PROVINCE OF NEW BRUNSWICK

Labour and Employment Board

IR-030-16

IN THE MATTER OF THE *INDUSTRIAL RELATIONS ACT*

AND IN THE MATTER OF AN APPLICATION FOR CERTIFICATION

BETWEEN:

New Brunswick Union of Public and Private Employees

Applicant,

- and -

Woolastook Long Term Care Facility carrying on business
as Orchard View Long Term Care
Gagetown, New Brunswick

Respondent,

- and -

New Brunswick Association of Nursing Homes Inc.

Interested Party.

BEFORE: G.L. Bladon
Alternate Chairperson

APPEARANCES:
For the Applicant: *Leigh Sprague*
For the Interested Party: *Justin Wies, Sophie Noël*

DATE OF HEARING: November 14, 2016

DATE OF DECISION: December 12, 2016

DECISION OF THE BOARD

I. INTRODUCTION

1. On August 31, 2016, the New Brunswick Union of Public and Private Employees ("the Union") applied for certification as the bargaining agent for – ultimately by way of agreement – "All employees of Woolastook Long Term Care Facility Inc., Gagetown, New Brunswick save and except Registered Nurses, Administrator, Director of Care, Administrative Clerk, Lead Cook, and those excluded by the *Industrial Relations Act*". The Respondent, Woolastook Long Term Care Facility Inc., operates a nursing home known as Orchard View Long Term Care in Gagetown, NB which is the subject of this Application. A Reply to the Union's Application was filed on September 16, 2016. When the matter came on for hearing, the sole issue in dispute was the level of Union support for the Application; more specifically, the question of the voluntariness of three Petitions and five Statements of Desire.

II. THE EVIDENCE

A. Statements of Desire

2. Five Statements of Desire came to the Board's attention. The first was faxed to the Board; however, the original document was not filed with the Board at any time. Consequently the Board rejected the first Statement of Desire. The signatory of that document also signed Petition #1. Two Statements of Desire were not relevant as the signatories did not sign a Union Membership Card. The two remaining Statements of Desire were not supported by any evidence at the hearing and were thus rejected as there was no proof of their voluntariness. However, these signatories also signed Petition #3.

B. Petitions

3. Petition #1 – this document, purporting to contain 20 signatures, was supported by the testimony of Kim Marr and Debbie McAllister.

4. Petition #2 – which purports to contain five signatures, was not supported by any evidence at the hearing. Accordingly there is no proof as to its voluntariness and it is therefore rejected.

5. Petition #3 – this document, purporting to contain 5 signatures, was presented by Stacey Seeley, who witnessed the signing of the document.

6. Petitions #1 and #3 were the focus of this hearing.

7. The circumstances surrounding the origin, circulation and delivery of these Petitions, which will be canvassed in detail, are best understood by a chronological discussion of the facts flowing from the evidence.

8. **August 31, 2016** – The Application for Certification was filed by the Union.

9. **September 1, 2016** – The Labour Board forwarded the usual "Notice to Employees of the Certification Application" to the Employer with instructions to the Employer to post the Notice immediately and keep it posted until the terminal date of September 16, 2016.

10. **September 6, 2016** – The Employer posted the "Notice to Employees" in the workplace.

11. **September 7, 2016** – Kim Marr, an Orchard View employee who provided personal care to the residents of the Respondent nursing home, noted paragraphs 6 and 7 of the "Notice to Employees" which advised Employees how to voice their opposition to the Union, should they wish to do so. After discussing the Union's Application with other members of the staff, Marr sought the assistance of Mary Douthwright ("Douthwright"), whom Marr described as the Administrative Assistant who did book work in the office. The evidence indicated that Douthwright's office was adjacent to the offices of Charlotte Hiscock and Steve Little. The Respondent's website lists the Orchard View "Management Team" as comprising Senior Managers Steve Little – Administrator, and Charlotte Hiscock – Director of Care, and seven Department Managers which include "Mary Douthwright – Office", and "Debbie McAllister – Activation."

12. Marr said she and Douthwright created the letter dated September 7, 2016, signed by Marr, indicating Marr as a representative of a group of employees who opposed the Union. The letter was attached to a second page which contains the heading "Employees Who Oppose Notice of Application for Certification" under which spaces were left blank for individuals to print and sign their names. This document was identified as Petition #1.

13. Marr and McAllister explained and circulated Petition #1. They identified and witnessed, either separately or together, 18 of the 20 signatures appearing on the document. McAllister testified that upon receiving signature number 17, she placed Petition #1 in a drawer in her desk

in her office. She did not see the document again. Marr said that she removed Petition #1 from McAllister's drawer to obtain the signature of number 18. She then returned the document to McAllister's drawer and did not see the document again. Neither Marr nor McAllister could explain the signatures of numbers 19 and 20. They could not testify as to the exact dates of the 18 signatures that they did witness, nor could they explain what happened to Petition #1 after Marr last placed it in McAllister's desk drawer.

14. **Sometime between September 6, 2016 and September 16, 2016**, a letter over the signature of the Chair of the Orchard View Board of Directors – Dr. Ronald Samuels, was mailed to some employees and/or placed in the employee's mailbox at the workplace. The Samuels letter is marked as Schedule A to this decision. Attached to Samuels' letter is a document appearing to come from www.Labourwatch.com entitled "**Cancellation of Union Membership or Application for Membership** (Individual) – sometimes also Called **A Statement of Desire**." It is attached as Schedule B to this decision. The first paragraph of the Labour Watch document reads, "By signing this, I am saying that: I do not support, I do not want to become a Member or do not want to remain a Member of and I do not want to be represented by:" followed by a blank space for the name of the union and immediately below that blank, a blank space for the employer's name. In this case the document circulated to the employees had the name of the union and the name of the employer inserted – for which there was no explanation offered. There is then a space for the name of the signatory and a space for his/her signature, the date, and the witness' signature and the date.

15. The Labourwatch document contains a note which reads in part "1. Do not use your employer's fax machine if you fax this in".

16. Finally, the form identifies the New Brunswick Labour and Employment Board, with its address, phone and fax numbers, below the instruction "To file your cancellation with the New Brunswick Labour and Employment Board:"

17. Stacey Seeley is an almost 10 year employee of Orchard View. As a Resident Source Clerk, her responsibilities include scheduling and assisting the charge nurse with doctors' orders and related needs. **On or about September the 7th, 2016**, Douthwright gave Seeley a document – Petition #3 – apparently downloaded from the Labourwatch website entitled "Petition for Cancellation of Union Membership or Application for Union Membership" on which the name of the union and the employer were completed in the space provided therefor. The area for the date, full name, signature and a witness name and signature was left blank. Seeley testified that Douthwright identified each of the subsequent signatories to Seeley and instructed Seeley to obtain their signatures, which she did on September 9, 2016 (2) and September 15, 2016 (3). Seeley then returned the signed Petition #3 to Douthwright in Douthwright's office.

18. On **September 15, 2016**, the Union filed a "Notice of Intention" that it intended to allege, at the hearing, that the Employer had violated s. 3(1) of the *Act* by circulating Samuels' letter and its attachment.

19. On **September 16, 2016**, Seeley was present in Douthwright's office when Douthwright "put all the documents together" in a larger envelope. Seeley and Douthwright then drove to the post office. Douthwright spoke to the postal clerk and paid the registered mail postage fee of $10.80 by credit card. Seeley said that Douthwright had a company credit card but she could not say if Douthwright used that card or a personal credit card for the payment of the registration fee for this envelope.

20. As the parties were advised, this Board received a light grey envelope with the employer's return address thereon containing three petitions and four Statements of Desire in separate white envelopes. The Board also received a faxed Statement of Desire.

21. Joelyne Clark testified that she was an LPN, now working as a casual, with the Respondent. She received the Samuels letter and its attachment mailed to her home and in her mailbox at the workplace about **September 12th, 2016**. Subsequently, Clark received a phone call at her home in Oromocto from Douthwright. Clark said the call was about the Petition. She was asked by Douthwright if she signed a Union Card. Clark did not respond. Douthwright then asked if she could bring the Petition to Clark to sign because, according to the uncontradicted evidence of Clark, Douthwright said that the Union would not be "any good". Douthwright spoke about money and that Orchard View could lose residents and then staff. Clark did not accede to Douthwright's request that she sign the Petition.

22. As to Douthwright's responsibilities, Clark was asked, in cross-examination, if Douthwright "just processes material or if she manages." Clark responded saying: "She

processes, but she thinks she manages". Clark went on to say that "questions about vacation or anything like that…sick leave questions, go to Mary [Douthwright]." Clark testified that Douthwright did the payroll. On one occasion when Clark was out on "Doctors' Orders", Douthwright assessed Clark's time away from work against her vacation time when "I should have had sick leave". Clark further testified that the denial of her Workers Compensation claim was handwritten by Douthwright.

23. Cathy Francis has been employed for 10 years as a Residential Attendant providing daily care for the residents. She too received the Samuels letter and its attachment at her home and in her mailbox at work.

24. On the evening of **September 14, 2016**, Francis received a phone call at her home from Douthwright. Douthwright wanted Francis "to sign a paper to not be part of the Union". The uncontradicted evidence of Francis was that Douthwright told her about the things the Union could do – "cut jobs, residents would suffer". When Francis declined Douthwright's urgings over the telephone to sign a document opposing the union, Douthwright said the document to be signed could be put in Francis' locker. Francis subsequently found an envelope in her locker with her name handwritten – the evidence confirmed – by Douthwright, on its face. The envelope contained a letter under Francis' home address to the Labour Board reading in part "By way of my signature below, I wish to oppose the application for certification." The larger envelope also contained an empty envelope addressed to the Labour and Employment Board to which a yellow sticky note was attached. The sticky note, marked as Schedule C, reads:

Cathy: I did this
for you in case
you have a
change of heart
today! 

And I sure hope you
do – (only you, me & Steve)
know.

Clark gave evidence, which was uncontradicted, that the handwriting on the sticky note was that of Douthwright.

25. Other than the evidence of a number of petitioners in support of the petition, there was no further evidence led.

III. ANALYSIS

26. It is important that one understands the significance of an application for certification of a union as the bargaining agent for a group of employees at a place of employment. If such an application is successful, it changes the employer/employee relationship dramatically. Once the union is certified, the employer can no longer bargain directly with the individual employee, but rather, it bargains with the union – a stranger to that workplace. Frequently, the paternal relationship that has been built up between employer and employee over a number of years as the company grew in size and success is threatened. Unionization, on occasion, will fracture that long established relationship. Furthermore, allegiance is not only between employer and employee, but also among the employees themselves with some employees supporting the union and others believing their loyalty lies with the employer. The workplace can suddenly find itself

in turmoil as tension and distrust arise. In *Re Covered Bridge Potato Chip Co.*, [2016] N.B.L.E.B.D. No. 5, this Board said:

> [2] The difficulties faced by these parties are mirrored in [*Re Allsco Building Products Ltd.*, [1998] NBLEBD No. 24 at para. 6:] and thus the Board's comments there are appropriate:
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> > [6] As is so often the case with family businesses which have expanded significantly beyond their initial formation, the transition from an unorganized to an organized workplace has not been an easy one. The tenor and spirit of a family run business, often premised upon a 'partnership' between owner-manager and employees with a commonality of purpose and objective, fits uneasily into the ethos of the statute which is premised on an arms length relationship between employer and employees, and a conflict of interest between management and labour, each with divergent interests which are accommodated with one another through the process of collective bargaining. Upon the grant of a certificate the direct relationship between employer and employee is stripped of almost all but its bare essentials – the initial act of hiring and little beyond that.
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> > [7] All of this has been well recognized by our trade unions, labour boards and courts – but on the part of employers, and in particular employers such as Allsco rooted in a small family enterprise, there is little understanding of that reality until that point in time when its employees elect to exercise the right of freedom of association entrenched in the Act to join a trade union of their choice and participate in its lawful activities, [s.2].
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> > …
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> > There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations
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> > …
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> > The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto.

It is not surprising, then, that these circumstances give rise to Statements of Desire, Petitions and Counter-petitions as the employees wrestle in their own minds with what kind of workplace will be better for them. This consternation sometimes results in the employee supporting the union one day and then, perhaps, changing his or her mind the next to oppose the union.

27. How then is this discomfort in the workplace addressed? Labour relations in New Brunswick, and largely throughout the western world, embrace the principle of industrial democracy which underlies its labour legislation. That principle focuses on "its ability to increase worker autonomy, individual well-being, productivity and satisfaction, as well as greater participation in determining one's role and place at work, all of which factors are apt to be lacking to some degree where the principles of industrial democracy are lacking." – see *Fundy Masonry Ltd. and New Brunswick Council of International Union of Bricklayers and Allied Craftworkers* (1997), 35 C.L.R.B.R. (2d) 71 at paragraph 20.

28. Labour Boards have a responsibility to administer labour legislation with an appreciation of these components of industrial democracy. In that respect, this Board, like others, is sensitive to the vulnerability of employees particularly at the early stages of union organization such as exists here. See *Re Entec Inc. (Saint John)*, [2015] N.B.L.E.B.D. No. 3, where at paragraph 5, this Board cites with approval, the Ontario Board's statement in *United Electrical vs. DeVilbiss (Canada) Limited*, [1975] O.L.R.B. Rep. Sept. page 678 at para. 11:

> In the early stages of union activity, employees are particularly susceptible to the influence of employer conduct. The exercise of the power of discharge by the employer at this time is a blunt reminder of the economic strength of the employer and, conversely, the economic vulnerability of the employees.

29. It is this background which gives rise to the particularity of the *Industrial Relations Act* ("the *Act*") provisions determining whether or not there are a sufficient number of employees who have chosen the union as their representative to negotiate their conditions of employment, wages and job security, among others, with their employer.

30. The process, as set out in the New Brunswick legislation relating to the finding of the degree of union support, begins with the Labour Board determining the number of employees in the proposed group of employees or unit the union seeks to represent. Then it counts the number of valid union membership cards in that group filed by the date fixed by the Board for the completion of filings relevant to that particular application, *i.e.*, the terminal date (s. 14(1)). Assuming for the moment that no petitions are filed, if union membership evidence exceeds sixty percent of the group of employees the union seeks to represent, the Board must certify the union as the bargaining agent for those employees without a vote (s. 14(3)); if the union support is between fifty and sixty percent, the Board has the discretion – it may order a vote among the employees to determine if the majority of them are in favour of a union or it may certify the union – s. 14(5); if the support for the union is between forty and fifty percent, the Board will order a vote – s. 14(2); if the union support is below forty percent, the Board will dismiss the union's certification application without a vote – s. 14(2).

31. Where, however, some employees indicate they are opposed to the union, by Petition or Statement of Desire, the Board will determine if any of the signatories to those documents have also signed union cards, then the Board will determine the degree of union support absent those employees who have signed both a membership card and a document opposing the union. If the

union support is then calculated to fall between fifty and sixty percent – assuming the petition is found to be voluntary, *i.e.*, as this case, free from employer influence, then the Board may order a vote or it may certify the union. If the support falls below fifty percent then the Board, absent other factors, must order a vote.

32. It is important to appreciate that voluntary signing of a petition or statement of desire is not taken by the Board, notwithstanding the wording of the document, to be a revocation of union membership, but rather it is seen, if signed after signing a union membership card, as the most recent expression of the employees' true wishes. Hence the importance of determining that by signing the document opposing the union, the employee is exercising his or her free will independent of any outside influence exercised by the employer or those purporting to act on the employer's behalf. The matter was addressed by this Board in *Re Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 406 v. Les Aliments Bonté Ltd.*, [2003] N.B.L.E.B.D No. 26 at para. 13:

> [13] The law in determining whether or not a petition is voluntary was originally articulated by this Board in the case of *Metropolitan Stores*, [1979] N.B.L.L.C. 189 where then Chairman Graser stated:
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> > "This Board has always taken the position with respect to **Statements of Desire or petitions filed by employees that they must be proved to have been freely and voluntarily originated, circulated, executed and delivered, isolated from management influence or interference so that there is no question of the bona fides of the intention of the employees and their true desires**. This has been a policy respecting the onus of proof required by the Board over many years.
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> This articulation of the law has withstood the test of time, both before this Board and other provincial Labour Boards. In *Re Quality Control Council and Trispec, (supra)* the board stated:
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> > "27. That statement was made within the context of an application for termination of bargaining rights but the same care in establishing the bona fides of the intentions of employees and their true desires has always characterized the Board's consideration of statements of desire filed in

support of an application for certification. The rationale behind this heightened concern of labour tribunals in such cases was long ago articulated by the Ontario Labour Relations Board in *Pigott Motors (1961) Ltd.* 63 CLLC para. 16,264 as follows:

> "The Labour Relations Act contains detailed provisions designed to protect the rights of employees to become members of, and to select or reject a particular or any trade union as their collective bargaining agent and to bargain collectively or individually with their employer. It is an important function and duty of this Board under the legislation to be circumspect and vigilant to see that these rights are preserved and not made illusory.
> There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employees who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interest and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document, such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories. (See for instance, the Sinnott News Case, CCH Canadian Labour Law Reporter, 1955-59, Transfer Binder 16, 114 at p. 12, 209 and the Fleck Manufacturing Ltd. case, CCH Canadian Labour Law Reporter, vol. 1, 16, 236, at p. 13,201). In seeking this assurance, the Board draws no distinction between documents which purport to express a desire on the part of employees to resign from the union and those which purport merely to express opposition to the applicant as their collective bargaining agent. In other words, for this purpose, it does not seek to distinguish between the two matters of membership and representation."

And see as well *Baltimore Air Coil Inter American Corporation* [1982] OLRB Rep. 1387 (Oct.) at 1406 f. Indeed, the Ontario board has gone so far as to hold even in the absence of evidence of management participation or involvement in a petition that a credible reason for the 'change of heart' which it expresses must be forthcoming to discharge the onus of proof that is voluntarily grounded and expresses the true desires of the employees signatory.

…

> [32] As the Board has noted in *Re W.J. Beirsto Co. Ltd.* (1995) 24 CLRBR (2d) 161. "**The slightest hint of employer involvement in the origination, circulation and execution of employee petitions … is fatal to their validity'** [p. 181]. Here, improper employer involvement has been established. Accordingly, the board rejects both statements of desire here filed. Neither, in its view, is free from the taint of managerial influence and interference.
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> [Emphasis added]

33. The issue of voluntariness was explained by the New Brunswick Court of Appeal in *Fortis Properties Corp. v. United Steelworkers of America, Local 1-306*, 2007 N.B.C.A. 16 at para. 23:

> [23] Most of the issues raised by the respondents, as outlined earlier in these reasons, are premised on a fundamental misunderstanding with respect to the purpose of voluntariness hearings. The best way to explain that purpose is to explain what the hearings are not about. They are not proceedings to determine whether on a balance of probabilities the employer was involved in the subsequent withdrawal of union support. They are not hearings which pit the union against the employer. This explains why those employers who elect to participate in a voluntariness hearing are designated as "interveners" before the Board. Moreover, the winner is not the one who is best able to cobble together sufficient evidence to establish employer misconduct. **Rather, they are proceedings in which the Board has to decide whether the subsequent withdrawal of union support is "tainted" by employer/management involvement. Obviously, this is a much lower threshold than the civil standard of proof and, without putting works into the Board's mouth, one that seems to mirror the threshold of "reasonable possibility" that is so often applied in other contexts.** As well, the Board insists that the onus of proof is on the employees to establish that they have voluntarily withdrawn support for the union or the certification application (the individual respondents in this case).
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> [Emphasis added]

<u>The Samuels Letter</u>

34. The Union alleges that the undated letter from the Chair of the Board of Directors of Orchard View attaching a petition or statement of desire for the employee to sign if opposing the union violates s. 3(1) of the *Act*. This letter was distributed by regular mail to many employees' homes and placed in all employees' mailboxes at the workplace. The Employer argues that this

letter is simply informative and balanced in setting out the "current situation regarding unionization at Orchard View, …" Section 3(5) of the *Act* protects the employer's freedom of expression so long as the exercise of that freedom is not "coercive, intimidating, threatening, or intended to unduly influence any person". On the other hand, s. 3(1) states that no one "shall participate or interfere with the formation of a trade union…". Labour Boards have long struggled with the conflict between the employer's limited freedom of expression as it is defined in s. 3(5) of the *Act* and the employee's freedom to choose to join a trade union under s. 3(1). In addressing to competing interests, the Ontario Labour Board said in *Dylex Ltd*., 77 C.L.L.C. para. 14, 112 (Ont. Div. Ct.):

> Counsel for the applicant took the position that an employer was required to stay neutral during the course of a union organizing campaign. We are of the view that no such requirement exists. Section [64] expressly states that nothing in the section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, threats, promises or undue influence. Where the difficulty inherently arises, however, is in trying to define the line at which an expression of views by an employer becomes "coercion, threats, promises or undue influence". In seeking to establish where the line lies the Board starts with the presumption that employees recognize that employers generally are not in favour of having to deal with employees through a trade union, and that therefore it ought not to surprise them when their employer indicates that he would prefer it if they voted against a trade union. Following from this the Board takes the view that an invitation to employees from their employer to vote against a trade union, in the absence of any surrounding facts or circumstances which would cause the employees to place undue emphasis on such statements, does not constitute undue influence within the meaning of [s. 65]. (See: *Playtex Limited*, [1972] O.L.R.B. Rep. Dec. 1027). On the other hand, however, the Board is cognizant that an employee may be peculiarly vulnerable to employer influences. This point is clearly brought out in the decision of the Canada Labour Relations Board in the *Taggart Service Limited* case, [(1964), CLRB Transfer Binder '64-'66 16, 015 at page 13, 055] the following excerpt from which was cited with approval by this Board in the leading case of *Bell & Howell Ltd.*, [1968] O.L.R.B. Rep. Oct. 695 at p. 706:
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> > An employer may express his views and give facts in appropriate manner and circumstances on the issues involved in representation proceedings in so far as these directly affect him and has the right to make appropriate reply to propaganda directed against him in relation thereto. However, he should bear in mind in so doing the force and weight which such expressions of views may have upon the minds of his employees and which derive from the nature and

> extent of his authority as employer over his employees with respect to their wages, working conditions and continuity of employment. He should take care that such expressions of views do not constitute and may not be reasonably construed by his employees to be an attempt by means of intimidation, threats or other means of coercion to interfere with their freedom to join a trade union of their choice or to otherwise select a bargaining agent of their own choice.

And specifically regarding the meaning of "undue influence", the Ontario Board's view is found in *K-Mart Canada Limited*, [1981] O.L.R.B. Rep. Jan. 60 at page 70:

> In *Words and Phrases Legally Defined* (London, 1970) undue influence is defined in part as:
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> > The unconscientious use by one person of power possessed by him over another to induce the other to enter into a contract.
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> In the context of the *Labour Relations Act* undue influence includes the unconscientious use by an employer of its power or authority over employees in order to induce them to forego their rights in relation to a union. An employer exerts undue influence on its employees, and thereby breaches the Act, when it takes unfair advantage of its position and authority in an attempt to sway the will of the employees. The line between legitimate employer expression and undue influence is not easy to draw in the abstract, and can only be assessed on a case by case basis.
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> The Board has long recognized the sensitive nature of the employer-employee relationship and the position of dominance enjoyed by the employer. The employer decides who will work and under what terms and conditions of employment. The employer is in a position to respond to employee concerns or to ignore them. The scheme of collective bargaining provided under the Act is designed to place employees on a more equal footing with their employer. **If, when faced with a move by employees to avail themselves of collective bargaining, an employer uses his authority to confer benefits or to otherwise improve the terms and conditions of employment, and does so with a purpose of undermining the trade union, must it be found that the employer, given the extent of his authority within the employment relationship, has exercised undue influence? The answer, regardless of the coexistence of a business motive, is yes. An employer who takes advantage of and relies upon his control over the employment relationship in this manner unduly influences his employees in contravention of the Act**.
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> [Emphasis added]

35. The New Brunswick Labour and Employment Board has considered the issue in *Re B.W.S. Manufacturing Ltd.*, [2015] N.B.L.E.B. No. 7 at para. 92 and 93:

> [92] Constraints on the Employer's free speech were considered in *FedEx Ground, supra*, at paras. 81 and 81 which read:

80 Although section 94(2) (c) [NB IRA ss. 3(5)] is relatively new to the *Code*, it is similar to corresponding provisions in various provincial legislation. The provincial Boards have generally interpreted the expressions coercion, intimidation, threats and promises at face value, creating a fairly straightforward factual test namely, if a communication is found, as a matter of fact, to consist of personal expression and not found to contain coercion and intimidation, threats, promises or undue influence, it should fall into the exception created in section 94(2) (c). These decisions based on the comparable statutory provisions are of assistance in resolving the issues presented in this case.

81 From the case law, the Board derives the following non-exhaustive principles:

- An employer is entitled to express its views and is not confined to mere platitudes. There is a middle ground, between mere platitudes and interference and undue influence, in which an employer is free to express its views.

- In evaluating employer conduct, the Board should seek to establish whether the employer's conduct has detrimentally affected the employees' ability to express their true wishes. **In other words, has the employer's conduct deprived the employees of the ability to express their true wishes in exercising their decision to associate or not?**

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

- The fact that an employer does not want a union and expresses its opinion to that effect is not necessarily a violation of the *Code*; **a factual analysis must be conducted to determine whether the manner in which this opinion is expressed contains an element of coercion, intimidation, threats, promises or undue influence.**

- **The Board should consider the context in which the statements are made and the probable effect on a reasonable employee of the means used**. Circulation of written material is the preferable mode, as the choice of written text is less intrusive that captive audience meetings or private discussions with employees.

[Emphasis added]

36. Looking at the Samuels' letter and its attachment dispassionately, it comprises four paragraphs describing the ongoing union organization attempt at Orchard View. It contains two

paragraphs advising the employee, in detail, how he or she can oppose the union. There is then a final paragraph, which apart from reminding the employee of the deadline "to make a representation to the Board", is innocuous. The letter is supplemented by the attachment of a partially completed Statement of Desire. The employer made a considerable effort to assure all employees ["Dear valued employees of Orchard View"] received the Samuels letter and its attachment by mailing it to their homes in most cases and placing it in their mail boxes at work. A reasonable employee, reading the letter and its attachment, would gather that the employer was opposed to the union. It invites the employee, quite clearly, of the steps to be taken to oppose the union and, in effect, join the employer in opposition. However, there is nothing in the Samuels letter that could be construed as conferring a benefit for that opposition. There is no mention of a possible improvement in working conditions or wages, there is no threat or hint that unionization might have a negative effect on the business operation of the employer and thereby raise the question of job security. In the circumstances in this case then, the Board finds that the Samuels' letter and its attachment does not impact on the voluntariness of the Petitions, nor does it offend s. 3(1) or s. 3(3) of the *Act*.

Petitions #1 and #3 - Voluntariness

37. Petition #3 contains the printed and signed names of five employees expressing their opposition to the Union. Those signatures were witnessed by Stacey Seeley. When Seeley attended at Mary Douthwright's office, she was given Petition #3 with identification of the Union and the Employer completed. Seeley was instructed by Douthwright to obtain the five signatures from the five employees identified to Seeley by Douthwright. Seeley circulated and returned the signed document to Douthwright as instructed. On September 16, 2016,

Douthwright was observed by Seeley gathering all of the materials received by the Board in opposition to the Union, placing them in an envelope bearing the Employer's return address and then proceeding to the Gagetown post office where Douthwright arranged with the postal clerk to send the envelope by registered mail to the Board for which Douthwright paid.

38. Petition #1 was initiated by Kim Marr, but the document itself was created by Douthwright in her office. It was circulated and 18 signatures were witnessed either by Douthwright or McAllister according to their testimony at the hearing. The petition contains 20 signatures – the final two signatures were not observed by Marr or McAllister. The last they saw of Petition #1 was its placement in a drawer in McAllister's desk. It arrived at the Board in the same envelope that contained Petition #2 and #3 and four Statements of Desire.

39. The Petitions are troubling in a number of respects: 1) s. 66(1) of New Brunswick Regulation 82-92 requires the petition to be accompanied by the return address of the person who files the evidence and the name of the employer. Here the only return address for Petitions #2 and #3 is on the envelope enclosing all the documents in opposition to the Union and it is that of the Employer. 2) The circulation of Petition #1 was not fully explained. There was no evidence of anyone witnessing signatures number 19 and 20, nor is there any evidence of how Petition #1 moved from McAllister's desk drawer to Douthwright's office for placement in the envelope sent to the Board. In *Re Primo Électrique Ltée*, [2008] N.B.L.E.B.D. No. 2 at para. 8, the Board said:

> [8] The difficulties the Board has with Mr. Chiasson's activities are first, his consultation with the employer's wife in order to contact one of the employees, and second, his apparent loss of control of the petitions. Authors *Sack & Mitchell* speak to this point as follows in paragraph 3.5130 of their work:

> *It is necessary that there be direct evidence regarding the document from the time of its inception to the time of its receipt by the Board including direct evidence of the physical preparation of the document and its actual delivery to the Board…*
>
> *… If the custody of the petition through the period of circulation cannot be substantially documented by direct evidence, the Board will not attach any weight to the petition.*

40. Then there is the evidence of Clark and Francis who had both received a telephone call at their homes from Douthwright urging them to sign a document in opposition to the Union.

Mary Douthwright

41. Petitions #1 and #3 will be found to be voluntary if it is shown that they are free from employer involvement. The test to be employed in determining that issue is to ask if there is the "slightest hint", "taint", or "reasonable possibility" of employer influence. Here it is argued that Mary Douthwright is a member of management or is perceived by the employees to be a member of management.

42. The evidence is: 1) Douthwright works in the general office, an office adjacent to the offices of Steven Little, the Home Administrator – or as one witness said - "He's the boss", and the office of Charlotte Hiscock, the Director of Care. These individuals are identified on the employer's website as Senior Managers. 2) Douthwright is not a member of the proposed bargaining unit *negotiated and agreed upon* by the parties. 3) The Orchard View website, as of September 22, 2016, sets out the "Management Team". Douthwright is included under the sub-heading of Department Managers – "… Mary Douthwright – office". 4) Clark testified that her Workers Compensation claim was denied in Douthwright's handwriting. 5) Clark testified that Douthwright did the payroll and on one occasion when Clark was off on Doctors' Orders,

charged the time off against Clark's vacation time rather than sick leave. 6) Petition #1, last seen by Marr and McAllister in McAllister's drawer, appeared in Douthwright's office on September 16, 2016 with two additional names on it. 7) Douthwright solicited opposition to the union from Clark and Francis. 8) Douthwright wrote a sticky note to Francis urging her to reconsider her position in support of the Union which was attached to a white envelope containing a completed Statement of Desire in Francis' name. The envelope was addressed to the Labour Board. Those documents were placed in Francis' locker in accordance with Douthwright's comments to Francis on the telephone. The bottom of the sticky note reads "And I sure hope you do. – (only you and me & Steve) know." The only "Steve" mentioned in the evidence was that of Steve Little, the Orchard View Administrator. 9) Douthwright did not testify at this hearing. 10) No evidence was called by the employer.

43. There can be no doubt on these unchallenged facts - particularly the apparent control exercised by Douthwright over payroll, the seeming determination of Clark's Workers Compensation claim and what Clark complains was sick leave being charged against her vacation time, that Douthwright was management or, at the very least, was perceived to be management by the employees. Finally, Douthwright's handwritten note to Francis, has on its face, "(only you, me and Steve) know." This evidence makes it clear that Douthwright was, if not in fact part of management, at the very least in the confidence of management. See *Re Landry*, [2000] N.B.L.E.B.D. No. 60 at para. 25. Douthwright's involvement in the creation, circulation and delivery of Petitions #1 and #3 amounts to a good deal more than a hint of employer involvement.

44. For these reasons, the Board finds that Petitions #1 and #3 have not been shown to be voluntary.

45. In the result the Union support is over 50%. The Board has the discretion to certify the Union without a vote. That discretion will be exercised absent factors suggesting otherwise.

> Those factors, given the certification scheme in place in New Brunswick, must relate to the integrity of the union membership. For example, allegations of coercion or fraud might well influence the Board against the exercise of its discretion in favour of certification, similarly a realistic expectation of employee build-up in the bargaining unit could give the Board reason for pause. The individual circumstances of the particular case may support other weaknesses in union membership. In this instance however, no such factors have been raised. The basis upon which certification is granted in this province is not challenged. The evidence of union support, as that term is defined in the New Brunswick legislation, is greater than 50%, i.e., the majority of the employees support the union as its agent for collective bargaining with this employer as evidenced by the membership cards and receipts for union initiation fees which have been filed in the certification process. There is no reason to question the level of employee support for the union in this case, and as it is greater than 50%, a certification order will issue.

See *Re Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 406 v. Les Aliments Bonté Foods Ltd.*, [2004] N.B.L.E.B.D. No. 13 at para 14.

46. There is nothing in the evidence in this case that indicates a weakness in the Union membership. Accordingly, a Certification Order will issue for the following bargaining unit:

> "All employees of Woolastook Long Term Care Facility Inc. carrying on business as Orchard View Long Term Care, Gagetown, New Brunswick save and except Registered Nurses, Administrator, Director of Care, Administrative Clerk, Lead Cook, and those excluded by the *Industrial Relations Act*".

Dated at Fredericton, New Brunswick, this 12th day of December, 2016.

G.L. BLADON
ALTERNATE CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD