

ONTARIO LABOUR RELATIONS BOARD

2339-93-R Michael McDougall, Applicant v. Hotel Employees, Restaurant Employees Union Local 75, Responding Party.

BEFORE: Lee Shouldice, Vice-Chair.

APPEARANCES: Sean Clancy, Michael McDougall and Agostino Da Silva for the applicant; Alick Ryder and Rebecca Murdock for the responding party; Lynn Bevan for Ronald Kelly

DECISION OF THE BOARD; March 25, 1994

I Introduction

1. This is an application for a declaration terminating bargaining rights brought under section so of the Labour Relations Act. The responding party, Hotel Employees and Restaurant Employees union, Local 75 ("Local 75") *was* certified as a bargaining agent for employees working at the Triumph Hotel located at 2737 Keele Street, North York, in 1981. There is no dispute by Local 75 that the application is brought in a timely manner under the Act. Nor s there any dispute that, if voluntary, the petition would be numerically relevant so as to result in a representation vote of the employees in the bargaining unit. The dispute in this case centres around allegations of employer involvement in the origination, preparation and circulation of the petition document.

II The Facts

2. In the instant application the employee petition to terminate the union's bargaining rights was chiefly sponsored by Michael McDougall, who has worked at the hotels since December, 1992, as a bellman. Evidence before the Board indicates that the hotel, now operating as the Howard Johnson's Plaza Hotel North York ("the hotel"), was closed rather abruptly in July, 1991 as a result of financial difficulties. In fact, since 1981 the hotel has gone through a series of name changes and, presumably, changes in Ownership. The operation of the hotel resumed in December, 1992 under new ownership, that of Kelloryn Hotels Inc., ("Kelloryn" or "the company"), a company incorporated pursuant to the laws of Ontario. The President and Chief Executive Officer of Kelloryn is One Ronald Kelly.

3. On November 20, 2992, prior to the resumption of operations at the hotel, a collective agreement was entered into between the United Food and Commercial Workers, Local 206 ("Local 206") and Kelloryn. The collective agreement was executed, on behalf of the hotel, by Ronald Kelly and on behalf of Local 206 by John Hurley and Frank Kelly, the President of Local 206 and a Business Representative of Local 206, respectively. Ronald Kelly and Frank Kelly are not related. The collective agreement recognized Local 206 "as the sole and exclusive bargaining agent for all employees of the company save and except supervisors, persons above the rank of supervisor, front desk, office and clerical and security staff",

4. Not surprisingly, the impending resurrection of the hotel operation had led Local 75 to bring an application before the Board pursuant to section 64 of the Act, in which Local 75 claimed that all or part of the "business" of the Skyline Triumph Hotel had been transferred to Kelloryn and/or Accomodex Franchise Management Inc. ("Accomodex"), which by agreement dated September 23, 1992 with Kelloryn operates the hotel as agent for Kelloryn. The section 64 application had been filed with the Board by Local 75 on November 12, 1992, and came before another panel of the Board for hearing on February 15, 1993. On February 16, 1993, the Board issued a brief "bottom line" decision declaring that a sale of a business within the meaning of section

64 of the Act had occurred. Reasons for the decision subsequently followed (now reported at [1993] OLRB Rep. Apr. 281). On the request of the parties, that panel of the Board dealt only with the issue of whether a “sale of a business” had occurred—it was agreed by the parties that to whom the business had been sold would be “worked out” amongst the parties themselves.

5. The evidence before the Board suggests that at the time of their hire by Kelloryn, in late November or early December, 1992, each now employee was provided with a blank Local 206 membership application and was asked to complete it and return it to the employer's representative, who was an individual hired by Accomodex to interview and hire employees for *the* hotel. In fact, Article 15.01 of the collective agreement between Local 206 and Kelloryn provided that, subject to the provisions of the Labour Relations Act, all employees covered by the agreement “shall become members and remain members of (Local 206) in good standing as a condition of employment”. The employees who testified recalled, in varying degrees of detail being advised in early December 1992 by management that their union was Local 206. They were also advised at that time that “the United Food and Commercial Workers” (“the UFCW” had some financial interest in the hotel.

