the Code.

Nolin was wrong when he stated that the Union was misrepresenting the Code by telling employees that a representation vote would take place before the workplace could be unionized. The Union was truthful when it stated that a representation vote would take place if it received sufficient support. The Code provides for a

representation vote when a union can show that at least 45 per cent of the employees in an appropriate bargaining unit have signed membership cards.

The uncontradicted evidence of Union representatives is that they never offered to pay employees if they signed membership cards. Nolin repeated allegations about the Union offering to buy membership support without checking the truth of these statements.

When all of the above statements in the February 4 Letter are considered together, Nolin and the Law Firm breached Section 9 of the Code by acting in a coercive manner that could reasonably have the effect of compelling or inducing a person to refrain from becoming a member of a union.

Certain employees of Wal-Mart did not breach the Code when they distributed the February 4 Letter. At the time that the letter was distributed, they would not have known that it was erroneous. The Union did not breach the Code by filing an unfair labour practice complaint against the employees.

Wal-Mart did not breach the Code when the Dawson Creek store manager told an employee about a meeting being organized by employees opposed to the Union or when Wal-Mart managers passed allegations from a Dawson Creek anti-union employee onto a Saskatchewan employee.