The Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. WAL-MART CANADA CORP. and THE ATTORNEY GENERAL FOR SASKATCHEWAN, Respondents

LRB File No. 164-11; October 16, 2012
Vice-Chairperson, Steven Schiefner; Members: Jim Holmes and Ken Ahl

For Applicant Union:	Mr. Drew Plaxton
For Respondent Employer:	Mr. John R. Beckman, Q.C., Ms. Catherine Sloan & Ms. Brittnee J. Holliday
For A.G. for Saskatchewan:	Mr. Graeme G. Mitchell, Q.C. & Ms. Joanne V. Colledge

Union Security – Employer obligation – Union asserts employer failed to advise new employees of their obligation to join union in certified work place – Employer argues notices posted on bulletin board were sufficient to notify new employees of statutory obligation – Board find employers must give union security information during hiring process and before new employees are hired - Board finds employer failed to satisfy statutory obligations – Board finds employer in violation of s. 36 of Trade Union Act.

Unfair Labour Practice – Duty to bargain in good faith – Disclosure – Union asserts employer violated Trade Union Act by failing to disclosure information that Union asserted was necessary for both administration of union and collective bargaining – Information sought included specific wage rates for employees, together with updated information when employees receive promotions and/or are no longer employed by the employer – Board finds employer violated s. 11(1)(c) of Trade Union Act by failing to provide union with information necessary for collective bargaining and for proper administration of union.

Unfair Labour Practice – Access to workplace – Union asserts employer violated union's right of access to the workplace through restrictions on non-employee union representatives attending workplace to distribute business cards or literature or to speak with members – Union asserts it ought to enjoy unimpeded right of access to the workplace arising out of Trade Union Act, common law and/or International law – Board not satisfied that union enjoys an unimpeded right of access to workplace – Board finds that union has limited right of access to the workplace – Board finds that determination as to whether or not employer violated a trade union's right of access must be made on a case by case basis – Board's find that employer violated s. 11(1)(b) of Trade Union Act when it refused to permit union representatives to attend workplace to view union notices posted by employer on employee bulletin board.

The Trade Union Act, ss. 11 & 36

REASONS FOR DECISION

[1] **Steven D. Schiefner, Vice-Chairperson**: In these proceedings, the United Food and Commercial Workers, Local 1400 (the "Union") asserts that Wal-Mart Canada Corp. (the "Employer" or "Wal-Mart") has committed various violations of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*"). The impugned conduct of the Employer occurred in relations to its retail store in Weyburn, Saskatchewan. The parties are not new to each other nor are their disputes new to the Saskatchewan Labour Relations Board (the "Board"). We have been called upon numerous times in recent years to adjudicate various disputes between these parties; originally, in relation to the Union's efforts to organize the workers of this workplace and, after receiving a certification Order from this Board, in relation to the Union's continuing efforts to represent those workers.

Background:

[2] While a full enumeration of the labour relations history of these parties is unnecessary, certain background information is of assistance in placing this particular application into context.

[3] Following an organizing drive, the Union filed a certification application with this Board on April 19, 2004[1]. On December 4, 2008, the Board rendered its decisions on the Union's certification application concluding that the Union enjoyed the majority support of employees in an appropriate bargaining unit and granting the Union a certification Order for those employees[2]. While the Union's certification Order was dated December 4, 2008, its operation was effectively suspended and/or quashed through various proceedings until October 14, 2010, when it was restored by the Saskatchewan Court of Appeal[3].

[4] Following the restoration of the Union's certification Order, a number of proceedings came before this Board. Firstly, the Union sought to prosecute three (3) unfair labour practice applications that had been previously filed by the Union with the Board alleging various violations by the Employer; one (1) involving impugned conduct by the Employer during

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1 Application bearing LRB File No. 069-04.

2 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.* [2008] Sask. L.R.B.R. 951, 2008 CanLII 64399, LRB File Nos. 069-04, 122-04 & 124-04 to 130-04 (inclusive).

3 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, 2009 CanLII 13640, LRB File No. 069-04.

the Union's organizing drive in 2004[4]; one (1) relating to the closure of a Wal-Mart store in Jonquière, Quebec in 2005[5]; and one (1) involving impugned conduct by the Employer in 2009[6]. In addition, on the day following the re-instatement of the Union's certification Order, the Union filed an application[7] seeking assistance from the Board toward the conclusion of a first collective agreement pursuant to s. 26.5 of the *Act*. In addition, on October 29, 2010, an application[8] was filed by an employee seeking rescission of the Board's certification Order; the certification Order that had just been restored by the Court of Appeal some fifteen (15) days earlier. Finally, on November 8, 2010, the Union filed another unfair labour practice application[9] with the Board alleging that the Employer had committed new violations of the *Act* during the period of time immediately following reinstatement of the Board's certification Order by the Saskatchewan Court of Appeal.

[5] All of these applications were subsequently heard and determined by this Board. Firstly, in a decision dated December 9, 2010, the Board elected to join and hear the Union's four (4) unfair labour practices concurrently, together with the rescission application[10]. In a decision dated June 23, 2011[11], the Board dismissed all four (4) of the Union's unfair labour practice applications and directed that the ballots from the representation vote of affected workers in the rescission application be counted. Before the ballot box was to be opened (and the representation vote counted), the Union obtained a stay of proceedings. On judicial review, Justice Mills of the Court of Queen's Bench concluded that the Board had erred in certain aspects of our June 23, 2011 decision and directed that the representation vote be quashed until the matter could be reheard by the Board. The decision of Mills J. was subsequently appealed (and cross-appealed) by both the Union and the Employer to the Saskatchewan Court of Appeal. As of the date of these Reasons for Decision, no decision has been rendered and thus certain aspects of the Union's unfair labour practice applications and the rescission application remain unresolved.

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4 Application bearing LRB File No. 094-04.
5 Application bearing LRB File No. 038-05.
6 Application bearing LRB File No. 001-09.
7 Application bearing LRB File No. 166-10.
8 Application bearing LRB File No. 177-10.
9 Application bearing LRB File No. 184-10.
10 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, 2010 CanLII 90104.
11 See: *Gordon Button v. United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. et. al.*, [2011] 199 C.L.R.B.R. (2d) 114, LRB File Nos. 096-04, 035-05, 001-09, 177-10, 184-10 & 224-10.

[6] The Union's first collective agreement application was heard separately from the other proceedings. In a decision dated February 8, 2011[12], the Board appointed an agent to meet with the parties and attempt to assist the parties in advancing the collective bargaining process. The Board's agent was Mr. Jim Jeffery, a Senior Labour Relations Officer with the Ministry of Labour Relations and Workplace Safety. Mr. Jeffery met with the parties on a number of occasions and his participation appears to have advanced the collective bargaining process, with a number of matters being agreed to by the parties. However, by the time Mr. Jeffery's mandate had expired and he reported to the Board, the parties were far from concluding a collective agreement, with little or no bargaining taking place on many of the most contentious matters, including wages and benefits. In a decision dated March 14, 2012,[13] the Board concluded that it was premature for the Board to intervene in collective bargaining at that point in time. Simply put, the Board concluded that there had not been enough bargaining by the parties to enable or justify intervention by the Board.

[7] The within application was filed by the Union on November 3, 2011. In it, the Union alleged that the Employer committed three (3) violations falling within the jurisdiction of this Board:

1. **Union Security Obligations**: The Union alleged that the Employer failed to comply with its obligations pursuant to s. 36 of the *Act* because it neither had new employees sign union cards nor told new employees of their obligation to join the Union as a condition of employment at the Weyburn Wal-Mart store once that store was certified by this Board.

2. **Obligation to Provide Information**: The Union alleged that the Employer violated its obligations under the *Act* by failing to provide the Union with information; information which the Union asserted was necessary for the Union to engage in collective bargaining, to properly represent its members, and to attend to its own administration.

3. **Access to the Workplace**: The Union alleged that the Employer's actions in preventing non-employee members of the Union from attending

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12 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.*, 2011 CanLII 27607.

13 See: *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.* [2012] 208 C.L.R.B.R. (2d) 220.

to the workplace to distribute business cards and literature and to speak with employees regarding Union business, including collective bargaining, represented a violation of the Union's right of access to the workplace of its members. The Union asserted that it enjoys (or ought to enjoy) an unimpeded right of access and that this right arises out of a number of sources, including the *Act*, the common law, and international law, including the covenants, conventions, decisions and principles of the International Labour Organization[14]. Furthermore, to the extent that the Employer relied upon *The Trespass to Property Act*, S.S. 2009, c.T-20.2, and to the extent that *The Trespass to Property Act* deprives or interferes with the Union's right of access to the workplace, the Union asserts that the effect of this legislation is contrary to the *Canadian Charter of Rights and Freedoms* and, thus, is of no force and effect.

[8] Because a component of the Union's application involved a *Charter* challenge to *The Trespass to Property Act*, the Attorney Generals for Canada and for the Province of Saskatchewan received notices pursuant to *The Constitutional Questions Act 2012*, S.S. 2012, c.C-29.01. The Attorney General for the Province of Saskatchewan elected to participate in the proceedings. The Attorney General for Canada declined to do so.

[9] A hearing in the within application commenced on July 30, 2012 and continued on July 31, 2012, September 19, 2012, and September 21, 2012, in Regina, Saskatchewan. The Union called Mr. Norman Neault, President of the local, Mr. Darren Kurmey, its Secretary/Treasurer, and Mr. Cory Cozart, a representative of the Union. The Employer called Mr. Troy Langford, the manager of the Weyburn Wal-Mart store from April, 2010 until November 5, 2011.

[10] For the reasons set forth herein, we find that the Employer has committed and continues to commit an unfair labour practice within the meaning of s. 36(2) of the *Act*. We also find that the Employer has committed and continues to commit unfair labour practices in violation of ss. 11(1)(b) and (c).

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[14] The International Labour Organization is an agency of the United Nations dealing with labour issues, including international labour standards. Canada is a member of the United Nations and the International Labour Organization and has ratified some (but not all) of the conventions of the International Labour Organization.

Facts:

[11] The facts relevant to these proceedings were not in dispute. The Employer operates numerous retail department stores under the "Wal-Mart" banner in Saskatchewan and throughout Canada. The Employer is the owner and operator of a Wal-Mart store in Weyburn, Saskatchewan. The Weyburn Wal-Mart store is a freestanding retail store surrounded by a large parking lot. The store is approximately 60,000 square feet; large for a store in Weyburn but comparatively small by Wal-Mart's operational standards. The store sells a variety of consumer goods, including hard goods, pantry supplies, clothing, fashion goods, and outdoor and gardening supplies. The staffing complement for this particular store varies from between 90 and 105 employees, approximately half of which are full-time and half of which are part-time. As with many employers in the retail sector, there is a relatively-high turn-over of employees and management is routinely hiring new employees at the rate of approximately thirty (30) new hires per year.

[12] As indicated, the Weyburn Wal-Mart store was certified by Order of this Board dated December 4, 2008. However, this Order was effectively inoperative until October 14, 2010.

[13] Mr. Langford testified on behalf of the Employer and his testimony was candid and responsive. Mr. Langford indicated that the Weyburn store was the first unionized store that he had worked at and that he relied extensively (if not entirely) upon the advice of and direction from his superiors in dealing with labour relations involving the Union, including the mode and substance of information communicated to employees about union activities.

[14] Mr. Langford testified that the Employer's method of communication to its employees regarding union matters was to place notices on one of three (3) "bulletin" boards located adjacent to a time clock in or adjacent to the store's staff room. All employees in the bargaining unit utilized had access to this room and used this clock to punch "in" and "out" of work. The bulletin boards were in plain sight and matters posted on one of these bulletin boards remained there until the clip for that board was too full to hold any more documents; at which time, the oldest notices would be removed. The new notices were placed on one of the three bulletin boards and the notices were stored with the most recent notices on top. Prior to certification, these bulletin boards were used to display notices regarding charitable events and functions of interest to or involving the staff.

[15] Mr. Langford testified that he received notices regarding labour relations matters from his supervisor or the Employer's Human Resources Department and, after reviewing these documents, he would place them on one of the bulletin boards. Each time a new notice was placed on a bulletin board, Mr. Langford would inform staff at one of the store's daily meetings that a new notice had been placed on the bulletin board and that the employees were free to read the document if they choose to do so. It was not the practice of Mr. Langford to read or explain new notices to staff; rather, Mr. Langford's practice was to merely inform staff that a notice had been posted on the bulletin board and to allow each notice to speak for itself.

[16] Mr. Langford testified that it was his responsibility, as store manager, to make all offers of employment to new employees. He would personally meet with all prospective employees. When offering a job to a prospective employee, Mr. Langford, would explain the job offer and, in doing so, he would describe the position being offered and the wage and benefits associated with that position. If the person accepted the job, he would congratulate them and then arrange for their orientation. Mr. Langford testified that, during the period of time that he was manager of the Weyburn Wal-Mart store, he received no instructions to have new employees complete Union membership cards nor was he instructed to change the information he was providing to new hires. In cross-examination, Mr. Langford admitted that, while he was manager of the Weyburn Wal-Mart store, the Employer did not have employees sign membership applications for the Union. Mr. Langford also admitted that new hires were not verbally informed, at the time of they were hired, that the Weyburn Wal-Mart store was unionized or that they would be required, as a condition of employment, to join the Union if they accepted a job offer to work at that store.

[17] Mr. Langford was manager of the Weyburn Wal-Mart Store at the time the Court of Appeal restored this Board's certification Order (i.e.: on October 14, 2010) and he was the store manager at the time this Board rendered its June 23, 2011 decision in *Gordon Button v. United Food and Commercial Workers, Local 1400 & Wal-Mart Canada Corp.*[15] Save one (1) exception, Mr. Langford testified that the Employer did not change its practices as a result of either the October 14, 2010 decision of the Court of Appeal or the June 23, 2011 decision of this Board. The exception being the Employer began posting notices of the status of labour relations on the bulletin boards, including any notices that were provided by the Union or its counsel. The

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15 [2011] 199 C.L.R.B.R. (2d) 114, LRB File Nos. 096-04, 035-05, 001-09, 177-10, 184-10 & 224-10.

Employer's response to its obligations arising out of s. 36 of the *Act* relating to union security was to post the following notice on one of its bulletin boards, together with a copy of correspondence from the Union regarding union security, together with pages 42, 43 and 44 of this Board's decision in *Button, supra*:

> *September 19, 2011*
>
> *To All Weyburn Wal-Mart Associates*
>
> *As you know the Union has appealed the Labour board's decision granting you a vote on whether or not you wish to be represented by the Union, and has asked that the votes you cast in December not be counted. There has been no decision on the Union's appeal and we will let you know when a decision has been received.*
>
> *In the meantime, the Union asserts that new associates affected by the certification order must apply for and maintain membership in the Union to continue to be employed by Wal-Mart. The affected associates are:*
>
> > *"All employees of Wal-Mart Canada Corp. in Weyburn, Saskatchewan, except department managers, those above the rank of department managers, employees in the pharmacy and office staff."*
>
> *The Union lawyer's demand letter is attached.*
>
> *The Labour Board says in the decision that is being appealed by the Union that "employers are also under an obligation to advise new employees of their obligation to obtain and maintain membership in the Union as a condition of employment to work in a certified workplace." Attached are copies of paragraphs 102 and 107 of the Board's decision. This communication and its attachments does what the Board says we need to do.*
>
> *We will continue to keep you advised of any new events, and as always, your management team is available if you have any questions.*
>
> *Yours sincerely;*
>
> *Troy Langford*
> *Store Manager*

[18] Mr. Langford testified that he was aware of this Board's June 23, 2011 decision and that he had read the decision. However, Mr. Langford indicated that, other than posting notices on the bulletin board, he received no instructions to change the hiring process or provide any additional or different information to prospective new employees during the hiring process because the store was certified. Mr. Langford estimated that following re-instatement of the Board's certification Order by the Court of Appeal (i.e.: after October 14, 2010) and until November 5, 2011 (when Mr. Langford left the Weyburn Wal-Mart store), he hired between thirty

(30) and fourty (40) new employees. In cross-examination, Mr. Langford admitted that it was unlikely that any of these new employees would have seen the notices on the bulletin board until after they had commenced employment at the store. Mr. Langford did indicate, however, that, to the best of his knowledge, the information posted by the Employer regarding union security was still posted on one of the bulletin boards at the store (or, at least, it was when he left in November of 2011).

[19] Mr. Langford also testified as to the existence and application of the Employer's non-solicitation policy and the impact of this policy on the Union's efforts to communicate with employees in the workplace. Simply put, save for a few exceptions (not applicable to these proceedings), the Employer's non-solicitation policy prohibited solicitation of either customers or associates (i.e.: employees) at the Weyburn Wal-Mart store by anyone. Mr. Langford testified that, as the store manager, it was his responsibility to enforce this policy and that it was strictly enforced by the Employer. The Employer's non-solicitation policy was well known in the store and staff would contact the management if anyone was soliciting in the store. Mr. Langford testified that he had personally removed various individuals from the store found to be in contravention of the policy. In addition, Mr. Langford testified that, pursuant to this policy, he had removed representatives of the Union from the Weyburn store.

[20] Mr. Cozart testified that the Weyburn Wal-Mart store was within his service area as a representative of the Union and that he routinely attended to the store to make what he described as "service calls". When he attended to the store, he would be wearing clothing that identify himself as a Union representative and his goals was to make contact with members of the bargaining union. Mr. Cozart's intention was to answer any questions that his members had regarding union business or to assist them with any issues they had with management. Before entering the store, Mr. Cozart would first attempt to speak with employees who were on their break in the parking lot (i.e.: smoking outside the building). He would then enter the store and begin introducing himself to the employees that he encountered inside the building.

[21] In their testimony, Mr. Neault, Mr. Kurmey and Mr. Cozart each identified occasions when they had attended to the Weyburn store and were asked to leave pursuant to the Employer's non-solicitation policy. On each such occasion, the Union officials were inside the store; in some instances purporting to be shopping and in some instances attempting to communicate with employees. The triggering event on each occasion was the act of distributing

business cards or pamphlets to workers by a non-employee Union official at the store. On each occasion, a representative of management approached the Union official, who explained that they were in violation of the Employer's non-solicitation policy, and asked the individual(s) to leave the store. On each occasion, the exchanges between the representatives of management and the Union were polite and respectful.

[22] In response to questions from the Board, Mr. Langford indicated that he was not aware of any occasion when an employee had asked to have a Union representative present in the workplace to assist them with any workplace issues. Similarly, the Union representatives indicated that each of their attendances at the workplace were service calls during which Union officials wished to speak to employees and give them information regarding the activities and business of the Union. None of the attendances by the Union to the Weyburn Wal-Mart store were in response to a specific request from a specific employee asking for assistance from the Union in relation to his/her dealings with management.

[23] The most recent example of a representative of the Union being asked to leave the Weyburn store occurred in April of 2011. At that time, the parties were engaged in collective bargaining. In fact, access to the store by non-employee Union officials was the subject of collective bargaining at that time, with both the Employer and the Union offering proposals on the subject. Mr. Cozart testified that in April of 2011 he attended to the Weyburn Wal-Mart store to update members on the status of collective bargaining. The events that transpired on this occasion were much the same as his earlier attendance; in that, he was asked to leave the store as soon as he began distributing business cards to employees. While the exchange between Mr. Cozart and management at the store was polite, Mr. Cozart's attendance on this occasion was controversial at the bargaining table.

[24] In response to a Union official attending to the Weyburn Wal-Mart store, the Employer verbally advised the Union when collective bargaining next resumed (i.e.: April 28, 2011) that UFCW activities in the workplace were unwelcome and that non-employee Union officials were prohibited from attending to the workplace for the purposes of leafleting vehicles; from distributing pamphlets, brochures or similar material of the Union to employees (or customers) anywhere on the Employer's property; and from speaking to employees about the Union's activities or unionization anywhere on the Employer's property. In doing so, the Employer stated its reliance upon *The Trespass to Property Act.* The Employer's position

regarding access to the workplace by non-employee Union officials was subsequently confirmed in a written notice from counsel for the Employer to counsel for the Union on November 1, 2011 which provided, in part, as follows:

> *Re: Wal-Mart Canada Corp. – Weyburn – Union security*
>
> *This will acknowledge receipt of your correspondence dated October 28, 2011.*
>
> *...*
>
> *With respect to the Union's intentions to have representatives visit the store, we remind you that Wal-Mart Canada Corp. has a non-solicitation policy that is and will be strictly enforced. That policy was the subject of complaint before the Labour Relations Board and Justice Mills on judicial review. Neither the Board nor Justice Mills directed any change to the non-solicitation policy.*
>
> *We also remind you that the UFCW Local 1400 was served with verbal notice on April 28, 2011 under The Trespass to Property Act, S.S. 2009, c. T-20.2. This will provide written notice pursuant to s. 11(1) of The Trespass to Property Act that any UFCW activity is unwelcome and prohibited in any and all Wal-Mart Canada Corp. stores in Saskatchewan, including parking areas. For clarity, unwelcome and prohibited UFCW activities include, but are not limited to, leafleting vehicles, distributing or leaving any UFCW or other Union material in Wal-Mart stores or to our associates and customers, speaking to any Wal-Mart Canada Corp. associates about UFCW business or unionization anywhere on Wal-Mart Canada Corp. property.*
>
> *This is to provide further notice to you that any UFCW representative found violating this notice will be charged pursuant to the provisions of The Trespass to Property Act.*
>
> *As you know, Wal-Mart Canada Corp. will continue to insist on its existing legal rights. As such, it appears that your stated intentions can only be seen as a deliberate attempt to provoke an incident for publicity purposes.*
>
> *Wal-Mart is willing to post a notice for our associates to advise them of an off site UFCW meeting on the day, time and location of the Union's choosing for the purposes of membership issues. If you are in agreement, simply forward the notice required, and we will ensure that it is promptly posted.*

[25] The parties did not achieve any agreement regarding access to the store by Union officials through collective bargaining. During bargaining, the Union argued that it needed access to the workplace to communicate with its members to among other things, inform its members as to the status of collective bargaining and to obtain and discuss proposals. While the Employer took the position that its non-solicitation policy prevented Union officials from meeting with its members in the workplace, the Employer did agree to post any notice prepared by the Union regarding union business on the bulletin boards in the workplace. The Employer,

however, was not prepared to permit Union officials to attend to the workplace to view or confirm the posting of such notices. Again, the Employer was relying upon its non-solicitation policy in denying such access.

[26] During and in preparation for collective bargaining, the Union sought certain information from the Employer; information which the Employer declined to provide. The subject information included the following:

1. *The current classification and wage rates of current employees.*
2. *Updated information when employees receive promotions or changes in wage rates.*
3. *Notice when employees left the workplace.*

[27] Finally, during the hearing, the Employer stipulated that the practices described by Mr. Langford regarding the information provided to new employees when they were hired and the method and procedure for posting notices on the bulletin boards remained unchanged following the departure of Mr. Langford and that subsequent manager(s) had maintained the same or similar practices and procedures.

Argument of the Parties:

[28] The Union took the position that the Employer had committed three (3) violations of *The Trade Union Act*. Firstly, the Union alleged that the Employer failed to comply with its obligations pursuant to s. 36 of the *Act* because it neither had new employees sign union cards nor told new employees of their obligation to join the Union as a condition of employment at the Weyburn Wal-Mart store following certification of that store by this Board. Secondly, the Union alleged that the Employer violated its obligations under the *Act* when the Employer refused to provide the Union with information; information which the Union asserted was necessary for the Union to engage in collective bargaining, to properly represent its members, and to attend to its own administration. Thirdly, the Union alleged that the Employer's actions in preventing non-employee members of the Union from attending to the workplace to distribute business cards and literature and to speak with employees regarding Union business, including collective bargaining, represented a violation of the Union's right of access to the workplace of its members.

[29] The Union filed multiple briefs of law in support of its position; briefs of law which we have read and for which we are thankful.

[30] The Employer denied that it committed any violations of the *Act* and also submitted multiple briefs of law in support of its position; briefs of law which we have also read and for which we are also thankful.

[31] The Attorney General for the Province of Saskatchewan took no position with respect to the alleged violations of the *Act*. Rather, the Attorney General confined its submissions to the constitutional questions stated in the Union's Notice of Constitutional Question.

Relevant Statutory Provisions:

[32] The relevant provisions of *The Trade Union Act* are as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(a) to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinions to its employees;*
> >
> > *(b) to discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it; but an employer shall not be prohibited from permitting the bargaining committee or officers of a trade union representing his employees in any unit to confer with him for the purpose of bargaining collectively or attending to the business of a trade union without deductions from wages or loss of time so occupied or from agreeing with any trade union for the use of notice boards and of the employer's premises for the purpose of such trade union;*
> >
> > *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*
> >
> > *(d) to refuse to permit a duly authorized representative of a trade union with which he has entered into a collective bargaining agreement or that represents the majority of employees in an appropriate unit of employees of the employer to negotiate with him during working hours for the settlement of disputes and grievances of employees covered by the agreement, or of employees in the appropriate unit, as the case may be, or to*

> *make any deductions from the wages of any such duly authorized representative of a trade union in respect of the time actually spent in negotiating for the settlement of such disputes and grievances;*
>
> . . .
>
> *(n) where one or more employees are permitted or required to live in premises supplied by, or by arrangement with, the employer, to refuse, deny, restrict or limit the right of the employee or employees to allow access to the premises by members of any trade union representing or seeking to represent such employee or employees of any of them for the purpose of bargaining collectively;*
>
> . . .
>
> *36(1) Upon the request of a trade union representing a majority of employees in any appropriate unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:*
>
> > *Every employee who is not or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within 30 days after the commencement in his employment, apply for and maintain membership in the union, and maintain membership in the union as a condition of his employment, provided that any employee in the appropriate bargaining unit who is not required to maintain his membership or apply for and maintain his membership in the union shall, as a condition of his employment, tender to the union the periodic dues uniformly required to be paid by the members of the union;*
>
> *and the expression 'the union' in the clause shall mean the trade union making such request.*
>
> *(2) Failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice.*

Analysis:

[33] As indicated, the Union's application alleged that the Employer committed three (3) violations of *The Trade Union Act*. We will consider each of these allegations in turn.

Section 36 and Union Security Obligations

[34] In its application, the Union alleged that the Employer failed to comply with its obligations pursuant to s. 36 of the *Act* because it neither had new employees sign union cards nor told new employees of their obligation to join the Union as a condition of employment at the Weyburn Wal-Mart store once that store was certified by this Board. The Union argued that, while Employer may not have been obligated to obtain union membership cards from new employees following certification of the workplace, at a minimum, compliance with s. 36 of the *Act* required the Employer to explain to each new employee when that employee was being hired that the workplace was unionized. When doing so, the Employer was also obligated to explain to new hires that it would be a condition of his/her employment at that store to join and maintain membership in the Union because the Union had been certified by this Board to represent the employees of this particular workplace. The Union argued that this minimum obligation is clear from this Board's jurisprudence, including *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.* [1996] Sask. L.R.B.R. 75, LRB File No. 131-95, *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. Limited* [1994] 22 C.L.R.B.R. (2d) 123, [1994] 1st Quarter Sask. Labour Rep. 169, LRB File Nos. 148-93, 151-93, 192-93, 193-93 &194-93, *Canadian Union of Public Employees, Local 4195 v. Board of Education for the Saskatchewan Rivers School Division, No. 19*, [2000] Sask. L.R.B.R. 104, LRB File No. 202-98, and *United Food and Commercial Workers, Local 1400 v. Impact Security Group Inc. & Invicta Group Inc.,* [2006] Sask. L.R.B.R. 517, 2006 CanLII 62946, LRB File No. 081-06.

[35] The Union took the position that the Employer's violation of s. 36 of the *Act* was particularly egregious in light of this Board's June 23, 2011 decision in *Gordon Button v. United Food and Commercial Workers, Local 1400 & Wal-Mart Canada Corp.*[16] wherein this Board clarified for the Employer its obligation to inform new employees.

[36] The Employer, on the other hand, took the position that it satisfied its obligation pursuant to s. 36 by:

1. posting a copy of the Union's letter regarding Union security, together with a copy of the portions of this Board's decision regarding the Employer's obligations pursuant to s. 36, on one of its bulletin boards; and

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16 Ibid.

2. providing the Union with the names and addresses and other contact information for each new employee as they were hired.

[37] Counsel for the Employer argued that posting a written notice regarding union security avoided any potential errors or miscommunications that could arise with management attempting to verbally communicate this information to new employees during the hiring process. Counsel also noted that "everyone" in local community was well aware that the Weyburn Wal-Mart store was unionized and thus the Employer assumed that its notice would fulfill all of its statutory obligations.

[38] In our opinion, the Employer's response to the statutory obligations arising out of s. 36 of the *Act* was simply too little, too late. Furthermore, we find the Employer's action disappointing in light of our June 23, 2011 decision in *Re: Button, supra.*

[39] Employees applying for a job in a unionized workplace need to know that the workplace is organized and they need to know that accepting a job within the scope of a bargaining unit carries with it a statutory obligation to join the representative trade union. The only person from whom prospective new employees can receive this information on a timely basis is from the employer. Thus, for the reasons stated in the *Button* decision, there is an onus on employers in a unionized workplace to ensure that prospective employees receive at least this basic information during the hiring process. See also: *Madison Development Group Inc., supra, F.W. Woolworth Co. Limited, supra,* and *Board of Education for the Saskatchewan Rivers School Division, No. 19, supra.*

[40] With all due respect, the Employer's reliance on the notice it posted on its bulletin boards was misguided. Firstly, this information came too late. By the time new hires saw this information, they had already commenced employment. As indicated, new employees need this information before they are hired; they need this information when they are deciding whether or not to take a job at a unionized workplace because doing so carries with it a statutory obligation to join the Union as a condition of employment. Not only would a new employee not see notices posted on the bulletin board until after he/she had been hired; the probability that a new employee would ever see the Employer's notice eroded over time as it became more and more buried under newer notices on the bulletin board.

[41] Furthermore, we were not persuaded by the Employer's argument that it need not inform prospective employees because it was common knowledge in the local community that the Weyburn Wal-Mart store was unionized. Even if we accept that there was common knowledge in the community to this affect, this certainly doesn't mean that "everyone" knew; particular in light of the high rate of immigration and mobility of workers in this province at this point in time. Furthermore, we have no way of knowing whether or not the information that was circulating in the community about the labour relations status of the Wal-Mart store in Weyburn, Saskatchewan was remotely accurate and/or came anywhere close to accurately conveying the legal implications arising out of s. 36 of the *Act* for prospective new employees. With all due respect, we find it doubtful that the recipients of local gossip would have a satisfactory understanding of the implications arising out of s. 36.

[42] In our opinion, the onus was on the Employer, when it elected to not have new hires complete union membership forms (when asked to do so by the Union pursuant to s. 36 of the *Act*), to advise prospective new employees (working within the scope of the Union's certification Order) of the fact that the Weyburn Wal-Mart store was unionized. There was also an onus on the Employer, when it elected to not have new hires complete union membership forms, to advise each prospective new employee that it would be a condition of his/her employment (for those employees working within the scope of the bargaining unit) to apply for membership in the Union within thirty (30) days and to maintain said membership for so long as they work within the scope of the Union's bargaining unit or until this Board orders otherwise. See: *Madison Development Group Inc., supra, F.W. Woolworth Co. Limited, supra,* and *Board of Education for the Saskatchewan Rivers School Division, No. 19, supra*.

[43] Having considered the evidence in these proceedings, we are not satisfied that any of the employees hired at the Weyburn Wal-Mart store after the October 14, 2010 decision of the Saskatchewan Court of Appeal were provided with appropriate information regarding the status of the Union in the workplace. As such, we are satisfied that the Employer has violated ss. 36(2) of the *Act* and, in so doing, has committed an unfair labour practice. Furthermore, based on the Employer's stipulation that its hiring practices (as described by Mr. Langford) have remained unchanged, we are satisfied that the Employer's violation is continuing.

[44] All of which bring forward the difficult issue of the appropriate remedy under the circumstances. In light of the Employer's violation, our remedial goal is to attempt to place the

Union in the position it would have been but for the Employer's violation and to ensure that the violation does not continue. To which end, we believe that all employees hired after October 14, 2010 (that continue to work within the scope of the Union's bargaining unit) must be individually notified of the Employer's failure and given the correct information regarding the Union's status in the workplace (i.e.: the fact that the workplace is unionized and that they are statutorily obligated to join the Union and maintain membership therein as a condition of employment). In our opinion, this information ought to be communicated by management and a representative of the Union is entitled to be present when that information is given. If the parties are unable to agree on the process to be following and/or the content of the information to be provided to these employees within thirty (30) days, the Employer shall prepare a rectification plan pursuant to s. 5.1 of the *Act* and deliver same to the Registrar within sixty (60) days (from these Reasons for Decision) for subsequent consideration by the Board.

[45] We also want to ensure that this violation of the *Act* does not continue; particularly in light of the Employer's failure to heed the advice of this Board in *Button, supra*. As such, we direct that a Union representative shall have the opportunity to meet with all new employees (working within the scope of the bargaining unit) hired after the date of these Reasons as part of the Employer's orientation process. This Board heard evidence that all new employees undergo an orientation at the workplace. In our opinion, to ensure that new employees are given appropriate and timely information from the Employer during the recruitment process regarding the status of the Union in the workplace, together with the implications of s. 36 of the *Act*, a Union representative shall be afforded a reasonable (albeit brief – five minutes) opportunity to speak directly and individually with each new employee at the workplace on company time as part of the orientation process. For purposes of clarity, during these orientation sessions, Union representatives may provide new hires with membership application forms and distribute business cards, literature, pamphlets and any other information that the Union believes would be of interest to new employees. If the parties are unable to agree on the procedure, timing or content of the participation of Union officials in the orientation process for new employees within thirty (30) days, the Employer shall prepare a rectification plan pursuant to s. 5.1 of the *Act* and deliver same to the Registrar within sixty (60) days (from these Reasons for Decision) for subsequent consideration by the Board.

Information for Collective Bargaining:

[46] The Union took the position that the Employer violated its obligations under the *Act* by failing to provide the Union with information necessary, in the Union's opinion, for it to engage in collective bargaining, to properly represent its members, and to attend to its own administration. The impugned information sought by the Union was as following:

1. The current classification and wage rates for all employees falling within the scope of the bargaining unit.
2. Updated information when such employees receive promotions or changes in wage rates.
3. Notification when employees leave the workplace.

[47] The Employer acknowledged that it had a duty to disclose certain information to the Union but denied that it breached its duty with respect to the above information. The Employer argued that the Union did (does) not need this information for purposes of collective bargaining and, to the extent that it may have desired this kind of information, it would be better for the Union to have obtained it directly from its members.

[48] In our opinion, the Employer is in violation of its obligations to provide necessary information to the Union concerning individual employees and the terms and conditions of employment for employees falling within the scope of the Union's bargaining unit. In our opinion, the information sought by the Union was proper and necessary for the Union to formulate bargaining strategies, to properly represent its members, and to attend to its own administration.

[49] This Board has clarified on a number of occasions that the corollary of an employer's duty to bargain collectively is an obligation to convey to the trade union such information as may be necessary to make collective bargaining possible. In *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, (1989), Winter Sask. Labour Rep. 52 at pp. 58-59, LRB File Nos. 245-87 & 246-87, the Board summarized this aspect of the Employer's duty as follows:

> *There are a multiplicity of other decisions dealing with the employer's duty to make disclosure during negotiations for a collective bargaining agreement (see, for example, Inglis Ltd. [1977] OLRB Rep. Mar. 128; Consolidated Bathurst Packaging Ltd. [1983] 4 CLRBR [NS] p. 178; Canada Post Corporation, Vol. 63 di p. 136; Gainers Inc. [1987] 16 CLRBR [NS] 189; Noranda Metal Industries Ltd. [1975] 1 CLRBR 145; DeVilbiss (Canada) Ltd. [1976] 2 CLRBR 101; and Royal Conservatory of Music [1985] OLRB Rep. Nov. 1652). The decisions are difficult*

> *to reconcile and, for the purposes of this decision at least, add little to the comments in the Westinghouse, decision. They could be perceived as enunciating different rules for different factual situations, but the Board prefers a much less complicated interpretation: that is, each decision simply illustrates a different facet of the basic duty to negotiate in good faith. That duty is imposed by Section 11(1)(c) of The Trade Union Act and its legislative counterpart in every other jurisdiction. It requires the union and the employer to make every reasonable effort to conclude a collective bargaining agreement, and to that end to engage in rational, informed discussion, to answer honestly, and to avoid misrepresentation. More specifically, it is generally accepted that when asked an employer is obligated:*
>
> *(a) to disclose information with respect to existing terms and conditions of employment, particularly during negotiations for a first collective bargaining agreement;*
>
> *(b) to disclose pertinent information needed by a union to adequately comprehend a proposal or employer response at the bargaining table;*
>
> *(c) to inform the union during negotiations of decisions already made which will be implemented during the term of a proposed agreement and which may have a significant impact on the bargaining unit; and*
>
> *(d) to answer honestly whether it will probably implement changes during the term of a proposed agreement that may significantly impact on the bargaining unit. This obligation is limited to plans likely to be implemented so that the employer maintains a degree of confidentiality in planning, and because premature disclosure of plans that may not materialize could have an adverse effect on the employer, the union and the employees.*

[50] With all due respect, there can be no serious argument that the Union was not entitled to the information it sought and to receive this information directly from the Employer. The information regarding the specific wage rates of individual employees may well be personal information but it is also the type of information that trade unions require to effectively represent their members and to formulate collective bargaining strategies. See: *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 75, LRB File No. 131-95. We are also satisfied that the Union is entitled to receive timely updates from the Employer regarding changes in the positions held by members of the bargaining unit, including promotions and departures. As we have stated previously, the Union is not a stranger to this workplace; it is the certified bargaining agent for in-scope employees. As such, it has the right (and in fact is bound by the duty) to represent the employees of this workplace unless and until this Board orders otherwise. In light of the restrictions on the Union's access to the workplace (restrictions discussed later in these Reasons for Decision) and in light of the ongoing changes in the workplace, the Union is entitled to receive from the Employer timely information regarding any changes in the employment status or contact information of its members.

[51] Having considered the arguments of the parties, we find that the conduct of the Employer in failing to provide the Union with the above information when requested to do so by the Union constituted an unfair labour practice within the meaning of s. 11(1)(c) of the *Act*.

Access to the Workplace by Non-Employee Union Officials:

[52] The final allegation of the Union in the within proceedings was that the Employer's actions in preventing non-employee members of the Union from attending to the workplace to distribute business cards and literature and to speak with employees regarding Union business and activities represented a violation of the Union's right of unimpeded access to the workplace. The Union asserts that its right; the right of unimpeded access; is found in a number of sources, such as the *Act*, the common law, and international law, including the covenants, conventions, decisions and principles of the International Labour Organization[17]. Furthermore, to the extent that the Employer attempted to relied upon *The Trespass to Property Act*, S.S. 2009, c.T-20.2, and to the extent that *The Trespass to Property Act* deprives or interferes with the Union's right of unimpeded access to the workplace, the Union asserts that the effect of this legislation is contrary to the *Canadian Charter of Rights and Freedoms* and, thus, is of no force and effect.

[53] In support of its position, the Union relied upon the decisions of various labour relations boards in other parts of Canada, including and in particular, the decision of the Ontario Labour Relations Board in *Retail, Wholesale and Department Store Union v. T. Eaton Company Limited, et. al.*, [1986] 10 C.L.R.B.R. (NS) 289, (1985) CanLII 989, [1985] O.L.R.B. Rep June 941. The Union argued that these decisions collectively stand for the proposition that, where property rights conflict with labour obligations, a balance must be struck to best ensure protection of the latter (resulting in a general and largely unimpeded rights of access to the workplace). To which end, the Union argued that the Employer's total ban on access to the workplace by non-employee Union officials constituted an impermissible interference in the Union's right of access. Simply put, the Union argued that Wal-Mart does not have the right to ban Union officials from its store in Weyburn and its threat of proceedings pursuant to *The Trespass to Properties Act* constituted a violation of s. 11(1)(a) of the *Act*.

[54] In further support of its position, the Union argued that this Board ought to be guided by the covenants, conventions, decisions and principles of the International Labour

[17] Ibid Note 14.

Organization in interpreting *The Trade Union Act*. The Union took the position that, as the International Labour Organization has recognized the right of union representatives to enter the workplaces of its members, the *Act* ought to be interpreted in a similar fashion. Specifically, the Union asserted that this Board ought to interpret s. 11(1)(a) as prohibiting employers from restricting access to the workplace for union officials.

[55] In support of this position, the Union relied upon certain principles established by the Committee on Freedom of Association; being, a body formed by the International Labour Organization to, *inter alia*, establish principles and make decisions on complaints regarding the interpretation and application of the International Labour Organization's Convention No. 87, concerning "*Freedom of Association and Protection of the Right to Organize*". The Union argued that the following principles[18] established by the Committee on Freedom of Association are instructive in our interpretation of the *Act*:

> ***1103***. *Governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization.*
>
> ***1104***. *Workers' representatives should be granted access to all workplaces in the undertaking where such access is necessary to enable them to carry out their representative function.*
>
> ***1105***. *Trade union representatives who are not employed in the undertaking but whose trade union has members employed therein shall be granted access to the undertaking. The granting of such facilities should not impair the efficient operation of the undertaking concerned.*
>
> ***1106***. *For the right to organize to be meaningful, the relevant workers' organization should be able to further and defend the interests of their members, by enjoying such facilities as may be necessary for the proper exercise of their functions as workers' representatives, including access to the workplace of trade union members.*
>
> ***1109***. *Access to the workplace should not of course be exercised to the detriment of efficient functioning of the administration or public institutions concerned. Therefore, the workers' organizations concerned and the employer should strive to reach agreement so that access to workplaces, during and outside working hours, should be granted to workers' organizations without impairing the efficient function of the administration or the public institution concerned.*

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[18] Digest of Decisions and Principles of the Freedom of Association Committee.

[56] The Employer acknowledged that the Union has certain rights of access to the workplace but took the position that the scope of those rights has already been determined by the legislature and those rights are prescribed by s. 11(1)(d) and (n) of the *Act*. The Employer denied that its conduct, including the application of its non-solicitation policy to Union officials, violated either of these provisions of the *Act*. The Employer took the position that it was merely relying upon its rights as a property owner and upon the state of the law in Saskatchewan in denying non-employee Union representatives access to the workplace. The Employer argued that its non-solicitation policy was enacted for valid operational reasons and was applied consistently to all persons and organizations (not just trade unions) that attempted to solicit its associates (i.e.: its employees) or its customers in the workplace. Simply put, the Employer took the position that the type of access to the workplace sought by the Union is over and above the level of access granted by the *Act* or otherwise required by law (international or otherwise). As a consequence, the Employer argued that the type of access sought by the Union must be obtained through collective bargaining. To which end, the Employer encouraged this Board to leave the parties to conclude their own arrangements through collective bargaining.

[57] With respect to the *Charter* challenge, both the Government of Saskatchewan and the Employer argued that the Union's challenge to *The Trespass to Property Act* was either premature or that the Union lacked standing to raise objections to this statute or its affect because no one has been charged nor had any state action taken place (other than passage of the statute itself). The Government of Saskatchewan took the position that the events occurring between the Union and the Employer in these proceedings were insufficient to trigger a challenge to the Constitutionality of *The Trespass to Property Act*. Simply put, the Government argued that, based on the facts of this case (namely, that the Employer threatened to commence a prosecution under the statute but that no such prosecution or any other actions pursuant to the statute occurred), it would be inappropriate for this Board to subject the statute to *Charter* scrutiny.

[58] In the alternative, both the Government and the Employer took the position that *The Trespass to Property Act* was *Charter* compliant.

[59] With one (1) exception, we find that the Employer's actions in denying the Union access to the workplace through application of its non-solicitation policy did <u>not</u> represent a violation of the *Act*. We note that on none of the impugned occasions when Union officials were

asked to leave the workplace were they attending to "represent" a member in his/her dealing with management. Rather, on each occasion, the Union was attempting to communicate with employees at the workplace and to distribute business cards and/or its literature. In our opinion, this is an important distinction as neither the property rights of a land owner nor the application of *The Trespass to Property Act* would justify excluding a union official from attending to a workplace, if the purpose of that attendance was to "represent" a member in his/her dealings with management, save in exceptional circumstances. However, such was not the case in the present circumstances and, in our opinion, this is an important distinction.

[60] In these proceedings, the Union has taken the position that the *Act* should be interpreted by this Board as granting the Union a general and largely unimpeded right of access to the workplace for the purpose of communicating with the members of its bargaining units. In addition (or potentially in the alternative), the Union suggests that a trade union's right of unimpeded access is an inherent or fundamental right (similar to the right to join a trade union, the right to bargain collectively and, more recently, the right to strike) and thus the *Act* ought to be interpreted in such fashion as to prevent employers from restricting the exercise of that right. However, having considered the arguments of the parties, we are not persuaded that the *Act* can be, or should be, interpreted as granting the level or kind of unrestricted access to the workplace that was sought by the Union in these proceedings.

[61] In *Retail, Wholesale and Department Store Union v. Canadian Linen Supply Co. Ltd.*, [1990] Sask. Labour Rep. (Fall) 104, LRB File No. 150-89, this Board reviewed various decisions from other jurisdictions (many of the same decisions propounded by the Union herein) dealing with the tension between an employer's property rights and the restrictions placed on an employer not to interfere with a trade union in the representation of its members and/or in its own administration. Following this review, the Board made the following comments regarding its views on a trade union's right of access to the workplace of its members:

> *Generally speaking, where the parties have been unable to reach an accommodation on this subject, the weight of authorities express the view that an employer cannot prohibit employees or non-employee union representatives from engaging in union business on the employer's premises during non-working hours unless the employer is protecting a legitimate business interest. Without attempting to be exhaustive, examples of a legitimate business interest include maintaining productivity, discipline, good order, safety and security. At the same time, the boards and courts who have considered this issue have been very careful not to overstate the rights of employees and union representatives. All boards emphasize how fact sensitive the balance is and subscribe to the view of*

> *the Ontario Court of Appeal that notions of absolutism have no place where the right of employees to engage in trade union activity comes into conflict with the employer's property and management rights. Neither right is unlimited and an accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. It follows, that the formulation of general rules must be undertaken with caution for differing fact situations that may call for different accommodations. (See Consolidated Fastfrate Ltd., 1980 OLRB Rep. April, 418 at 421; Audio Transformer Co. Ltd., 1969 OLRB Nov. 994 at 1002-3.)*

[62] Having reviewed the principles of the International Labour Organization's Committee on Freedom of Association that the Union asserts ought to inform our interpretation of *The Trade Union Act*, we are not persuaded that they signal a departure from the balancing of competing interests that was recognized by this Board in *Canadian Linen Supply Co., supra*, or other labour tribunals in Canada. For example, we note that the Committee on Freedom of Association has recommended that governments, in enacting labour relations, strive to balance the needs and interests of trade unions (i.e.: to be able to communicate with their members) with property rights and the rights of management. The Committee on Freedom has also recognized that, if access to the workplace by union officials would harm the "efficient operation" of the employer's business, access may be limited. In our opinion, the covenants, conventions, decisions and principles arising out of the International Labour Organization do not assist the Union to the extent it may have hoped. It is not apparent that the instruments of the International Labour Organization require the kind or level of access sought by the Union in these proceedings.

[63] In addition, there is another problem with the Union's argument that we ought to be guided by international law in interpreting the *Act*. Canadian courts have recognized that the instruments of the International Labour Organization can be a "*relevant and persuasive source*" for interpreting the *Canadian Charter of Rights and Freedoms* and in subjecting Canadian legislation to *Charter* scrutiny. See: *Saskatchewan Federation of Labour v. Saskatchewan*, [2012] 211 C.L.R.B.R. (2d) 1, (2012) SKQB 62 (CanLII). However, even if we were to find that *The Trade Union Act* provides less protection for union officials seeking access to the workplace of its members than is required by International law or recognized by the international instruments that Canada has ratified[19], the Union still bears an evidentiary burden to satisfy this Board that the lack of access to the Employer's property has "substantially interfered" with the ability of workers to come together to pursue common goals through collective bargaining. See:

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[19] Such as the International Labour Organization's Convention No. 87, concerning *Freedom of Association and Protection of the Right to Organize.*

Health Services and Support-Facilities Subsector Bargaining Association, et al. v. British Columbia, [2007] 2 S.C.R. 391, 283 D.L.R. (4th) 40, 7 W.W.R. 191, (2007) SCC 27 (CanLII). Absent a significant and adverse interference with a fundamental right (i.e.: the freedom of association) or a right derivative therefrom (such as, the right to join a trade union, the right to pursue common goals through collective bargaining, or to exercise the right to strike), this Board must be guided by the policy choices made by the legislature in designing Saskatchewan's labour regime (not by International Law); particularly so where the legislature has crafted a balance between the rights of labour and the rights of management in matters that involve difficult policy choices and competing interests. See: *Plourde v. Wal-Mart Canada Corp.*, [2009] 3 SCR 465, 2009 SCC 54 (CanLII). See also: *Ontario (Attorney General) v. Fraser,* [2011] 2 S.C.R. 3, 331 D.L.R. (4th) 64, 2011 SCC 20 (CanLII). Having considered the evidence in these proceedings, we are not satisfied that the Union has met this burden.

[64] In this regard, the following comments regarding a trade union's right of access to the workplace of its members were made by this Board in *F.W. Woolworth Co. Limited, supra* (the facts of which bear many similarities to the facts before the Board in these proceedings):

> *The Canada Labour Relations Board has come to the same general conclusion (see: Canada Post Corporation, supra). The Alberta Labour Relations Board has also recently acknowledged the necessity of accommodating the right of a union to organize employees and the employer's property rights (see: Midwest Pipeline Contractors Inc., 91 CLLC 16,013). The courts and all boards have emphasized how sensitive the accommodation is to the facts of each case. In some circumstances or for some purposes the union may have no right of access to the employees at the workplace. In other cases, the access may be quite generous.*
>
> *Our purpose in reviewing these authorities is to illustrate that the workplace is no longer the exclusive preserve of the employer to which the union can only obtain access by leave of the employer. It is clear from recent decisions, in particular, the decision of the Ontario Court of Appeal in T. Eaton Company, that depending on the facts, unions may have a statutory right to conduct lawful union business at the workplace. Where the Union has no reasonable or practical alternative to the workplace, restrictions imposed by the employer which interfere with the union's ability to discharge its representation functions at the workplace should be for legitimate business reasons. If the Employer's purpose is merely to make it more difficult for the union to discharge its statutory function, then the restrictions may constitute interference within the meaning of Section 11(1)(b) or 11(1)(a), or both.*
>
> *This does not mean that union representatives have the run of the workplace. Alternatives to the Employer's premises will be examined and even if the workplace is the only reasonable point of access, the Union representatives are under a duty to act responsibly and maturely. They do not have the right to simply arrive at the workplace unannounced and begin carrying out their duties,*

> *without explanation to the employer. This is especially true with a newly-certified union whose officers are not well-known or even known at all to the employer and where there is no understanding or agreement governing access. In these circumstances, the Union should approach the Employer and inform it of what access it needs and generally why. Arrangements could then be made, subject to the Employer's legitimate interests. During the formative stages of the relationship, an effort by the union to sit down with the employer and agree on reasonable access pending the negotiation of a more permanent arrangement of the collective bargaining agreement is, at least in most situations, a precondition to a successful allegation that the employer has violated Section 11(1)(a) or 11(1)(b) by denying or restricting the union's access to the employees while on the employer's premises.*
>
> *In this case, there was no evidence that the Union ever attempted to work out an arrangement on access or explain what its representatives were doing prior to their appearance at the workplace. We are not suggesting that the Union representatives did not have the right to conduct union business at the workplace. We are concerned here with process - how that right should be implemented. Had the Union made a reasonable attempt to negotiate access for legitimate union business, and had the Employer refused without cause, our view of the Employer's conduct would be entirely different. However, appearing as they did without notice or explanation, a confrontation with the Employer was predictable and largely of the Unions own making. This part of the application is dismissed.*

[65] As this Board stated in the *Woolworth* decision, a certification Order does not grant union officials the run of an organized workplace. While *The Trade Union Act* grants many rights to a trade union upon the issuance of a certification Order, the *Act* does not give union officials the right to simply arrive unannounced at the workplace during working hours and begin carrying on union business with employees. In the present case, we were satisfied that the Employer's non-solicitation policy was a policy of general application based on valid operational considerations. We heard evidence that it was applied to all persons attempting to solicit customers and/or employees on the Employer's property during business hours. As such, we find that it represented a valid basis for a restriction on the Union's right of access to the Employer's workplace.

[66] Having considered the evidence in these proceedings, save one (1) exception, we were <u>not</u> satisfied that the Employer's actions in limiting the access of Union officials to the workplace represented a violation of the *Act*. Of particular significance, we note that none of the Union's attendances to the workplace involved a request by a member of the bargaining unit for a Union official to be present during his/her dealings with management. Furthermore, none of the impugned actions of the Employer (in restricting the Union's access to the workplace) involved circumstances that engaged s. 11(1)(d) or (n) of the *Act*.

[67] However, we find that the Employer violated s. 11(1)(b) of the Act when it denied Union officials the opportunity to periodically inspect the notices posted on its behalf in the workplace. In the face of the application of the Employer's non-solicitation policy to Union officials, reasonable accommodation needed to be made to protect the Union's capacity to communicate with its members. In this regard, the proposal by the Employer of allowing the Union to post notices on its bulletin boards regarding union business was reasonable and provided an alternative means for the Union to communicate with its members. However, in our opinion, the Employer erred when it denied Union officials the capacity to periodically inspect the notices posted in the workplace.

[68] Based on the evidence before us, it is difficult to imagine any operational or safety limitations that would prevent a Union official from attending to the workplace, asking the store manager (or his/her designate) to view the Employer's bulletin boards, and then doing so. This Board heard evidence that service personnel from vendors regularly attended to the Weyburn Wal-Mart store to restock the vending machines in the staff room. The intent of posting notices in the workplace was to provide the Union with an alternative means of communicating with its members (i.e.: in lieu of talking to employees in the workplace). As such, surely, a similar accommodation could have been found for representatives of the Union to personally inspect its notices to ensure their visibility and continuity in the workplace. For these reasons, we find that the Employer violated s. 11(1)(b) of the Act when it denied Union officials the opportunity to periodically inspect the notices posted on its behalf in the workplace.

[69] In our opinion, until such time as alternate arrangements are agreed to by the parties regarding access to the workplace by Union officials, the Union shall be entitled to have notice, documents and/or literature it prepares posted by the Employer on the bulletin board at the Weyburn Wal-Mart store and to have its representatives attend to the workplace periodically (i.e.: once a week) to inspect the Employer's bulletin board and may do so after presenting themselves to management in accordance with reasonable operational restrictions (similar to the restrictions placed on service personnel from vendors restocking the vending machines in the staff room). If, however, the parties are unable to agree on the specifics of the process to be followed for such access within thirty (30) days, the Employer shall prepare a rectification plan pursuant to s. 5.1 of the *Act* and deliver same to the Registrar within sixty (60) days (from these Reasons for Decision) for subsequent consideration by the Board.

Status of *The Trespass to Property Act*:

[70] Finally, we were not satisfied that the facts in these proceedings warrant subjecting *The Trespass to Property Act* to *Charter* scrutiny in the fashion suggested by the Union. Firstly, we note that no formal proceedings have been instituted pursuant to that *Act*. In this regard, we agree with the position advanced by the Government of Saskatchewan that, even if we assume that the communication of the Employer dated November 1, 2011 was a "threat" of proceedings under the statute, such communication alone provides an insufficient basis upon which to challenge the constitutionality of this statute. Secondly, it is not apparent that *The Trespass to Property Act* altered the right of access granted to union officials by *The Trade Union Act*. While the statute appears to provide a legal means for a landowner to deal with individuals found to be trespassing upon their property, it is not apparent that this statute altered the right of access, *per se*, enjoyed by a trade union arising out of *The Trade Union Act*. The significance of these observations being that absent a clear nexus between *The Trespass to Property Act* and our application or interpretation of *The Trade Union Act*, this Board is without jurisdiction to subject the former to the kind of scrutiny sought by the Union.

[71] For these reasons, this aspect of the Union's application is dismissed.

Conclusion:

[72] In the circumstances of these proceedings, we find that the Employer has committed and continues to commit an unfair labour practice within the meaning of s. 36(2) of the *Act*. We also find that the Employer has committed and continues to commit unfair labour practices in violation of ss. 11(1)(b) and (c).

[73] To remediate these violations, an Order will be issued including the following provisions:

1. ordering the Employer to immediately cease and to refrain from committing the said unfair labour practices.

2. ordering the Employer to post these Reasons for Decision, together with any Orders that may be issued by the Board, on the bulletin board at the Weyburn Wal-Mart store and to advise the employees of the workplace on no less than four

(4) occasions (i.e.: during the Employer's regular daily meetings) that these documents have been posted on the said bulletin board.

3. ordering the Employer and the Union to bargain collectively regarding the process to be followed and the content of the information regarding union security to be provided to those employees hired during the period after October 14, 2010 (that work within the scope of the Union's bargaining unit) until the date of these Reasons for Decision. Provided, however, should the Employer and the Union be unable to agree upon the said process to be followed and the content of the information to be provided to said employees regarding union security within thirty (30) days of these Reasons for Decisions, ordering the Employer to file with the Registrar of the Board a rectification plan pursuant to s. 5.1 of the *Act* for subsequent consideration by this Board.

4. ordering the Employer and the Union to bargain collectively regarding the procedure to be followed for the participation of Union officials in the orientation of employees hired after the date of these Reasons for Decision (to work within the scope of the Union's bargaining unit). Provided, however, should the Employer and the Union be unable to agree upon the said procedures within thirty (30) days of these Reasons for Decisions, ordering the Employer to file with the Registrar of the Board a rectification plan pursuant to s. 5.1 of the *Act* for subsequent consideration by this Board.

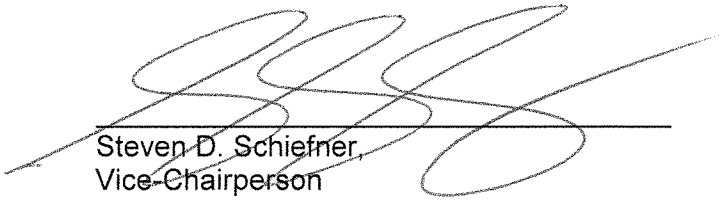
5. ordering the Employer to provide to the Union the current classification and wage rates for all employees working at the Weyburn Wal-Mart store working within the scope of the Union's bargaining unit.

6. ordering the Employer to periodically and regularly provide to the Union updated information when employees working within the scope of the Union's bargaining unit receive promotions or changes in wage rates, together with notification when employees leave the workplace or are no longer working within the scope of the Union's bargaining unit.

7. ordering the Employer and the Union to bargain collectively regarding the procedures to be followed for Union officials to attend to the workplace to inspect the notices posted on behalf of the Union in the workplace. Provided, however, should the Employer and the Union be unable to agree upon the said procedures within thirty (30) days of these Reasons for Decisions, ordering the Employer to file with the Registrar of the Board a rectification plan pursuant to s. 5.1 of the *Act* for subsequent consideration by this Board.

DATED at Regina, Saskatchewan, this **16th** day of **October, 2012.**

LABOUR RELATIONS BOARD



Steven D. Schiefner,
Vice-Chairperson