6. The employees Who testified stated that they become aware of Local 75's successful attempt to reclaim its bargaining rights in the spring of 1993. It would appear, however, that Local 206 continued to meet with the employees regularly until late May or early June, 1993. Mr. McDougall testified that the employees were generally upset with the successful application made by Local 73 because they had had “no say” in the determination of which union would represent them. At the last meeting held by Local 206 with the hotel employees, Frank Kelly, the Local 206 business Representative, was, according to the applicant, asked what the employees could do to displace Local 75. Frank Kelly, in what was described as an “off the record” comment, advised the applicant and one Mr. Ernest Shanly, a bartender and co-sponsor of the petition document, that employees can “voice their opinion” before the expiry of every collective agreement. Some discussion of the petition process ensued and Frank Kelly told Mr. McDougall at that time that forty-five per cent of the employees had to sign a petition in favour of the request to oust Local 73. Frank Kelly offered his assistance and, in fact, on occasions prior to the filing of this application provided advice to the applicants regarding certain aspects of the petitioning process. There was no dispute that the UFCW provided the applicant with one thousand dollars to cover his legal fees in this proceeding.

7. I should note at this juncture that the four employees who testified - Mr. McDougall, Mr. Shanly, Ms. Barbara Powell and Mr. Agostino Do Silva - each described his or her own reasons for wanting to end Local 75's status as their bargaining agent. There is no doubt in my mind that those employees circulated the petition document at least in part because of particular complaints they had relating to the representation afforded by Local 75. It would appear that the dental plan contained in the Local 206 agreement had certain advantages over that negotiated by Local 75. As well, Mr. Do Silva testified that he had tried to reach a Local 75 business representative on numerous occasions while the hotel was in receivership (for pension information) only to be rebuffed or ignored by representatives of Local 75, As a general observation, I am satisfied that the employees who testified held legitimate concerns which led them to believe that Local 75 should be ousted as the bargaining agent at the hotel.

8. Mr. Shanly and Mr. Da Silva initiated the gathering of signatures in the form of a petition. According to the testimony of Mr. Shanly, he originally prepared a petition document on “office type” paper. It was circulated amongst employees for a short time, at which point it was realized that something “more official” was needed. In fact, Mr. McDougall stated that when Mr. Shanly's document reached him, he realized that it would be difficult due to the size Of the hotel staff, to assess when forty-five per cent of the employees, had signed” the document. Accordingly, he decided *that he would ask Shelly Swan* the individual responsible for Human

Resources at the hotel (her formal title was never determined), for a seniority list. Mr. McDougall stated that he had been a union steward for Local 206 and, when Local 75 reclaimed its representation of these employees, it had kept him on as a steward. Mr. McDougall asked Ms. Swan for a seniority list and one was provided to him. He stated that he did not indicate to Ms. Swan the reason for the request, and she did not ask why he wished such a list.

9. Mr. Shanly, on the other hand, indicated that Ms. Swan was aware (at least at some point) of the purpose of providing such a list. He, too, approached Ms. Swan for a seniority list. Although he testified that Mr. McDougall received a seniority list before one was provided to him by Ms. Swan he stated that when the seniority list was offered to him by Ms. Swan she indicated that she wanted to be discreet. Mr. Shanly also testified that Ms. Swan was aware of the circulation of the petition, asking him occasionally during the period that signatures were collected "how the list was going". Mr. Shanly testified that other restaurant managers may have become aware that he was circulating a Petition, but he was unaware of any one else in management, to his knowledge, who knew of his circulating the petition. Mr. Shanly also testified that to his knowledge, with one exception, employees were not aware of Ms. Swan's knowledge of the circulation of the petition document.

10. The applicant and the three employees identified above testified as to the circulation of the petition. I will not go into the evidence of the four individuals in any great detail, as counsel for the responding party, in argument, did not largely dispute the validity of the Signatures on the document, and that the signatories were aware of the purpose for which the petition document was to be used. With the exception of the evidence regarding the involvement of Ms. Swan and the UFCW, there was no evidence of management or employer involvement in the origination or circulation of the petition. Accordingly, subject to the issue of employer involvement discussed below, in my opinion the petition document is otherwise voluntary in nature.

11. A great deal of evidence was heard which detailed the interrelationship between the various actors in the workplace. The evidence establishes that Kelloryn is a single-purpose corporation, incorporated to purchase the assets of the hotel. The company was initially incorporated on August 17, 1992, with Ronald Kelly as its sole director. On that same date Ronald Kelly was appointed president, chief executive officer, secretary and, treasurer of the company. Kelloryn has issued one hundred thousand common shares, thirty thousand of which are held by Ronald Kelly, either directly or through a holding company. The remaining seventy thousand common shares are held equally by two companies I.F. Propco Holdings (Ontario) 14 Ltd. and I.F. Propco Holdings (Ontario) 16 Ltd. ("hereinafter referred to as "Propco 14" and "Propco 16", respectively).

12. By way of a loan agreement dated October 7, 1992, Propco 14 advanced to the company a loan in the amount of seven million dollars. A shareholders agreement of same date was entered into between Ronald Kelly, Propco 14 and Kelloryn the terms of which were not placed before me, on May 12, 1993, Propco 16 advanced to the company a loan in the amount of eight million dollars. A shareholder's agreement of same date, which by its terms supersedes the previous shareholder's agreement of October 7, 1992, was at that time entered into between Ronald Kelly, Kelloryn, Propco 14 and Propco 16. The loan was advanced pursuant to a loan agreement between the company and Propco 16 also dated May 12, 1993.

13. According to documentation provided by counsel for the responding party, consisting of a Form 1 "Notice of Change" filed by the company with the Ministry of Consumer and Commercial Relations on September 1, 1993, in October and November, 1992, the officers and directors of Kelloryn were altered significantly. On October 16, 1992, Alexander Ahee was appointed Assistant Treasurer of the company. Mr. Ahee is a prominent counsel in the labour relations community acting for trade unions. On November 24, 1992, Mr. Ahee was also elected as a director of the company, along with five others – Edward McConnell, Clifford Evans, Howard Preston, Ronald Kelly and Hubert Kelly. Mr. Thomas Kukovica, currently the Canadian

Director of the United Food & Commercial Workers International union ("the international"), testified under Subpoena that Mr. Ahee is legal counsel for the Canadian Commercial Workers industry Pension Plan ("CCWIPP"), though not for the International. He also advised that Mr. McConnell is an investment manager who works with an investment firm used by CCWIPP. Mr. Ronald Kelly testified that Mr. McConnell was a former business partner of his, that Mr. Preston and Mr. Evans (the latter having been the previous Canadian Director of the International) were appointed to the Board of Directors by Propco's 14 and 16, and that Mr. Hubert Kelly was his brother and partner.

14. Mr. Kukovica was questioned regarding the nature of CCWIPP. Mr. Kukovica stated that he is a trustee of CCWIPP. There are currently eight trustees of CCWIPP, which is jointly managed by the International and representatives of the employer community. According to Mr. Kukovica, the International appoints four trustees. A representative of each of the Oshawa Group, Canada Safeway and Loblaws make up *three other* trustees of CCWIPP, and a fourth individual sits as a representative of other employers who participate in CCWIPP. Mr. Kukovica testified that the trustees ensure that the pension plan is administered to the benefit of its members, and that an Investment Committee appointed from the trustees makes the effective investment decisions for CCWIPP. Currently, four of the trustees sit on the Investment Committee - Clifford Evans and Bernard Christophe, both of the International, and Victor Pinchin and Howard Preston, representing Safeway and the "other employers" respectively.

15. Mr. Kukovica testified that CCWIPP invests through corporations. He identified Propco's 14 and 16 as being two of the vehicles used by CCWIPP to invest in companies such as Kelloryn. Mr. Kukovica had little knowledge of the specific details of CCWIPP's investment in the company, but conceded his knowledge of two mortgages held by CCWIPP, through Propco's 14 and 16, in the total amount of fifteen million dollars, secured by the hotel property. The articles of incorporation and most recent Form 1 filed with the Ministry of Consumer and Commercial Relations for Propco 16 were placed into evidence before the Board. The address of the Registered or Head office of the corporation is stated to be that of the offices of Ahee, McMahon and Meikle. The directors consist of Mr. Ahee, Mr. Evans, Mr. Preston, Mr. Christophe, Mr. Pinchin, Michael Rogerson and William Minnis. Messrs. Rogerson and Minnis were not identified at the hearing. Mr. Evans is identified as the Chairman, Mr. Preston as the President, Mr. Pinchin as the Vice-President, and Mr. Ahee as the Secretary-Treasurer. No such corresponding information for Propco 14 was placed into evidence.

16. Also placed into evidence was the shareholder's Agreement dated May 12, 1993, between Ronald Kelly, Kelloryn, Propco 14 and Propco 16. This agreement governs the manner in which the affairs of Kelloryn are conducted. In the document the parties acknowledge that the source of funding for Propco 14 and 16 are "registered Canadian pension funds". The document by its terms also creates, amongst other things, the following relationship and obligations:

- (a) the board of Directors of the company Shall consist of six directors;
- (b) each of Propco 14, Propco 16 and Ronald Kelly shall have the right to nominate two nominees of its/his choice to be elected directors of the company;
- (c) the BY-Laws of *the company are to* provide that a quorum for a meeting of directors shall be three directors, which must include at Least one of the nominees of each Propco 14, Propco 16 and Ronald Kelly;
- (d) any contracts "having a value in excess Of \$10,000.00 or having a term or duration in excess of one year" require prior approval of the board of Directors; and

- (e) at all times that Propco 14 and Propco 16 are Jointly or severally shareholders of Kelloryn, Kelloryn may not enter into "any agreement, contract or comitment" (except as specifically provided) without the approval of the Board of Directors.

The agreement also permits, in certain limited circumstances, Propco's 14 and 16 the right to purchase the shares of Ronald Kelly in the company. Finally, any monies available in the company for distribution after the enumerated obligations and expenses are paid are distributed largely in favour of Propco's 14 and 16 - that is Propco's 14 and 16 receive forty per cent each, and Ronald Kelly receives twenty per cant of all monies available for distribution. The agreement appears to have been executed on behalf of Propco's 14 and 16 by Alexander Ahee.

17. Also reviewed by the Board was the operating Agreement dated September 25, 1992 between Kelloryn and Accomodex. This agreement in essence creates an agency relationship between Accamodex and Kelloryn (although not determinative of the nature of the relationship, the document specifically characterizes the relationship between Accomodex and Kelloryn as one of agent and principal). The relationship created is characterized, amongst other things, by the following incidents and obligations:

- (a) the Owner (Kelloryn) grants the operator (Accomodex) the exclusive right, licence and privilege to supervise, direct and control the management and the operation of the hotel as agent of the owner;
- (b) the operator has control and discretion in the management and operation of the hotel, except as specifically provided;
- (c) the operator, at the request of the owner, shall consult with the owner concerning policies and procedures affecting all phases of the conduct of the business at the hotel; and
- (d) the operator conducts labour negotiations, hires, supervises and terminates employees on behalf of the owner, as agent. All employees of the hotel are stated to be employees of the owner. Collective agreements are to be approved by the owner prior to execution.

The operating agreement was executed by Mr. Ronald Kelly, on behalf of the company, and Mr. Steven Phillips, an behalf of Accomodex.

18. It is On the basis of the above facts that the issue of employer involvement was argued by counsel.

III Argument & Decision

19. Counsel for the applicant urged the Board to uphold the voluntariness of the petition document notwithstanding Ms, Swan's involvement. In counsel's submission, Ms. Swan had little involvement with the circulation of the petition and the minimal knowledge held by her of the circulation of the petition does not constitute involvement which would require the dismissal of this application, There is no evidence of any employee peception of employer involvement. Counsel noted that some employees declined to sign the petition. Counsel submitted that, in fact, there was no evidence to suggest that any employee at the hotel (other than Mr. Shanly) knew of Ms. Swan's awareness of the existence of the petition.

20. Counsel for the responding party claimed that the petition document was fatally flawed on a number of grounds. He focused on the involvement of No. Swan in the origination and circulation of the petition document. He submitted that Ms. Swan must have been aware of the purpose of the request for a seniority list made by Mr. McDougall. Mr. Shanly's evidence regarding Ms. Swan's knowledge of the existence of the petition and her continuing interest in the petition was also highlighted by counsel. It was also suggested that as an employer's seniority list employees would perceive the list as being one produced by the employer and therefore counsel questioned the voluntariness of the petition on that basis as well. Counsel urged me to conclude that all of these factors constitute "fatal interference" on behalf of the employer.

21. In my view, this argument must fail. It is, by now an established principle of law that the Board treats a petition filed in support of an application for a declaration terminating bargaining rights with a lesser degree of scrutiny than a petition filed in an application for certification, on the basis that a petition circulated in the former context does not involve the "sudden change of heart" which typically characterizes a petition filed in the context of an application for certification (see, for example, *Kent Drugs Limited* (1991) OLRB Rep. 321 and *Ontario Hospital Association* [1980] OLRB Rep. Dec. 1759). On any analysis, there is no evidence to conclude that the signatures on the petition document were involuntary because of the initial involvement of me. Swan. At some point, and clearly by the time that Mr. Shanly approached Ms. Swan, Ms. Swan had become aware of the reason for the request for a seniority list by Mr. McDougall. However, that does not, in my view, constitute the requisite degree of employer interference required to lead us to conclude that the origination of the petition document was tainted by management participation. On the evidence I cannot conclude that when Mr. McDougall approached her Ms. Swan was aware of the purpose for which Mr. McDougall wanted the list. Mr. McDougall testified that he did not advise her of the purpose of the request. Accordingly, I am of the view that the mere giving of the list by Ms. Swan to Mr. McDougall, at his request, (and subsequently to Mr. Shanly) does not constitute inappropriate interference in the petition process so as to cause the petition to be involuntary in nature.

22. Did Ms. Swan's knowledge of the circulation of the petition document constitute improper interference? In my view, the answer must again be in the negative. Board jurisprudence establishes the proposition that mere knowledge by an employer that a petition is circulating does not in itself taint the voluntariness of the petition document. See, for example, *Parker's Dye Works & Cleaners Ltd. Toronto* [1974] OLRB Rep. Dec. 859. Here, according to the evidence of Mr. Shanly, there was no further inquiry of him by Ms. Swan except to ask him "how is it going" on an occasion. There is no suggestion that these comments were made in the presence of other employees. Neither is there any evidence that Ms. Swan discussed this petition document with other employees or other managers. Overall, I am led to conclude that Ms. Swan's knowledge of the circulation of the petition is not sufficient to call the voluntariness of the signatures on the petition document into question.

23. Finally, the fact that the list utilized by Mr. McDougall was an employer-generated seniority list does not, in my view, add weight to the argument made by counsel for Local 75. By definition seniority lists are typically employer-generated and, as a union steward, Mr. McDougall could reasonably be expected by other employees to be in possession of such a list. In my view, the voluntariness of the petition is not affected by the use of a seniority list by the petitioners.

24. The remaining issue, and one which appears to be of unique circumstances, is whether the UFCW, in its organization as an International or as Local 206, through involvement in the petition process, has tainted the voluntariness of the petition.

25. It was the position of counsel for the responding party that the origination of the petition was tainted by employer interference as a result of UFCW involvement. His theory was as follows. One Must carefully consider the nature of the position of the UFCW at the hotel to assess whether it is that of a possible bargaining agent or that of "the employer". In counsel's submission, the UFCW is the majority owner of the company that owns the hotel and has engaged Accomodex to operate the hotel as its agent. (in argument-neither counsel distinguished between Local 206 or the International, referring only to the "UFCW"). Counsel characterized the "UFCW", Kelloryn and Accomodex as jointly constituting an "ownership employer group", and submitted that conduct emanating from any of the entities should be interpreted as conduct emanating from the group as a whole. Counsel traced the links between the "UFCW", CCWIPP, Propco 14, Propco 16 and Kelloryn described above. He submitted that, in his view at least, in a major corporation, ten to fifteen per cent of the share ownership constitutes effective control of the company. Here, fifty per cent of CCWIPP was controlled by the UFCW and no other single entity held more than one vote. He urged the Board to conclude that, on the balance of probabilities, in most cases the major investment decisions of CCWIPP are controlled by the "UFCW", and therefore that the UFCW controls CCWIPP.

26. Counsel stated that, due to the links between the various corporate entities (two of which are extensions of CCWIPP and which would appear to have voting control when acting in concert), it was not difficult to conclude that the "UFCW" has effective control over Kelloryn. The Board's attention was drawn to an article by Mr. Mike Edwards in the December, 1992 issue of "Our Times", profiling Mr. Kukovica. An excerpt at pages 24 and 25 states as follows:

Besides putting money directly back into the pockets of the Membership, the joint trusteeship of pension plans between the UFCW and its various employers has permitted the Union to control the investment destiny of millions of dollars. "With the pension funds we've been mainly concentrating in real estate, such as affordable housing projects" says Kukovica. This month the UFCW, with an equity stake of over 50 per cent, helped to reopen the Triumph Hotel in suburban Toronto, "It was in receivership. Now the hotel will be unionized, so we've created (union) jobs at the same time."

It was Mr. Kukovica's testimony that he and Mr. Edwards may well have misunderstood one another. He was of the view that the International had no equity stake at all in the hotel. Counsel for the responding party submits that a closer review of the facts suggests otherwise.

27. Counsel for Local 75 asserted that the link between the "UFCW" and Kelloryn is highlighted by the fact that Kelloryn voluntarily signed a collective agreement with Local 206 on November 20, 1992 prior to the commencement of operations Of the hotel in December, 1992, and prior to the hiring of any employees. This suggests that, notwithstanding the control by Accomodex over labour relations disclosed by the Operating Agreement, Kelloryn still has control over selecting abargaining agent. He noted that the evidence was clear that, when employees were hired by Accomodex on behalf of Kelloryn in November and December, 1992, the employees were all asked to sign Local 206 membership cards.

28. counsel submitted that it was not necessary for the Board to identify one or more of the UFCW, Kelloryn or Accomodex as "the employer". In his view, the issue of the voluntariness of the petition can be dealt with without making that determination. It was submitted that the Board should consider whether Kelloryn, the UFCW and Accomodex are so closely linked that the wishes of the employees would not likely be expressed in a petition document. Counsel urged the board to focus on substance and not form of the interrelationships between the players and emphasized that the promise of the Labour- Relations Act is that of honest conflict between an employer and a trade union even in the best of relationships. He noted the potential conflicts of

interest between the UFCW as bargaining agent and the UFCW as owner of the hotel and pointed out that the existence of Accomodex as an agent does nothing to eliminate that conflict.

29. With respect to UFCW "interference" as management in the initiation of the petition document, counsel focused on the last Local 206 meeting held on the premises, during which Frank Kelly planted the idea to circulate a petition in the minds of Mr. McDougall and Mr. Shanly. At the time, further assistance was offered by Frank Kelly. Mr. McDougall in fact testified to various instances in which Frank Kelly gave advice or aid to him - in advising that the signatures on the petition be dated, and eventually in providing Mr. McDougall with one thousand dollars to cover his legal fees. In counsel's submission, the latter payment colours all that went before it. In any event, counsel submits, the fact that such financial assistance was offered and, is now known of by employees makes it unlikely that a fair vote could be held determining the fate of Local 75.

30. Counsel for the applicant submitted in argument that any ownership of Kelloryn by CCWIPP was as an investment vehicle only. In any event, counsel noted that it is jointly trusted by the UFCW and employer representatives. In counsel's view, Propco 14 and Propco 16 are so distantly connected to the UFCW that the "involvement", if any, of the UFCW as described above cannot constitute employer involvement which would affect the voluntariness of the petition document.

31. Counsel agreed with union counsel that it was not necessary for the Board to determine the identity of the employer in this case, However, on the basis of the factors set out in Sutton Place Hotel [1960] OLRB Rep. Oct. 1538, counsel urged me to conclude, it necessary, that Accomodex was the employer of the hotel employees. In any event, counsel stated that on the application of the criteria contained in Sutton Place Hotel, supra, it is not possible to conclude that the UFCW was "the employer". Accordingly, the involvement of the Local 206 representative in the origination and circulation of the petition could not constitute "employer" involvement.

32. With respect to the responding party's characterization of an "Ownership group", counsel for the applicant conceded that the concept made theoretical sense but noted that in a case such as this the crucial question is determining whether the petition document represents the voluntary wishes of the employees, and whether any act of the employer has directly or indirectly interfered with the wishes of the employees. In counsel's view, a conclusion that the petition was involuntary would require, at minimum, the prior conclusion that the employees perceived the UFCW to be their employer. Counsel submitted that, notwithstanding the knowledge by employees of the UFCW interest in the hotel, the employees did not and do not view the UFCW as an employer or their employer. He noted, as well, that the status of Local 206 as bargaining agent is not an issue in this case. A vote, if ordered, will not be a contest between Local 206 and Local 75, but rather will determine only whether employees wish Local 75 to remain as their bargaining agent.

33. Section 58 (3) of the Labour Relations Act provides as follows:

58.- (3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at the time that is determined under clause 105(2)(J.1) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

The role of the Board, upon receipt of an application for a declaration terminating bargaining rights, is to determine whether forty-five per cent of the employees in the bargaining unit as at the time the application was made have voluntarily signified in writing that they no longer wish to be represented by the trade union, in this case Local 75. The focus of the Board's inquiry is on the voluntariness of the application, and typically involves an assessment of the voluntariness of a written petition document such as the one filed with the Board in this case.

34. The board is sensitive to the fact that some employers involve themselves in the origination, preparation and/or circulation of, petition documents, and therefore it enquires into the voluntariness of the petition document with that reality in mind. Employer involvement, actual or perceived, can affect the voluntariness of signatures on a petition document, In this case, therefore, the question which must be addressed by the Board is whether any employer interference in the origination, preparation or circulation of the petition document occurred or could be perceived by employees to have occurred so as to lead the Board to conclude that the signatures on the petition are not voluntary in nature.

35. The distinguishing feature in this case is the particular status of the International and/or Local 206 at this workplace. It was submitted by counsel for the responding party, and subsequently concurred with by applicant's counsel, that I need not identify "the employer" of the hotel's employees for labour relations purposes to determine this case. I agree with this proposition. The evidence called before as barely touched on this issue and I would not be giving the matter due consideration if I were to decide such an issue without an adequate evidentiary base before me. The issue before me can be determined on the basis of perception - that is, could the employees, on balance, have perceived the "UFCW" to be their employer, or so aligned in interest with their employer, so as to make their signatures on the petition document involuntary?

36. A great deal of the evidence suggests that Kelloryn and Local 206 enjoyed an unusually close relationship prior to the re-opening of the hotel in December, 1992. Ronald Kelly testified that prior to purchasing and re-opening the hotel he had obtained a number of legal opinions to the effect that the purchase and sale transaction in which he purchased the hotel would not constitute a "sale of a business" pursuant to section 64 of the Act. A contrary conclusion was eventually reached by the Board. These legal opinions would go far to explain why Kelloryn would proceed to purchase and reopen the hotel and operate it without reference to any prior collective agreement affecting the workplace or to claims by Local 75 that it maintained bargaining rights at the hotel. However, the legal opinions do not explain why Ronald Kelly, on behalf of Kelloryn, executed a voluntary recognition agreement with Local 206 in advance of the hotel's reopening, and in advance of the hiring of any employees whatsoever.

37. The evidence before the Board from the applicant and the other petitioners suggests that all the employees hired in November and December, 1992, were advised by management shortly after the reopening of the hotel in December, 1992, that the "UFCW" had a financial stake in the hotel. Again, it is not clear why the employees were advised of this fact, except perhaps to explain the immediate presence of Local 206 as their bargaining agent. I note that the Local 206/Kelloryn collective agreement, signed by the parties on November 20, 1992, was executed on the heels of the application for a declaration under section 64 of the Act made to the Board on November 12, 1993 by Local 75 (in which both Accomodex and Kelloryn were named responding parties) and within five weeks of the seven Million dollar Mortgage, loan made by Propco 14 to Kelloryn. It should also be noted here that on November 24, 1992, the Board of Directors of Kelloryn was enlarged to include, amongst others, Clifford Evans, who has roots to the International.

38. It would appear from the testimony before me that the employees at the hotel (at least those who did testify) were unaware of the exact nature and extent of the "UFCW's" investment in Kelloryn. It is, however, clear that the investment by the UFCW was not overlooked by hotel Management on a day-to-day basis. Mr. Shanly testified that he would on occasion serve UFCW officials at the hotel bar who would point out to him the UFCW's investment in the hotel. Furthermore, Mr. Shanly recalled being told by Managers "to take good care" of certain tables of customers because the table consisted Of UFCW officials who were using the hotel. Mr. Shanly believed that the UFCW used the hotel "a lot" for meetings and lunches. It is clear on the evidence before me that the employees were aware of the "special relationship" existing between the UFCW and the management of the hotel, be it Kelloryn or Accomodex. Not only were they advised of the relationship at the outset of their employment, but the importance of the UFCW to the hotel was highlighted from time to time as testified to by Mr. Shanly.

39. It is in this light that the involvement of Frank Kelly, Business Representative for Local 206, must be considered, I am of the view that Frank Kelly's advice to the applicant and to Mr. Shanly as to how to oust Local 75 has had an effect on the voluntariness of the signatures on the petition document. I am satisfied, on the balance of probabilities, that the vast majority of the employees of the hotel were aware of hotel management's preference to have Local 206 represent them in their employment relations with the hotel, and that the employees were aware of a relationship between the UFCW and hotel management, in the sense that the former was "an investor" of some nature in the hotel. In this regard, I have concluded that it is unnecessary for me to determine whether the "UFCW" in its organizational form as an International Union or as Local 206, has effective control over Kelloryn via Propcos 14 and 16, as it was overwhelmingly perceived by employees that the UFCW did have a significant investment in the hotel, and therefore some Influence with management. In my view, the employees of the hotel would likely have viewed it to be in their best interests and in the best interests of the hotel and its long term viability (and, therefore, their job security) to have as their bargaining agent Local 206 of the UFCW. This would first require the ousting of Local 75 as their bargaining agent.

40. Here, a representative of the perceived "investor" with a special relationship with the employer urged and facilitated the genesis and circulation of the petition document. In these circumstances, I conclude that the origination of the petition, and its circulation, was tainted by the perception of employer involvement. I emphasize here that I have not in any way concluded that the UFCW is an "employer" at this hotel. I conclude only that because of the perception of the UFCW's financial interest in the hotel, which the vast majority of employees shared, Frank Kelly's involvement in the origination and circulation of the petition would likely have been perceived by the employees to represent the desire of Management. The voluntariness of the signatures on the petition document is, accordingly, questionable.

41. At the Conclusion of argument of this case, counsel were asked to make submissions on the issue of whether the separate identities of Local 206 and the International should have any effect on the voluntariness of the signatures. Having had an opportunity to consider their arguments, and having reflected on the issue, I am of the view that the distinction is one without a difference. It is clear from the evidence of the employees who did testify that "the UFCU" the "International" and "Local 206" were to them interchangeable entities, and that no distinction was ever made between them. In those circumstances, the concerns I note above remain and, in my view, nothing can rise or fall on the distinction between the International union and a local union affiliated with the International.

42. For the reasons set out above, this application is hereby dismissed.

"Lee Shouldice" for the Board