CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1486, Applicant v THE STUDENTS' UNION OF THE UNIVERSITY OF REGINA STUDENT INC., Respondent

LRB File No. 177-16; June 6, 2017

Vice-Chairperson, Graeme G. Mitchell Q.C.; Members: John McCormick and Allan Parenteau

For the Applicant Juliana Saxberg
For the Respondent: Paul Harasen

Voluntary Recognition – Unfair Labour Practice – Employer had voluntarily recognized Union for more than four (4) decades – In most recent round of collective bargaining, Employer unilaterally withdrew its voluntary recognition of the Union – Union subsequently obtained Orders certifying it as the bargaining agent of the Employer's employees – Union commenced an application alleging Employer's repudiation of collective bargaining agreement amounted to an unfair labour practice.

Voluntary Recognition – Statutory Interpretation – Board reviewed its jurisprudence on voluntary recognition – Board reviewed relevant principles of statutory interpretation – Board concludes that collective agreement is a "collective agreement" as defined in subsection 6(1)(1)(d) of *The Saskatchewan Employment Act* and following its expiry continues to operate on an annual basis by virtue of subsection 6-39(1)(b).

Voluntary Recognition – Statutory Freeze – Board reviewed its jurisprudence on statutory freeze and concluded it may apply unless Employer could successfully invoke the defence under subsection 6-62(7) of *The Saskatchewan Employment Act*.

Voluntary Recognition – Unfair Labour Practice – Union alleging Employer's repudiation of collective agreement amounts to an unfair labour practice – Board concludes that Union failed to satisfy its burden of proof and dismisses application.

REASONS FOR DECISION

OVERVIEW

[1] Graeme G. Mitchell, Q.C., Vice-Chairperson: Canadian Union of Public Employees, Local 1486 [CUPE] commenced an application under subsection 6-62(1) of *The Saskatchewan Employment Act*, SS 2013, cS-15.1 [*SEA*]. It alleges that the Students' Union of

the University of Regina Student Inc. [URSU] committed various unfair labour practices by failing to recognize CUPE as the exclusive bargaining agent for the employees of URSU; by failing to bargain collectively with it, and by communicating inappropriately with its members. By virtue of two (2) certification Orders of this Board dated October 6, 2016, CUPE is the certified bargaining representative for approximately 45 employees of URSU.[1]

[2] On February 12, 1973, Local 1486 became a chartered local of the Canadian Union of Public Employees.[2] Since that time, CUPE has been voluntarily recognized, first by the University of Saskatchewan Students' Union, and then by URSU after the University of Regina became an autonomous university on July 1, 1974[3]. Over the intervening decades, numerous collective bargaining agreements have been negotiated between the parties, the most recent of which expired on December 31, 2015.

[3] In September 2015, anticipating the expiry of that agreement CUPE notified URSU that it wished to commence bargaining on a new agreement.

[4] Collective bargaining commenced on April 10, 2016. Shortly after bargaining began, URSU requested a copy of the certification Order recognizing CUPE as the exclusive collective bargaining agent for its employees. An exhaustive search of both CUPE's and URSU's files yielded no such Order.

[5] As a result, on or about June 23, 2016, URSU advised it would no longer recognize CUPE as the exclusive representative of its employees, and, instead, it would negotiate directly with URSU's employees.

[6] As already stated, CUPE sought and obtained certification Orders from this Board on October 6, 2016. Since that time, URSU has agreed to bargain collectively with CUPE; however, it has taken the position that it is bargaining a first collective agreement pursuant to section 6-24 of the *SEA*, and not a renewal of a collective agreement pursuant to section 6-26. CUPE rejects URSU's position and asserts the parties are bargaining a renewal agreement. This dispute is caught up in this unfair labour practice application.

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[1] See: LRB File Nos. 149-16.01.& 149-16.02.
[2] See: "Newly Chartered Local Union" dated February 12, 1973, Joint Book of Documents at Tab 2.
[3] See: *The University of Regina Act*, RSS 1978, cU-5, as amended.

[7] For the reasons that follow, the Board has determined that CUPE's application under subsection 6-62(1) of the *SEA* must be dismissed. In coming to that result, the Board made the following findings:

- The collective agreement between CUPE and URSU that expired on December 31, 2015 is a "collective agreement" as defined in subsection 6-1(d) of the *SEA*, and by virtue of subsection 6-39(b) continues in force from year to year.

- The statutory freeze set out in subsection 6-62(1)(n) is relevant, but may not operate if URSU can demonstrate under subsection 6-62(7)(b) that it did not know about the organizing drive being conducted by CUPE to obtain support from URSU's employees.

- CUPE failed to prove on a balance of probabilities that URSU committed the unfair labour practices it alleged in its application.

FACTUAL BACKGROUND

[8] At the hearing of this matter on December 21, 2016, counsel commendably filed a Joint Statement of Facts and a Joint Book of Documents. In addition, one (1) witness testified on behalf of CUPE – Ms. Suzanne Posyniak, one of its National Representatives. URSU elected to call no witnesses.

A. Joint Statement of Facts

[9] In its entirety, the Joint Statement of Facts reads as follows:

> *The Canadian Union of Public Employees, Local 1486 ("CUPE" or "the Union") and the University of Regina Student's Union ("URSU") agree that the following facts are true and are not in dispute and may properly be considered by this Honourable Board in resolving the issues raised between the parties in LRB File No. 177-16:*
>
> 1. *The Applicant CUPE Local 1486 represents approximately 45 employees of the Respondent University of Regina Students Union ("URSU"), pursuant to the order of this Honorable Board in LRB File No. 149-16. A true copy of this Order is provided in the parties' Joint Book of Documents at Tab 1.*
>
> 2. *CUPE Local 1486 was chartered as a local union of CUPE in 1973. Proof of this Local Union's Charter has been filed with this Honorable Board in LRB File No. 149-16, and is provided in the parties' Joint Book of Documents at Tab 2.*

3. *Although CUPE Local 1486 has never been statutorily certified in this Province, the employer had historically voluntarily recognized it as the exclusive representative of employees since about 1973, until May or June 2016.*

4. *CUPE Local 1486 and the Respondent URSU have entered into a series of collective bargaining agreements since 1973, the most recent of which expired on or about December 31, 2015. A true copy of this collective bargaining agreement has been provided in the Joint Book of Documents at Tab 3.*

5. *CUPE delivered notice to commence bargaining to the Respondent URSU on or about September 15, 2015. A true copy of the Notice to Bargain is provided in the Joint Book of Documents at Tab 4.*

6. *Commencing on or about April 10, 2016, the parties and commenced collective bargaining.*

7. *On or about May 19, 2016, the employer requested from the union a copy of its certification order.*

8. *The Union advised the employer that it did not have a certification order.*

9. *On or about May 24, 2016, the employer exchanged emails about CUPE's organization of employees of the URSU on campus. A true copy of these emails are included in the Joint Book of Documents at Tab 5.*

10. *On or about June 17, 2016, CUPE wrote to the employer and advised that did not have a certification order, but asked the employer to continue to bargain in good faith towards the renewal of the collective agreement. A true copy of this correspondence is included in the Joint Book of Documents at Tab 6.*

11. *On or about June 23, 2016, the employer wrote to CUPE and advised that the employer would no longer recognize CUPE as the exclusive representative of employees, and that "[h]enceforth we will be dealing directly with our employees on matters pertaining to their employment." A true copy of this correspondence is included in the Joint Book of Documents at Tab 7.*

12. *The employer also advised CUPE that effective immediately [i.e. June 23, 2016] URSU would cease collecting and remitting union dues to CUPE on behalf of the employees.*

13. *CUPE Local 1486 also conducted an organization drive and applied to this Honorable Board to be statutorily certified as the bargaining agent for "all employees" of the URSU, except for named managerial exemptions. CUPE's application was heard by this Honorable Board on September 27, 2016 and certification orders were subsequently issued on October 6, 2016 for supervisory employees (LRB File No. 149.16.01) and employees (149.16.02). True copies of these documents are included in the Joint Book of Documents at Tab 1.*

14. *The parties subsequently agreed to include supervisory employees in the larger "all employees" bargaining unit and have jointly applied to this Honorable Board to amend the certification order(s) in this regard. A true copy of the "irrevocable elections" signed by the parties and the Joint Application for Amendment are included in the Joint Book of Documents at Tabs 8 and 9.*

15. *On or about October 12, 2016 URSU wrote to CUPE proposing to commence negotiations for a first collective agreement. Although CUPE took the position that the collective agreement was still in force and that negotiations should proceed on the basis of bargaining a renewal collective agreement rather than a first collective agreement, it agreed to engage*

in negotiations on a without prejudice basis. True copies of the parties' correspondence in this regard are included in the Joint Book of Documents at Tabs 10 and 11.

16. *The parties have met a number of times to attempt to negotiate a new or renewal collective bargaining agreement but have not been successful in this regard as of the date of hearing.*

B. Testimony of Suzanne Posyniak

[10] Ms. Posyniak is one (1) of CUPE's National Representatives, a position she has held since 2003. She is responsible for Local 1486 which is the bargaining agent for certain supervisory, and other, employees of URSU. Some of what Ms. Posyniak's testimony pertained to facts already set out in the Joint Statement of Fact. As a result, this summary of her testimony will focus principally on events not recounted in that document.

[11] Ms. Posyniak testified that relations between CUPE and URSU were reasonably harmonious until the letter from Mr. Carl Flis, URSU's General Manager to Mr. Neil Petrich, President of CUPE Local 1486 dated June 23, 2016. In its salient part, this letter which is found at Tab 8 of the Joint Book of Documents reads:

> *This is to notify CUPE, Local 1486 that the URSU no longer voluntarily recognizes CUPE, Local 1486 as the bargaining agent for the employees of the URSU. Henceforth, we will be dealing directly with our employees on matters pertaining to their employment. The first thing URSU will be doing is notifying its employees that the URSU is no longer voluntarily recognizing CUPE, Local 1486, and also assuring them that their employment with the URSU will continue on the same terms. Furthermore, as there is no longer a CBA, nor a voluntarily recognized or certified Union in place, effectively immediately, URSU will cease source deductions of any union dues from its employees.*

[12] At the time this letter was received, URSU was aware that CUPE was conducting an organizing drive in order to obtain enough support to bring a certification application to this Board. Earlier, Mr. Flis, on behalf of URSU, advised Ms. Posyniak on or about May 24, 2016, that CUPE representatives would not be permitted to enter the Lazy Owl Bar and Grill [Owl] in order to have employees sign union cards. The Owl is a pub located on the University of Regina campus which is operated by URSU, and is open to not only students at the University but also members of the general public.

[13] After receipt of Mr. Flis' communications, CUPE changed its plan, and set up a table outside the entry to the Owl. CUPE managed to obtain the support of at least 45% of

URSU employees as required under subsection 6-9(2)(a) of the *SEA* and formally filed a certification application on June 23, 2016.

[14] This Board heard URSU's certification application on September 27, 2016, and, as noted above, issued two (2) certification Orders on October 6, 2016. See: Joint Book of Documents at Tab 1.

[15] In the interim, on or about August 17, 2016, CUPE filed two (2) grievances under the most recent Collective Agreement, a copy of which was found at Tab 3 of the Joint Book of Documents. The first grievance alleged violations of Articles 2 and 25.08 of the Collective Agreement.[4] Article 2 is entitled "Recognition and Negotiations" and states in part that URSU "recognizes the Canadian Union of Public Employees and its Local 1486 as the sole and exclusive bargaining agents for all of its Employees and hereby agrees to negotiate with the Union or any of its authorized committees, concerning all matters affecting the relationship between the parties." Article 25.08 is entitled "Continuation of Acquired Rights" and reads as follows:

> *All provisions of this Agreement are subject to applicable laws now or hereafter in effect. If any law now existing or hereafter enacted or proclamation or regulation shall invalidate any portion of this Agreement, or if there is an amalgamation, annexation, merger or other structural change of the Employee, the entire Agreement shall not be invalidated and the existing rights, privileges or obligations of the Employees shall remain in existence.*

[16] The second grievance alleged violations of Article 6 of the Collective Agreement.[5] Article 6 which is entitled "Union Security" stipulates that every employee "shall maintain membership in the Union as a condition of employment" and "shall, as a condition of employment, tender to the Union the periodic dues uniformly required to be paid by the Members of the Union".

[17] In response to these grievances, URSU declined to move them forward until CUPE's application for certification was resolved by this Board.[6]

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[4] Exhibit U-1 - Letter from Neil Petrich, President CUPE 1486 to Mr. Carl Flis, URSU General Manager dated August 17, 2016.
[5] Exhibit U-2 – Letter from Mr. Neil Petrich to Mr. Carl Flis dated August 17, 2016.
[6] Exhibit U-4 – Letter from Mr. Carl Flis to Mr. Neil Petrich dated August 19, 2016, and Exhibit U-5 – Letter from Mr. Carl Flis to Mr. Andrew Loewen, CUPE National Representative dated August 30, 2016.

[18] After the Board issued the two (2) certification Orders, collective bargaining re-commenced. URSU took the position that the parties were negotiating a first collective agreement. CUPE disagreed and took the position that they were bargaining a renewal agreement.

[19] Ms. Posyniak testified that little progress has been made on the issues since collective bargaining recommenced.

C. Unfair Labour Practice Application – The Pleadings

1. CUPE's Application

[20] On August 2, 2016, CUPE filed this application alleging that based on the events recounted above URSU has committed a number of unfair labour practices. It particularized its allegations in its formal application as follows:

> 1. *CUPE alleges that unfair labour practices and violations of The Saskatchewan Employment Act, SS 2013, c S-15.1, are being and/or have been engaged in by [URSU]…*
>
> *. . . . . .*
>
> *q. CUPE says that the collective agreement between CUPE Local 1486 and the URSU continues in force pursuant to s. 6-39 of the Saskatchewan Employment Act and according to the terms of the collective agreement itself which provide for the continuation of present conditions until such time as they are modified by mutual agreement between the union and the employer (Article 25.08.*
>
> *r. CUPE says that by refusing to recognize CUPE as the exclusive bargaining agent of members of CUPE Local 1486, and by disputing its legal obligations flowing from CUPE's representation of the members and the collective agreement(s) governing those members, the Respondent URSU interfered or attempt to interfere with the administration of a trade union contrary to s. 6-62(1)(b) of The Saskatchewan Employment Act.*
>
> *s. CUPE says that by refusing to meet or to communicate with CUPE and by suspending negotiations for a renewal collective agreement, [URSU] has failed to bargain in good faith and committed an unfair labour practice contrary to s. 6-62(1)(d) of The Saskatchewan Employment Act.*
>
> *t. CUPE says that be restricting CUPE's ability to meet with, communicate with, and represent its members in Local 1486, and by communicating directly with members and advising members that they are not represented by CUPE, the Respondent URSU interfered or restrained, or attempted to interfere with or restrain the rights of workers to bargain collectively through the bargaining*

agent of their choice, contrary to s. 6-62(1)(a) of The Saskatchewan Employment Act.

u. CUPE says that by refusing to meet or communicated with CUPE, and by failing or refusing to include CUPE in discussions with Local 1486 members respecting terms and conditions of employment and /or disputes between the worker(s) and the employer, the Respondent URSU has committed unfair labour practices in violation of s. 6-62(1)(e) of The Saskatchewan Employment Act.

v. CUPE says that by refusing to recognize CUPE as the exclusive bargaining representative of the members of CUPE Local 1486, and by attempting to interfere with or block CUPE's ability to organize and communicate with members, the Respondent URSU has interfered or attempted to interfere with the selection of a trade union as representative of employees for the purposes of bargaining collectively, contrary to s. 6-62(1)(i) of The Saskatchewan Employment Act.

w. CUPE says that by refusing to recognize CUPE Local 1486 as the exclusive representative of its members, repudiating its collective agreement with Local 1486, the employer has unilaterally altered the terms and conditions of employment without bargaining and has committed unfair labour practices contrary to s.6-62-(1)(n) of The Saskatchewan Employment Act.

x. CUPE says that by refusing to recognize CUPE Local 1486 as the exclusive representative of its members, repudiating its collective agreement and its irrevocable agreement MOA with CUPE Local 1486, the employer has committed unfair labour practices and violated sections 6-62(1)(r)of The Saskatchewan Employment Act, which requires, inter alia, employers to refrain from interfering with or denying employees membership in a trade union (s. 6-4), to engage in good faith collective bargaining (s. 6-7), to deduct dues on behalf of a union local representing the employees in a bargaining unit (s. 6-42) and to address all disputes between the employer and the union and its members through the grievance arbitration process in the collective agreement (s. 6-45).

[21] In its application, CUPE requested the following remedial orders from this Board:

i. *A finding of Unfair Labour Practices under sections 6-62(1) and 6-104(2)(b) of The Saskatchewan Employment Act;*

ii. *An order requiring the Respondent URSU to cease and desist from engaging in the aforementioned unfair labour practices under sections 6-103 and 6-104(2)(c) of The Saskatchewan Employment Act;*

iii. *An order declaring CUPE Local 1486 to be the exclusive representative of the members employed by the Respondent URSU under section 6-103 of The Saskatchewan Employment Act;*

iv. *An order declaring the collective bargaining agreement and the irrevocable election memorandum of agreement to continue in force and effect under section 6-103 of The Saskatchewan Employment Act;*

v. *An order requiring the Respondent URSU to negotiate with [CUPE] with respect to the renewal of the collective bargaining agreement;*

vi. *An order requiring the Respondent URSU to reinstate any CUPE members terminated or laid off in contravention of the collective bargaining agreement and/or The Saskatchewan Employment Act;*

vii. *An order fixing and determining the monetary losses suffered by any CUPE members as a result of the unfair labour practices committee, and requiring the Respondents to compensate those members accordingly, in accordance with s. 5(g) of The Saskatchewan Employment Act[,] and*

viii. *Such further orders as counsel may advise and this Board may determine to be just and reasonable.*

2. URSU's Reply

[22] On August 12, 2016, URSU filed its Reply to CUPE's unfair labour practice application. In it URSU disputes many of CUPE's allegations essentially because it had withdrawn its voluntary recognition of CUPE as the collective bargaining representative of its employees on June 23, 2016.

[23] The essence of its argument in the Reply, and before this Board at the hearing, is set out in paragraph 4(b) as follows:

> *In its application, the Canadian Union of Public Employees, Local 1486 ("CUPE") alleges that the employer committed unfair labour practices pursuant to s. 6-62(1)(a) and s. 6-62(1)(b) of The Saskatchewan Employment Act (the "Act"). These allegations stem from the cessation of the employer's voluntary recognition of CUPE as the bargaining unit representing its employees. CUPE was informed that it would no longer be voluntarily in the letter of June 23, 2016[.]*
>
> *On June 14, 2016, the Executive Committee of the University of Regina Student's Union voted to withdraw voluntary recognition. CUPE was invited to make a presentation to the University of Regina Students' Union Board of Directors regarding this matter. On June 27, 2016, Suzanne Posyniak, representing CUPE, addressed the Board of Directors. On July 11, 2016, the Board of Directors voted to affirm support for the Executive Committee's decision to withdraw voluntary recognition of CUPE.*
>
> *The employees were informed of this change in an employee newsletter sent to employees on June 23, 2016, attached as Exhibit "A" to this document. The cessation of voluntary recognition is fully within the employer's rights, as voluntarily recognized bargaining units are not afforded the same protections as are certified bargaining units under the Act.*

[24] Respecting CUPE's allegations that URSU unilaterally repudiated the collective agreement, URSU asserts at paragraph 4(c) as follows:

> *CUPE alleges in its application that the employer has repudiated its collective agreement and unilaterally altered the terms and conditions of employment. This is not the case. In fact, in the employee newsletter alerting employees that CUPE would no longer be voluntarily recognized, which is attached as Exhibit "A" to this document, the employer assured employees that the terms of their employment remain unchanged.*
>
> *Although the terms of the now-expired collective agreement recognized CUPE as the bargaining agent for all employees, this voluntary recognition does not extend in perpetuity. In its application, CUPE claims that s. 6-39 and s. 6-62(1)(n) of the Act should be read together to interpret the collective agreement as extending voluntary recognition of CUPE indefinitely.*

[25] Respecting CUPE's allegations that URSU walked away from collective bargaining, URSU asserts at paragraph 4(f) as follows:

> *Commencing on or about April 10, 2106, the parties met a number of times to bargain a renewal of the collective agreement. The parties were able to find areas of agreement. However, throughout the negotiation, both sides mistakenly believed that CUPE was the certified bargaining agent for the employees. When parties disagreed on the scope of the bargaining unit, there existed no certification order on which they could rely to resolve the disagreement. Any negotiations which occurred were the result of a mutual mistake of a fundamental element underlying negotiations. Negotiations should not be interpreted as voluntary recognition of CUPE by the employer.*

[26] Finally, respecting CUPE's allegations that URSU blocked access to its employees for purposes of an organizing drive, URSU asserts at paragraph 4(g) as follows:

> *On May 24, 2016, the employer requested that CUPE not approach employees to sign union membership cards on the employer's premises, including the Lazy Owl Bar and Grill ("the Owl"). Following CUPE's request for reasons, Carl Flis sent an email to CUPE stating that the Owl is a place of employment and that it would be best if CUPE engaged employees elsewhere, so as to avoid distracting or interrupting employees while performing their duties and so as not to interfere with service to customers. . . This is a reasonable request which does not constitute an unfair labour practice.*
>
> *In anticipation of a certification vote, the employer sent two emails to employees detailing the position of the employer and encouraging them to vote regardless of their intention. These emails were sent on July 6, 2016 and July 13, 2016, and are attached and marked as Exhibit "C" and Exhibit "D" to this document.*

ISSUES

[27] After reviewing the pleadings filed in this matter, receiving *viva voce* evidence at the hearing, listening to the oral submissions of counsel, and reading their excellent written briefs, the Board is of the view that this particular unfair labour practice application presents (3) main issues for decision. These issues are:

1) Is there a collective agreement between the parties, and, if so, does it remain in force even though its term has expired? [Collective Agreement Issue]

2) Alternatively, was there a statutory freeze in effect and, if so, did URSU breach it? [Statutory Freeze Issue]

3) Did URSU commit unfair labour practice(s) in this case, and, if so, what is the remedy? [Unfair Labour Practice Issue]

RELEVANT STATUTORY PROVISIONS

[28] The provisions of the *SEA* most relevant to this application read as follows:

6-1*(1) In this Part:*

(a) ***"bargaining unit"*** *means:*

(i) a unit that is determined by the board as a unit appropriate for collective bargaining; or
(ii) if authorized pursuant to this Part, a unit comprised of employees of two or more employers that is determined by the board as a unit appropriate for collective bargaining;

(b) ***"certification order"*** *means a board order issued pursuant to section 6-13 or clause 6-18(4)(e) that certifies a union as the bargaining agent for a bargaining unit;*

. . . . . .

(c) ***"collective agreement"*** *means a written agreement between an employer and a union that:*

(i) sets out the terms and conditions of employment; or

(ii) contains provisions respecting rates of pay, hours of work or other working conditions of employees;

(d) ***"collective bargaining"*** *means:*

(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;

(ii) putting the terms of an agreement in writing those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;

(iii) executing a collective agreement by or on behalf of the parties; and

(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union;

. . . . . .

*(k)**"labour organization"** means an organization of employees who are not necessarily employees of one employer that has collective bargaining among its purposes;*

. . . . .

*(p) **"union"** means a labour organization or association of employees that:*

(i) has a one of its purposes collective bargaining; and

(ii) is not dominated by an employer[.]

. . . . . .

***6-7** Every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to this Part or by an order of the board.*

. . . . . .

***6-24** Authorized representatives of the union and the employer shall:*

(a) meet within 20 days after the board issues a certification order or any other period that the parties agree on; and

(b) commence collective bargaining with a view to concluding a collective agreement.

. . . . . .

***6-26**(1) Before the expiry of a collective agreement, either party to the collective agreement may give notice in writing to the other party within the period set out in subsection (2) to negotiate a renewal or revision of the collective agreement or a new collective agreement.*

(2) A written notice pursuant to subsection (1) must be given not less than 60 days nor more than 120 days before the expiry date of the collective agreement.

(3) If a written notice is given pursuant to subsection (1), to parties shall immediately engage in collective bargaining with a view to concluding a renewal or revision of a collective agreement or a new collective agreement.

. . . . . .

***6-39**(1) Except as provided in [Division 9, Subdivision 1 "Ratification of and Length of Collective Agreements"], every collective agreement remains in force:*

(a) for the term provided for in the collective agreement; and

(b) after the expiry of the term mentioned in clause (a) from year to year

. . . . . .

***6-62**(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*

(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;

(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;

. . . . . .

(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;

(e) to refuse to permit a duly authorized representative of a union with which the employer has entered into a collective agreement or that represents the employees in a bargaining unit of the employer to negotiate with the employer during working hours for the settlement of dispute and grievances of:

(i) employees covered by the agreement; or
(ii) employees in the bargaining unit

. . . . . .

(i) to interfere in the selection of an union;

. . . . . .

(n) before a first collective agreement is entered into or after the expiry of the term of a collective agreement, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in a bargaining unit without engaging in collective bargaining respecting the change with the union representing the employees in the bargaining unit;

. . . . . .

(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.

. . . . . .

(7) No employer shall be found guilty of an unfair labour practice contrary to clause (1)(d), (e), (f) or (n):

(a) unless the board has made an order determining that the union making the complaint has been named in the certification order as the bargaining agent of the employees; or
(b) if the employer shows to the satisfaction of the board that the employer did not know and did not have any reasonable grounds for believing, at the time when the employer committed the acts complained of, that:
(i) the union represented the employees; or

> *(ii) the employees were actively endeavouring to have a union represent them.*

[29] The powers that the Board can exercise on this application are found in the following provisions of the *SEA*:

> ***6-103****(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*
>
> *. . . . . .*
>
> ***6-104****(2) In addition to any other powers given to the board pursuant to this Part, the board may make order:*
>
> > *(a) requiring an employer or a union representing the majority of employees in a bargaining unit to engage in collective bargaining;*
> >
> > *(b) determining whether an unfair labour practice or a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board is being or has been engaged in:*
> >
> > *(c) requiring any person to do any of the following:*
> >
> > > *(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;*
> > >
> > > *(ii) to do anything for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board[.]*
>
> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *. . . . . .*
>
> > *(r) to decide any question that may arise in a hearing or proceeding, including any question as to whether:*
> >
> > > *(i) a person is a member of a union;*
> > >
> > > *(ii) a collective agreement has been entered into or is in operation; or*
> > >
> > > *(iii) any person or organization is a party to or bound by a collective agreement[.]*

ANALYSIS

A. <u>Introduction</u>

[30] This case is unique. For more than four (4) decades, URSU had voluntarily recognized CUPE as the bargaining agent for its employees. Over the years, numerous

collective agreements were negotiated between the parties, and ratified by CUPE members. The most recent collective agreement that expired on December 31, 2015, is a sophisticated document, virtually indistinguishable from collective agreements negotiated between parties in which the union in question has been certified by this Board as the exclusive bargaining agent of the employees.[7] It contains the typical clauses covering terms and conditions of employment such as payment of wages; hours of work and scheduling; overtime; vacation leave; holidays; sick leave, and leaves of absence. It sets out a process pertaining to the discipline and discharge of employees; the filing of grievances, and arbitrations. And, unlike many collective agreements involving uncertified unions, the CUPE-URSU collective agreement also contains provisions relating to union security[8]; collection, and remittance, of union dues, and a respectful workplace policy.

[31] It cannot be gainsaid that a long-standing and mature labour-management relationship has existed in this workplace for years. Yet, only recently after discovering that CUPE had never obtained a formal Order from this Board certifying it as the exclusive collective bargaining agent for URSU's employees did URSU withdraw its voluntary recognition. This unfair labour practice application is intended to deal, at least in part, with the fall-out from the employer's unilateral decision to end that recognition.

[32] Another unique feature of this application is that CUPE is not arguing that its voluntary recognition status operates as a bar to another union seeking certification pursuant to section 6-11 of the *SEA*, for example, to represent the same group of employees. The jurisprudence of this Board is clear: voluntary recognition cannot defeat the ability of another union to seek, and to obtain, a certification Order. See for example: *Canadian Messenger Transportation Systems Inc. and United Food and Commercial Workers, Local 1400*, LRB File No. 091-90, [1990] Fall Sask. Labour Rep. 93; *International Union of Operating Engineers Construction and General Workers of Canada – Local #1 v Hensuet Pipeline Construction*, LRB File Nos. 146-91, 188-91 & 195-91, [1991] Sask. Labour Rep. 4th Quarter 64, and *Inconvenience Productions Inc. and Teamsters Union, Local 395*, LRB File No. 144-98, (2002), 74 CLRBR (2d) 161 (SK LRB).

[7] A copy of this collective agreement was included in the Joint Book of Documents at Tab 3.
[8] See for example: *Grain Services Union (ILWU-Canadian Area) v Heartland Livestock*, LRB File No. 287-95, 30 CLRBR (2d) 119 (SK LRB) where this Board held that the employer did not commit an unfair labour practice when it refused to include a union security clause in the collective agreement it negotiated with a voluntarily recognized union.

[33] Rather, this unfair labour practice application raises the unique question of what, if any, protection CUPE may claim under the *SEA* after URSU withdrew its voluntary recognition of CUPE as the bargaining agent for URSU's employees. At the outset, this necessitates an assessment of the legal status of the collective agreement that expired on December 31, 2015.

B. The Collective Agreement Issue

[34] In the opinion of the Board, this issue raises an unusual question of statutory interpretation on which there is little jurisprudence to offer guidance. However, prior to embarking on this analysis, it is important to clarify the legal regime surrounding voluntary recognition or uncertified unions in Saskatchewan.

1. Voluntary Recognition in Saskatchewan

[35] This Board has considered the legal status of voluntary recognition in only a handful of cases, most notably, *Saskatchewan Government Employees' Union v Saskatchewan Institute of Applied Science and Technology*, LRB File No. 131-88, [1989] Summer Sask. Labour Reports 51; *Saskatchewan Construction Labour Relations Council Inc. v Construction Labour Relations Association of Saskatchewan Inc. and Saskatchewan Provincial Building and Construction Trades Council*, LRB File No. 023-94, [1994] 2nd Quarter Sask. Labour Reports 190, and *Grain Services Union (ILWU-Canadian Area) v Heartland Livestock*, LRB File No. 287-95, 30 CLRBR (2d) 119 (SK LRB). Indeed, the legal status of voluntary recognition under *The Trade Union Act*, RSS 1978, c T-17 [*TUA*], was described by this Board in *Saskatchewan Construction Labour Relations Council*, *supra*, at page 200 as "shrouded in uncertainty and remains one of the few significant issues on which there has been no extensive comment by the Board". This shroud of "uncertainty" lingers under the *SEA*.

[36] In *Saskatchewan Government Employees' Union*, *supra*, former Chairperson Ball, in a now oft-quoted passage, described voluntary recognition under the *TUA* as follows at pages 65-66:

> *[I]t is clear that a collective bargaining relationship may be established between an employer and a trade union independently from and without regard to the provisions of the Trade Union Act. An employer may enter into a collective bargaining agreement with a union, and the parties may govern their affairs according to that agreement, whether or not the union is ever certified. That type of arrangement, common in the construction industry but unusual in other*

industries, demonstrates that a collective bargaining agreement can exist independently from, and does not depend upon, the existence of a Board order.

In Beverage Dispensers et al v. Terra Nova Motor Inn Ltd., 74 CLLC 14253, at p. 448 Laskin C.J. observed:

> *It is notorious that long before labour relations legislation was enacted in British Columbia, compelling employers to bargain collectively with trade unions which obtain certification thereunder as bargaining agents for employees of those employers, there were collective bargaining relations between employers and trade unions which were the product of voluntary recognition of such trade unions by employers. The introduction of compulsory collective bargaining legislation did not exclude voluntary recognition and consequent voluntary bargaining, other than to require proof, if an issue arose thereon, that a collective agreement which resulted from voluntary negotiation was supported by a majority of employees covered thereby.*
>
> *Certification of a trade union as bargaining agent qualifies it to compel an employer to bargain collectively with it on behalf of employees for whom the union has been so certified.*

Unlike labour legislation in most other Canadian jurisdictions, The Trade Union Act makes little mention of voluntary recognition arrangements. It does not purport to give a voluntarily recognized union status as exclusive bargaining representative, or render the union, the employer, or the employees subject to the same duties and obligations that arise on certification. Exclusivity under the Act is founded upon the union's ability to demonstrate that it represents a majority of employees in an appropriate unit. Proof of majority support is not a prerequisite of voluntary recognition.

The most important feature of bargaining rights acquired by a Board order under the Act is exclusivity. Once a union acquires bargaining rights by demonstrating majority support, freedom of individual contract is abrogated and the employer may not bargain directly with individual employees or with any other organization unless and until the union's bargaining rights are terminated…The union's exclusive bargaining rights are accompanied by a concomitant obligation to fairly represent all employees.[Citation omitted.]

[37] Picking up this theme a few years later in *Heartland Livestock*, *supra*, former Vice-Chairperson Gray reviewed the Board's Decisions in *Saskatchewan Government Employees Union*, *supra*; *Saskatchewan Construction Labour Relations Council*, *supra*; *Canada Messenger*, *supra*, and *Hensuet Pipeline Construction Ltd.*, *supra*. She opined at page 128:

> *It can be concluded from the cases quoted that the status of a trade union holding a voluntary recognition agreement is a tenuous one. While some rights in relation that agreement may be enforceable under the provisions of The Trade Union Act, the right of the trade union to exclusively represent the employees is not statutorily guaranteed under s. 3 of the Act.*

[38] A fulsome discussion about voluntary recognition appears in *Raydon Rentals Ltd. (Certain Employees) and I.A.M., Local 99* (2005), 118 CLRBR(2d) 10, a decision of the Alberta Board. It is true that section 42 of Alberta's *Labour Relations Code* expressly provides for voluntary recognition agreements; however that Board's discussion in *Raydon Rentals*, *supra*, is equally relevant to Saskatchewan where no such explicit statutory acceptance exists. At pages 16-17, the Board stated as follows:

> *15. Voluntary recognition is an alternative method for a trade union to obtain bargaining rights with respect to a group of employees represented by the union. An employer may choose to recognize the union as the bargaining agent of the employees, thereby avoiding the need for the union to apply to the Labour Relations Board for certification and a vote of the employees.*
>
> *16. The informality of the voluntary recognition process represents at once both its greatest advantage and its greatest risk. The voluntary recognition process enables employers and unions to avoid the formality, expense and delay of certification proceedings, freely define the bargaining unit and commence a collective bargaining relationship in a non-adversarial manner. On the other hand, the informality of the process can enable employers to engage in "sweetheart deals" with "associations" that do not truly represent the employees. As well, the lack of a formal mechanism to ascertain employee wishes and the absence of Labour Relations Board oversight of the process means that there is no guarantee that the union actually enjoys the support of a majority of the employees…*
>
> *17. The relative advantages and disadvantages of voluntary recognition has been described by the B.C. board in Delta Hospital and H.E.U., Local 180, [1978] Can LRBR 356, at p. 367, as quoted in Sie-Mac Pipeline Contractors Ltd. and Construction & General Workers, Local 1111, [1991] Alta. LRBR 847, at pp. 885-886 (referred to as the "Sie-Mac decision"), as follows:*
>
> > *Each of the two routes to a legal recognition of a trade union – recognition by compulsion of a certificate and recognition by agreement – has its own advantages. The principal advantage of the first is that it is an orderly, statutory process and one which is overseen or monitored by an independent tribunal having the responsibility to protect the legitimate interest of employers, trade-unions, and employees. The most commonly noted advantages to recognition by agreement are that the parties have come together initially on amicable terms rather than as adversaries; that the parameters of the bargaining relationship are determined by the parties themselves rather than by some external agency which may or may not fully understand the intricacies of their work situation; and that expense and delay are avoided. (In some industries, most notably the construction industry, these advantages have resulted in the second route being almost as prevalent as the first.)*
> >
> > *Voluntary recognition, then, has a place in British Columbia labour relations. It has its own distinct advantages. But it is also true that there are risks to voluntary recognition which are not present, or are less likely to be present, where the relationship is initiated by a certificate or bargaining authority issued by a labour board, following the full paraphernalia of certification proceedings. For example, there is a danger that a "sweetheart" deal may be struck, one which favours the trade-union and management but which is to the distinct disadvantage of the employees. (We hasten to say that there was no suggestion of such*

> *an arrangement here.) Alternatively, an employer may, for no readily apparent reason invite a trade-union to enter into a collective agreement, but later examination reveals that the employer's objective was to influence his employees against another trade-union which had been experiencing some organizational success. Finally, even in the absence of such clear improprieties, it is entirely possible that voluntary recognition will result in the employees having foisted on them a bargaining agent which they have never wanted and still do not want. [Emphasis added.]*

> *18. Voluntary recognition must never be viewed as a mechanism to avoid the need for the union to have employee support in order to serve as the employees' bargaining agent. Employee support need not be measured via a formal mechanism such as a certification vote, but the support must be present. "Voluntary recognition is not a way of circumventing the employees' freedom to choose union representation, but of facilitating that choice": Sie-Mac, supra, at p. 883. As indicated in section 42 of the Code, the trade union seeking voluntary recognition must be "acting on behalf of the employer's employees".*

> *19. A union does not have an independent right to bargain collectively with an employer on behalf of employees. A union's right to do so flows only from the employees' choice that they wish to bargain collectively with their employer through a bargaining agent…The choice of whether to bargain collectively through a bargaining agent is not a choice made by unions; the right to make such a choice belongs to employees and it is important that we assiduously protect the right of employees to exercise their own free will and make that choice whatever it may be. As noted by the Alberta Board, while this rights is collectivist in nature and based on majority rule, it remains an employee right: Sie-Mac, supra, at p. 883.*

[39] Returning to *Heartland Livestock*, *supra*, the Board concluded at page 133 that the *TUA* should not be interpreted in a way which would provide "institutional security to a trade union which has not opted into the administrative scheme established by the Act for determining the representative capacity of the trade union". For that reason, the Board determined a voluntarily recognized union could not demand that an employer include a union security clause in its collective agreement, and the employer's refusal to do so did not result in an unfair labour practice. The principal policy motivation for this holding appears to be that the Board did not want to allow uncertified unions to "cherry-pick" provisions of the *TUA* it wished to invoke without first demonstrating it had majority support of the employees.

[40] Indeed, the apparent inability of an uncertified union to demonstrate it has majoritarian support is the principal concern about such arrangements consistently identified in the case law. See *e.g.*: *Canadian Messenger*, *supra*, at page 95; *Hensuet Pipeline*, at page 69, and *Inconvenience Productions*, *supra*, at page199. In *Saskatchewan Construction Labour Council*, *supra*, at page 200, the Board suggested tentatively that evidence of one or more ratified collective agreements may be sufficient to demonstrate such a level of support. Yet, in

Heartland Livestock, *supra*, itself, evidence of a "longstanding bargaining relationship" between the union in question – the Grain Services Union – and the employer, buttressed by ratifications of numerous collective agreements by its members, fell short. The Board ruled at page 134 this evidence failed to satisfy "the evidentiary standards that are imposed by the Board in determining representative capacity on an application for certification".

[41] Yet, it would be inaccurate to conclude from these authorities that an uncertified union is wholly without recourse to invoke statutory protections found in the *SEA*. To cite but one example, voluntary recognition imposes upon a union the obligation to represent all employees fairly. Should an employee believe the union has not fairly represented him or her an application under section 6-59 may be commenced. See especially: *Moran v Saskatchewan Joint Board, Wholesale and Department Store Union et al.*, LRB File No. 062-10, 2011 CanLII 24719 (SK LRB).

[42] As even the Board in *Heartland Livestock*, *supra*, conceded there is some scope for a voluntarily recognized union to seek protection under a labour relations statute such as the *SEA*. Thus, to determine whether a voluntarily recognized union can access the *SEA*, it is necessary first to identify the nature of the right which the union asserts, and whether a purposive interpretation of the *SEA* will accommodate such a right. As noted earlier, this becomes a question of statutory interpretation. We review the relevant statutory interpretive principles below.

2. Principles of Statutory Interpretation

[43] The Board most recently reviewed the interpretive principles relevant to these questions in *Saskatoon Public Library Board v Canadian Union of Public Employees, Local No. 2669*, LRB File No. 135-16, 2017 CanLII 6026 (SK LRB), at paragraphs 11 and 12.

[44] It is well-established that all questions of statutory interpretation must be determined by applying the modern rule of statutory interpretation. The Supreme Court of Canada *per* Brown J. recently summarized the modern rule in *Krayzel Corporation v Equitable Trust Co.*, [2016] 1 SCR 273, 2016 SCC 18, at paragraph 15 as follows:

> *[15] Statutory interpretation entails discerning Parliament's intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense in harmony with the statute's schemes and objects: Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21. Throughout, it must be*

> *borne in mind that every statute is deemed remedial and is to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": Interpretation Act, R.S.C. 1985, c.I-21, s. 12.*

[45] Like the federal *Interpretation Act*, section 10 of *The Interpretation Act, 1995*, SS 1995, c I-11.2 [*The Interpretation Act, 1995*] is to similar effect.

[46] The Saskatchewan Court of Appeal elaborated on the modern rule of statutory interpretation in two (2) recent judgments: *Ballantyne v Saskatchewan Government Insurance*, 2015 SKCA 38, 457 Sask R 254, and *Holtby-York v Saskatchewan Government Insurance*, 2016 SKCA 95, both judgments authored by Ryan-Froslie J.A. for the Court.

[47] This elaboration, which first appeared in *Ballantyne*, *supra*, at paragraphs 19-20, is helpful in this case, and, for that reason, it is reproduced below:

> *[19] The leading case with respect to statutory interpretation is the Supreme Court of Canada's decision in Re Rizzo & Rizzo Shoes Ltd., 1998 CanLII 837 (SCC), [1998] 1 SCR 27 [Rizzo Shoes]. A number of principles set out in that case are applicable to the case at hand, namely:*
>
> > *1. The words of an Act are to be read in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its objects, and the intention of the legislature (See: Rizzo Shoes at para. 87). (See also: Saskatchewan Government Insurance v Speir, 2009 SKCA 73 (CanLII) at para 20, 331 Sask R 250; and Acton v Rural Municipality of Britannia, No. 502, 2012 SKCA 127 (CanLII) at paras 16-17, [2013] 4 WWR 213 [Acton]).*
> >
> > *2. The legislature does not intend to produce absurd consequences. An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent or if it is incompatible with other provisions or with the object of the legislative enactment (See: Rizzo Shoes at para. 27).*
> >
> > *3. Any statute characterized as conferring benefits must be interpreted in a broad and generous manner (See: Rizzo Shoes at para. 21). This principle is enshrined in s.10 of The Interpretation Act, 1995, SS 1995, c I-11.2 (See: Acton at paras. 16-18).*
> >
> > *4. Any doubt arising from difficulties of language should be resolved in favour of the claimant (See: Rizzo Shoes at para. 36).*

> *[20] In Sullivan on the Construction of Statutes, 6th ed (Markham: LexisNexis, 2014) at 28-29, Ruth Sullivan sets out three propositions that apply when interpreting the plain meaning of a statutory provision:*
>
> 1. *It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.*
>
> 2. *Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.*
>
> 3. *In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning*.

[48] To summarize, for purposes of this application when interpreting the provisions of the *SEA* that CUPE relies on, the ordinary meaning of the words of the provision must be read in the context of the *SEA* as a whole, and, more particularly, in the context of Part VI. The purpose of the *SEA* and the legislature's intention in enacting the provision or provisions in question must not be forgotten. As well, it is important to recall that such legislation is benefit conferring and must be given a generous and purposive interpretation. Finally, the provision or provisions in question should not be interpreted so as to lead to an absurdity.

[49] Keeping these interpretive principles in mind, we now turn to the Collective Agreement Issue.

3. Position of the Parties

3.1 CUPE's Position

[50] CUPE's position is straight forward and easily summarized. CUPE submits that the text of the *SEA* is clear and by virtue of section 6-39, its last collective agreement with URSU that expired on December 31, 2015 continues in force "from year to year". Citing *Westfair Foods Ltd. v United Food and Commercial Workers, Local 1400*, 2004 SKCA 119, [2005] 1 WWR 606, and *Communications, Energy & Paperworkers Union of Canada, Local 721-G v Mercury Graphics*, 2012 SKCA 19, [2012] 6 WWR 415. CUPE submits that only certain events may lawfully terminate the operation of a collective agreement. In this case it was the unilateral decision of the employer to withdraw its voluntary recognition of the union. CUPE contends this

is not an event which negates a collective agreement and, therefore, section 6-39 stipulates that its most recent collective agreement with URSE continues to operate.

3.2 URSU's Position

[51] Although diametrically opposed to the position advanced by CUPE, URSU's is also straightforward and amenable to succinct restatement.

[52] URSU's principal argument is that an uncertified union cannot invoke the protections provided under Part VI of the *SEA*. It does not dispute that CUPE became the exclusive bargaining agent of URSU's employees once certification Orders were issued by this Board on October 6, 2016. However, prior to that CUPE held the tenuous status of voluntary recognition, and, as such, was not able to access provisions found in Part VI. URSU relies on authorities such as *Heartland Livestock*, *supra*; *Saskatchewan Government Employee's Union*, *supra*, and *United Food and Commercial Workers, Local 1400 v Saskatoon Credit Union Ltd.*, LRB File No. 010-08, 167 CLRBR (2d) 155.

[53] Simply put, URSU asserts that as employer it was lawfully entitled to unilaterally revoke its voluntary recognition of CUPE, and dissolve the collective bargaining relationship. A consequence of this revocation, it argues, was that the collective agreement no longer had any legal force.

4. Analysis of the Collective Agreement Issue

[54] For reasons that follow, we conclude that the collective agreement between CUPE Local 1486 and URSU which operated from September 1, 2013 to December 31, 2015 qualified as a "collective agreement" as defined by subsection 6-1(1)(e) of the *SEA*. As of January 1, 2016, it continues to operate "from year to year" by virtue of section 6-39(1)(b). Accordingly, we reject the position advanced by URSU respecting the Collective Agreement Issue.

[55] First, the modern, contextual approach to statutory interpretation begins with the text of the legislative provisions in question. In this application, the provisions most relevant to the Collective Agreement Issue are subsections 6-1(1)(d) (definition of "collective agreement");

6-1(e) (definition of “collective bargaining”); 6-1(p) (definition of “union”), and 6-39 (“period for which collective agreements remain in force”). No ambiguity flows from these provisions. It is obvious that none of them reference a certification Order nor stipulate that the union must be certified as the exclusive bargaining agent of the employees as a pre-condition to their operation. On their face, then, the scope of these provisions is elastic enough to include collective agreements between a voluntarily recognized union and an employer.

[56] Second, a contextual reading of these sections involves having due regard for the legislative objectives which the *SEA*, and more particularly Part VI, seeks to advance. Part VI is intended to govern how all manner of industrial relations are to be conducted in Saskatchewan. Its objective is to encourage and enhance stable labour-management relationships, and to that end a paramount principle enshrined in Part VI is that all parties should comply with their statutory duties to bargain in good faith. Offering limited statutory protection to a collective agreement achieved by an uncertified union and an employer, and ratified by its members, can only assist in maintaining labour peace in the workplace, most especially a workplace where the collective bargaining relationship has endured for more than four (4) decades and, apparently, with little, if any, history of labour disruption. Plainly, this advances a significant public policy value that underlies Part VI.

[57] Third, permitting a collective agreement like URSU’s to come within Part VI is not incompatible with other provisions of that Part. Indeed, other aspects of Part VI appear to confirm the soundness of such an interpretation. For example, section 6-62 of the *SEA* which includes in subsection 6-62(1) a list of unfair labour practices committed by employers, exempts in subsection 6-62(7) four (4) activities from qualifying as unfair labour practices if they involve a non-certified union. It would seem to follow that an uncertified union can invoke the remaining unfair labour practice provisions set out in section 6-62(1). This interpretation flows from the fact that the Legislature expressly identified unfair labour practices that did not apply to uncertified unions.

[58] To be sure, two (2) of the four (4) exemptions identified in subsection 6-62(7), namely subsection 6-62(d) (refusing to engage in collective bargaining with an uncertified union) and subsection 6-62(n) (relating to the statutory freeze), pertain to the collective bargaining process. At first blush, this reality might be construed as signaling that Part VI should not be interpreted to recognize collective agreements involving uncertified unions.

[59] However, the Board concludes that such a construction would place too great an emphasis on these exclusions. While an employer that refuses to bargain collectively with an uncertified union may not be found to have committed an unfair labour practice, it does not follow that such an employer is able to wholly ignore a collective agreement with an uncertified union that is legally enforceable by virtue of other provisions of Part VI. Part VI imposes a free-standing duty on all unions and employers to bargain collectively in good faith. An employer's refusal to do so, while not amounting to an unfair labour practice, may still breach the *SEA* by virtue of section 6-7 for which an uncertified union could seek legal recourse.

[60] Fourth, a lack of evidence of majority support for CUPE is not an issue in this case. Indeed, URSU did not identify concerns about the level of support CUPE enjoyed among its employees as the rationale for unilaterally withdrawing its voluntary recognition. In any event, majoritarian support was confirmed by the certification Orders issued by this Board on October 6, 2016. As a consequence, the concerns expressed in the line of cases discussed above, most notably *Canada Messenger*, *supra*, and *Inconvenience Productions*, *supra* do not arise in this case.

[61] Fifth and finally, to accept URSU's position could in the Board's view result in an injustice, and undermine a purposive and generous interpretation of Part VI of the *SEA*. At the very least, it would signal that in a voluntary recognition situation, employers can unilaterally withdraw its recognition of the uncertified union, terminate all collective bargaining arrangements, and, effectively, resurrect employers' ability to contract individually with its employees. The modern rule of statutory interpretation together with section 10 of *The Interpretation Act, 1995* counsel against interpreting a statutory provision in a way that would work an injustice, unless the provision itself suggests otherwise. The position advanced by URSU on the Collective Agreement Issue in this case runs contrary to this interpretive precept.

[62] For all of these reasons, the collective agreement between CUPE and URSU that expired on December 31, 2015 qualifies as a "collective agreement" for purposes of Part VI and, as such, continues in force "from year to year" by virtue of section 6-39(1)(b).

C. The Statutory Freeze Issue

[63] In view of the Board's conclusion on the Collective Agreement Issue, it is not necessary for us to address the Statutory Freeze Issue. However, as CUPE presented oral and written argument on the issue, we will briefly consider the Statutory Freeze Issue.

1. Overview of the Statutory Freeze

[64] In *United Food and Commercial Workers, Local 1400 v Securitas Canada Ltd.*, LRB File No. 246-14, 2015 CanLII 43767 (SK LRB) at paragraph 45, the Board adopted the following description of the statutory freeze set out in *Construction and General Workers' Union, Local 890 v Brekmar Industries Ltd.*, LRB File No. 113-92, [1993] 1st Quarter Sask. Labour Rep. 126, at pages 128-129:

> *Section 11(1)(m)[of the TUA] is not unique, as most jurisdictions in Canada impose a statutory freeze upon an employer's power to unilaterally change its employees' terms and conditions of employment during the period between certification and the conclusion of a first collective agreement. The wording of these provisions varies from jurisdiction to jurisdiction but their twofold purpose is the same: first to strike a balance between the need to provide a clearly identifiable point of departure for collective bargaining, while at the same time permitting the employer to manage its business; and second, to regulate the employer's right to change conditions of employment or withhold expected benefits (conduct which might not be caught by the other unfair labour practices) because of the effect this might have on the employees' enthusiasm for collective bargaining as a means of improving their working conditions. Unlike most of the unfair labour practices the emplo9yer's motivation is irrelevant un section 11(1)(m)[.] (Citation omitted.)*

[65] This Board's jurisprudence under section 11(1)(m) of the *TUA* consistently held that the freeze became effective once a certification Order is issued. See, *e.g.*: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Regina Exhibition Association Ltd.*, LRB File No. 179-00, at para. 10; *Newspaper Guild of Canada v Sterling Newspapers Group, A Division of Hollinger Inc.*, LRB File No. 006-01, at para. 22. In *Regina Exhibition Association*, *supra*, for example, former Chairperson Gray explained at paragraph 17 that the freeze provision in section 11(1)(m) "is intended to nurture collective bargaining, to set a solid basis of negotiations, to support the Union's role as the exclusive bargaining agent and to prevent unilateral changes of the sort that are destructive of collective bargaining."

[66] Put another way, the Board in *Sterling Newspapers Group*, *supra*, stated at paragraph 22:

> *The statutory purpose of s. 11(1)(m) is to require the employer to maintain the status quo with respect to the pre-certification terms and conditions of employment unless the union consents to a change…It stabilizes the bargaining relationship by fixing the terms and conditions of employment at their pre-certification state. The union is not required to bargain from a sliding scale and can anticipate that employees will retain their current level of pay and benefits until the union and the employer agree to something else.*

[67] Citing the decision of the Ontario Board in *Ontario Public Service Employees Union v Royal Ottawa Health Care Group*, [1999] OLRB Rep. July/August 711, former Chairperson Gray noted in *Regina Exhibition Association*, *supra*, at paragraph 12, that section 11(1)(m) is "more accurately viewed as a form of economic regulation, rather than a fault-based prohibition".

[68] More recently, the Saskatchewan Court of Appeal in *United Steelworkers, Local 7458 v Potash Corporation of Saskatchewan (Cory Division)*, 2013 SKCA 86 *per* Jackson J.A. summarized the effect of section 11(1)(m) as follows at paragraph 13:

> *Section 11(1)(m) prohibits an employer from unilaterally changing rates of pay, hours of work or other conditions of employment without bargaining collectively respecting the change with the trade union representing the majority of employees in the appropriate unit and is intended to protect the union's bargaining rights once a collective agreement has expired and a new agreement has yet to be negotiated.*

2. **The Statutory Freeze under the *SEA***

[69] In the *SEA*, the statutory freeze is found in subsection 6-62(1)(n). Although Its language differs from subsection 11(1)(m) of the *TUA*, on close reading these differences are subtle and reveal little, if any, substantive difference between the two (2) provisions. For this reason, the Board's jurisprudence analyzing section 11(1)(m) "provides helpful guidance in the application of s. 6-62(1)(n) of [the *SEA*]. See especially: *Securitas Canada Ltd.*, *supra*, at paragraph 47.

[70] For ease of comparison, the following chart sets out the text of these two (2) provisions.

***TUA*, s. 11(1)(m)**	***SEA*, s. 6-62(1)(n)**
It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer: *. . . . . .* *(m) where no collective bargaining agreement is in force, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in an appropriate unit without bargaining collectively respecting the change with the trade union representing the majority of employees in the appropriate unit[.]*	*It is an unfair labour practice for an employer, or any person acting on behalf of the employer to do any of the following:* *. . . . . .* *(n) before a first collective agreement is entered into or after the expiry of the term of the collective agreement, to unilaterally change rates of pay, hours of work, or other conditions of employment of employees in a bargaining unit without engaging in collective bargaining respecting the change with the union representing the employees in the bargaining unit[.]*

[71] The first thing to observe is that unlike the general opening language in section 11(1)(m), *i.e.* "where no collective bargaining agreement is in force", the opening language in under subsection 6-62 (1)(n) is more specific. It refers to situations where a union has been certified but a first collective agreement has not been achieved under 6-24, and also to situations where the term of a collective agreement has expired but a renewal of the collective agreement under subsection 6-26 has not been concluded. This clarifies that under the *SEA* the statutory freeze operates in circumstances other than during the collective bargaining period of a first collective agreement.

[72] Second, the term "bargaining unit" in section 6-62(1)(n) clarifies that the union in question must be certified as the bargaining agent for the employees in question. Simply put, a certification Order appears to be pre-condition to the operation of the statutory freeze.

[73] "Bargaining unit" is defined as follows:

> ***6-1****(1) In this Part:*
>
> *(a)* ***"bargaining unit"*** *means:*
>
> *(i) a unit that is determined by the board as a unit appropriate for collective bargaining; or*
> *(ii) if authorized pursuant to this Part, a unit comprised of employees of two or more employers that is determined by the board as a unit appropriate for collective bargaining[.]*

[74] To qualify as "a unit appropriate for collective bargaining", there must be a certification Order in place. "Certification order" is defined in subsection 6-1(1)(b) to mean "a board order issued pursuant to section 6-13 or clause 6-18(1)(b) that certifies a union as the bargaining agent for a bargaining unit". The provisions internally referenced pertain to a

certification Order issued either following a successful vote (section 6-13), or on a successorship (clause 6-18(1)(b)).

[75] From simply parsing the text of subsection 6-62(1)(n), it would appear that for purposes of this application the statutory freeze period commenced, at the very least, on October 6, 2016, the date this Board issued its Orders certifying CUPE as the bargaining agent for URSU's employees.[9]

3. Position of the Parties on the Statutory Freeze Issue

3.1 CUPE's Position

[76] CUPE maintains that (1) URSU breached the statutory freeze found in subsection 6-62(1)(n), (2) URSU's actions amount to an unfair labour practice, and (3) URSU cannot avail itself of the defence found in subsection 6-62(7) of the *SEA*. For ease of reference, subsection 6-62(7) reads as follows:

> *(7) No employer shall be found guilty of an unfair labour practice contrary to clause (1)(d), (e), (f) or (n):*
>
> > *(a) unless the board has made an order determining that the union making the complaint has been named in the certification order as the bargaining agent of the employees, or*
> > *(b) if the employer shows to the satisfaction of the board that the employer did not know and did not have any reasonable grounds for believing, at the time when the employer committed the acts complained of, that:*
> > > *(i) the union represented the employees; or*
> > > *(ii) the employees were actively endeavouring to have a union represent them.*

[77] CUPE asserts that URSU cannot satisfy its onus under subsection 6-62(7)(b)(ii), and, as a result, committed an unfair labour practice by failing to observe the statutory freeze at least since May 24, 2016, the day it denied access to the Owl to CUPE's representatives for purposes of an organization drive. Mr. Flis' e-mail dated May 24[10], CUPE argues, demonstrates that URSU knew of CUPE's organization drive by that date, and, as a consequence, it cannot rely on subsection 6-62(7) as a defence to allegations of an unfair labour practice that post-date that e-mail.

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[9] LRB File Nos. 149-16.01.& 149-16.02, Joint Book of Documents at Tab 1.

3.2 URSU's Position

[78] Consistent with its' position respecting the Collective Agreement, URSU submits that it cannot be found to have committed an unfair labour practice prior to October 6, 2016 for the simple reason that CUPE did not have a certification Order in respect of URSU's employees until that date. It relies particularly on subsection 6-62(7)(a) of the *SEA*.

4. Analysis and Conclusion on the Statutory Freeze Issue

[79] At the outset, it must be acknowledged that the application of subsection 6-62(7)(n) only becomes relevant if CUPE is able to demonstrate on a balance of probabilities that URSU has committed an unfair labour practice by failing to observe the statutory freeze period under the *SEA*, among other things. That particular issue will be addressed in the next Part of this Decision.

[80] For present purposes, suffice it say that subsection 6-62(7) is not limited to circumstances where the union in question is named in a certification Order and enjoys the status of the exclusive bargaining agent for employees. By virtue of subsection 6-62(7)(b)(ii), if an employer knew that an organizing drive was taking place in its workplace, it cannot rely on the defence set out in subsection 6-62(7). The statutory language in that subsection is disjunctive which means that those various sub-clauses operate independently.

[81] Furthermore, this interpretation is consistent with the purpose underlying the statutory freeze identified in *Sterling Newspaper Group*, *supra*, at paragraph 22 namely "to maintain the *status quo* with respect to the pre-certification terms and conditions of employment". This would extend to pre-certification organizing drives. Were it otherwise, an employer who discovers an organizing drive is underway in its workplace could reduce wages or remove other terms and conditions altogether prior to a certification Order being issued following the successful campaign for unionization. Such a scenario would undermine significantly the objective a statutory freeze seeks to achieve.

[82] Accordingly, for these reasons, and provided CUPE is able to prove on a balance of probabilities that URSU breached subsection 6-62(1)(n), URSU would bear the onus to

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[10] E-mails between Carl Flis and Suzanne Posyniak dated May 24, 2016, Joint Book of Documents, at Tab 5.

demonstrate that at that time it did not know or have reasonable grounds to believe its "employees were actively endeavouring to have a union represent them".

[83] We turn now to consider the Unfair Labour Practices Issue raised by CUPE's application.

D. The Unfair Labour Practices Issue

1. CUPE's Application

[84] In its' application CUPE has levelled against URSU various allegations of unfair labour practice. For convenience the relevant subsections and the allegations are summarized below:

- ***Subsection 6-62(1)(a)*** *– Restricting CUPE's ability to meet and communicate with their members in Local 1486, and by communicating directly with those members;*
- ***Subsection 6-62(1)(b)*** *– Failing to recognize CUPE as the exclusive bargaining agent of URSU's employees;*
- ***Subsection 6-62(1)(d)*** *– Refusing to meet or communicate with CUPE and suspending collective bargaining for a renewal agreement;*
- ***Subsection 6-62(1)(e)*** *– Refusing to include CUPE in discussions with members of its Local 1486 respecting terms and conditions of employment as well disputes between workers and the employer;*
- ***Subsection 6-62(1)(i)*** *– Refusing to recognize CUPE as exclusive bargaining agent for members of Local 1486 and by attempting to interfere with CUPE's ability to organize and communicate with its' members, and*
- ***Subsections 6-62(1)(n) and (r)*** *– Refusing to recognize CUPE as the exclusive representative of employees and by repudiating its collective agreement with Local 1486.*

2. The Onus

[85] It is well-established that the applicant in an unfair labour practice application bears the burden to prove the allegations of unfair labour practices on a balance of probabilities. This means CUPE must demonstrate it is more likely than not that URSU engaged in various activities that amount to unfair labour practices. See *e.g.*: *United Food and Commerical Workers, Local 1400 v. Calokay Holdings Ltd.*, 2016 CanLII 74282, 281 CLRBR (2d) 149 (SK LRB), at paragraph 105.

[86] In *Calokay Holdings*, *supra*, at paragraph 106, the Board cited *FH v McDougall*, [2008] 3 SCR 41, 2008 SCC 53 at paragraph 46, and emphasized that in order to satisfy the balance of probabilities standard of proof, the applicant's evidence must be "sufficiently clear, convincing and cogent". The union in *Calokay Holdings*, *supra*, failed to meet this standard in respect of most of its unfair labour practice applications, and, as a consequence, they were dismissed save for one.

3. Analysis and Conclusion on the Unfair Practice Applications Issue

[87] As recounted earlier in this Decision, evidence was presented by way of a Joint Statement of Facts and viva voce testimony from Ms. Suzanne Posyniak. No *viva voce* testimony was led by URSU.

[88] After reviewing this evidence, the Board finds that CUPE has not met its burden to prove that URSU more likely than not committed a series of unfair labour practice through evidence that is "sufficiently clear, convincing and cogent". Our reasons follow.

[89] To be sure, there were allegations of employer conduct that might support findings of unfair labour practices. For example, the Board heard from Ms. Posyniak that in her opinion URSU had unilaterally altered the terms and conditions of employment for CUPE members by failing to pay increases in accordance with the collective agreement. Indeed, a grievance has been filed alleging the very same thing. However, those allegations were very general in nature, and have yet to be tested.

[90] CUPE also alleged that URSU refused access to the Owl to its representatives for purposes of its organizing drive. The e-mail exchange relating to this allegation would seem to support it. However, there is also evidence from both the e-mails themselves, and URSU's reply, to indicate that it did not deny CUPE access to its employees entirely. As a consequence, there is insufficient evidence on this record for the Board to find that these allegations amount to an unfair labour practice.

[91] These are but two (2) examples where CUPE has made allegations of unfair labour practices committed by URSU but has not presented sufficient evidence to satisfy the Board on a balance of probabilities that such activities do, indeed, violate the *SEA*.

[92] Accordingly, for these reasons CUPE's unfair labour practice application must be dismissed.

E. First Collective Agreement or Renewal Agreement

[93] During the hearing, it came to light that after the certification Orders were issued in October 2016, the parties could not agree on whether they were bargaining a first collective agreement under section 6-24 of the *SEA* or a renewal agreement pursuant to section 6-26. CUPE invited the Board to weigh in respecting this dispute. On the other side, URSU submits that this is not a question requiring resolution on this unfair labour practice application.

[94] The Board agrees with URSU on this point. This question does not need to be resolved now, and it would be inappropriate for the Board at this time to insert itself in the collective bargaining process undertaken by these two (2) parties. See especially: *International Brotherhood of Electrical Workers, Local 2067 v SaskPower and Government of Saskatchewan*, LRB File No. 256-92, [1993] 1st Quarter, Sask. Labour Rep. 286, at pp. 290-293.

F. Concluding Remarks

[95] As already observed, there is a longstanding and mature labour-management relationship between CUPE, Local 1486, and URSU at the University of Regina, one that has rarely, if ever, been marred by labour discord throughout its lengthy history. The Board sincerely hopes that the conclusions reached in our Decision will enable the parties to resolve their current dispute amicably, and resume a productive and stable working relationship.

[96] Finally, the Board extends its appreciation to counsel for their oral and written submissions. They were of great assistance to us.

[97] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **6th** day of **June, 2017.**

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson